

I N T E R N A T I O N A L L A W

INTERNATIONAL LAW
A TREATISE

BY

L. OPPENHEIM M.A., LL.D.

VOL. II DISPUTES WAR AND NEUTRALITY

SEVENTH EDITION

Edited by **H. LAUDENKROCH, LL.D., F.B.A.**

INTERNATIONAL LAW

A TREATISE

By L. OPPENHEIM, M.A., LL.D.

LATE WHARFELL PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY
OF CAMBRIDGE; LATE MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW

VOL. I.—PEACE

EIGHTH EDITION

EDITED BY

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P R E F A C E

TO THE EIGHTH EDITION

THERE are, in this edition, two major changes which call for mention. In the first instance, I have eliminated a considerable number of references to older textbooks, monographs and articles. When necessary, such references can easily be traced with the help of the bibliographies which appear in this volume. It may be pedantic to clog a treatise of this kind with an accumulation of citations of limited usefulness. For this reason I was of the opinion that the effort of going through the volume and eliminating obsolete entries was justified by considerations of convenience and economy of space. Secondly, I have discarded the old Appendix which contained a voluminous table, accompanied by references to the relevant literature, of treaties establishing so-called international unions. In its place the present volume includes a Chapter in the form of an Appendix covering over fifty pages and entitled 'Specialised Agencies of International Co-operation and Administration.' The Appendix gives an analysis, supplemented by bibliographies, of the constitutions of the specialised agencies of the United Nations and an account of the basic aspects of their activity. In preparing the Appendix I have availed myself of the assistance and collaboration, on a most generous scale, of Dr. C. W. Jenks, Assistant Director of the International Labour Organisation, who combines academic distinction as a lawyer with unrivalled experience in the field of international administration. I am deeply grateful to him for the selfless manner in which he permitted me to draw upon his help. He has also given valuable assistance in the revision of the Sections on the International Labour Organisation.

Although I have made drastic cuts both in the bibliographies and otherwise in the text and footnotes, the length

of the present volume exceeds that of its predecessor by nearly one hundred and fifty pages. This is due not only to the size of the Appendix, but also to other additions which were considered necessary. I realise that as a result of these cuts and additions the character of the volume has undergone yet another substantial change and that there may be objection to the continued publication of a treatise in which the Sections written by its original author comprise only one-third – or less – of the total contents of the work. Even those Sections or what is left of them have undergone changes both of substance and of form. I am conscious of the doubts voiced, on that account, by friendly critics and of their exhortations that I should assume full responsibility, under my own name, for a treatise on International Law. I hope, in due course and subject to other calls, to comply with these wishes. In the meantime, so long as the demand for ‘Oppenheim’ continues, I have not felt justified in abandoning a treatise whose usefulness is widely acknowledged.

I wish to express my warm thanks to Mrs. G. Lyons, B.Sc. (Econ.), who has prepared the Table of Cases and who, with proved thoroughness, has read the proofs of the entire volume. I am also grateful to Mrs. E. E. Jansen, both for devoted secretarial assistance and for undertaking the heavy task of preparing the Index.

I am indebted to Messrs. Longmans, Green & Co. and to Messrs. T. & A. Constable, Ltd., Printers to the University, Edinburgh, for their courteous co operation.

H. LAUTERPACHT.

BIOGRAPHICAL NOTE

FROM MR. ROXBURGH'S PREFACE TO THE THIRD EDITION

LASSA FRANCIS LAWRENCE OPPENHEIM, the author of this book, was born near Frankfurt on March 30, 1858. Educated there and at the Universities of Berlin, Gottingen, Heidelberg, and Leipzig, he showed great versatility of talent, studying philosophy, medicine, and theology as well as law. Among his teachers were Binding, von Jhering, and Bluntschli. In 1886 he began to lecture in the University of Freiburg, and became extraordinary Professor there in 1889, he was called to a Professorial Chair at Basle in 1891. During these years he wrote several books, mainly upon Criminal Law. He left Basle for England in 1895, determined to devote the mature years of his life to International Law, which he had then recently been teaching. He studied its varied literature with characteristic energy and set himself to write this treatise, first published in 1905 and 1906. He was then Lecturer in International Law at the London School of Economics. In 1902 he married a daughter of Lieutenant-Colonel Cowan, and had one daughter Mary. In 1908 he succeeded Westlake in the Chair founded at Cambridge by William Whewell, and made it his constant aim to fulfil the charge given to the holder 'to lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations.' He was elected an Associate and then a Member, of the Institute of International Law, and an Honorary Member of the Royal Academy of Jurisprudence at Madrid. As Whewell Professor he devoted himself to the duties of his office, lecturing to large classes and watching with special care over the training of Whewell scholars. All who were thus drawn within his circle were fascinated by his enthusiasm and personal charm. He brought out a second edition of this treatise

in 1912, and was writing monographs and contributing articles to many papers. He edited the *Zeitschrift für Völkerrecht* in collaboration with Kohler until the outbreak of the war. In 1909 he had published *International Incidents*—a book of problems for discussion with his pupils. A short study of the *Panama Canal Conflict* was widely read, and with General Edmonds he prepared a manual of *Land Warfare* for the guidance of Officers of His Majesty's Army. His next work was to collect the papers of John Westlake, and to edit a series of contributions to International Law and Diplomacy.

During these Cambridge days his reputation had spread all over the world, and he enjoyed to the full the new opportunity thus brought to him. He sought, and gained easily, the friendship of distinguished jurists everywhere; and through a cordial exchange of opinions he was able to study their varying points of view. For such a work his training in different legal systems had especially fitted him, since his conceptions of jurisprudence were truly international. Visitors came to Whewell House from many lands, and his wife, who shared his interest in his work, his friends, and his pupils, joined in welcoming them to their home. Warmly received, they went and came again. In the Professor's private room at the Law Schools is a gallery of photographs of international lawyers of almost every nationality.

Then came the war. He had already offered his services to the British Government, and was able to lend his knowledge and prestige towards the overthrow of a system which would have throttled the Law of Nations. The new uses for this book soon exhausted the second edition; but he would not then publish a third, and confined himself to collecting material and recording the changes which each day brought. He felt that the stress of events was too great for him to mould judgments that should be fashioned in a mind in repose. So he looked to the United States, then at peace, to sustain the legal traditions of International Law during the struggle, and himself became Corresponding Member of the American Institute of International Law in 1915. He also hoped that an American jurist would first tell the legal story of the war, and this hope his friend, Professor Garner of

Illinois, has brought to fulfilment. With cautious sympathy he watched the growth of the League of Nations movement, and three lectures which he had delivered upon it were in the press when Germany asked for an armistice.

He at once began to prepare the new edition of this treatise. He was eager to point out that during the World War 'not the whole of International Law has gone to pieces, but only parts of the Law of War' and that 'the Law of Peace is the centre of gravity of International Law.' But the strain of the war had overtaxed his health, and the ill effects now revealed themselves. His friends found him in the summer of 1919 with his enthusiasm impaired by physical weariness, and he spoke regretfully of the mass of new material before him. He doubted whether he would live to work through it. At the beginning of August he went to Wales, breaking away from a study of the German Treaty. He had just heard that the University was to confer upon him the degree of Doctor of Letters. Rest and change did not restore him, and he came home dangerously ill. He died on October 7, 1919.

This is no place to set a value upon his achievements; or to voice the affection and esteem of those who knew him. That is being done by his old friend, Edward Arthur Whittuck, to whom the former editions of this treatise were dedicated, in the new *British Year Book of International Law* (1920-1921). His power of insight, his passion for research he gave freely in the cause of the Law of Nations. His optimism so attractive to all, was tempered by sober understanding. 'I will not deny,' he wrote at the end of the war, 'that the League may fall to pieces; and that a disaster like the present may again visit mankind.' But such thoughts did not deter him. To him labour in International Law was service for humanity; for future generations he could give no more than his best, and would give no less.¹

¹ See also appreciations and obituary notices in the following journals: *London Times* newspaper, October 9, 1919, *Cambridge Review*, November 7, 1919; *British Year Book of International Law*, 1920-1921, pp. 1-9, by E. A. Whittuck, *American Journal of International Law*, xiv. (1920) pp. 229-232, by C. N. Gregory.

ABBREVIATIONS

OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

THE books referred to in the bibliography and notes are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are often referred to throughout this work are quoted in an abbreviated form, as follows :

Accioly	-	Accioly, <i>Tratado de Direito internacional público</i> , 3 vols. (1933-1935).
<i>A.J.</i>	-	<i>American Journal of International Law</i> .
<i>Annuaire</i>	-	<i>Annuaire de l'Institut de Droit International</i> .
<i>Annual Digest</i>	=	<i>Annual Digest and Reports of Public International Law Cases</i> : 1919-1922, edited by Sir John Fischer Williams and H. Lauterpacht (1932) ; 1923-1924, edited by the same (1933) ; 1925-1926, edited by A. D. McNair and H. Lauterpacht (1929) ; 1927-1928, edited by the same (1931) ; 1929-1930 (1935) ; 1931-1932 (1938) ; 1933-1934 (1940) ; 1935-1937 (1941) ; 1938-1940 (1942) ; 1941-1942 (1945) ; 1919-1942 (supplementary volume) (1947) ; 1943-1945 (1949) ; 1946 (1951) ; 1947 (1951) , 1948 (1953)--all edited by H. Lauterpacht.
Anzilotti	=	Anzilotti, <i>Corso di diritto internazionale</i> , vol. i. 3rd ed. (1928), French translation by Gidel (1929) , vol. iii. part i (1915).
<i>A.S. Proceedings</i>	-	<i>Proceedings of the American Society of International Law</i> .
Balladore Pallieri	=	Balladore Pallieri, <i>Diritto internazionale pubblico</i> (1937).
Baty	=	Baty, <i>The Canons of International Law</i> (1930).
<i>Bibliotheca Visseriana</i>	=	<i>Bibliotheca Visseriana Dissertationum Jus Internationale Illustrantium</i> .
Bittner	=	Bittner, <i>Die Lehre von völkerrechtlichen Urkunden</i> (1924).
Bluntschli	=	Bluntschli, <i>Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt</i> , 3rd ed. (1878).
Borchard	=	Borchard, <i>The Diplomatic Protection of Citizens Abroad</i> (1915).

<i>Br. and For.</i>	British and Foreign State Papers (Hertslet),
<i>St. Papers</i>	vol. i. (1841), continued up to date.
Brierly	Brierly, <i>The Law of Nations</i> , 3rd ed. (1942).
Bustamante	Bustamante, <i>Derecho internacional público</i> , 3 vols. (1933-1935).
<i>B. Y.</i>	British Year Book of International Law.
Calvo	Calvo, <i>Le Droit international théorique et pratique</i> , 5th ed., 6 vols. (1896).
Cavaglieri	Cavaglieri, <i>Lezioni di diritto internazionale</i> (general part, 1925).
<i>Cunet</i>	<i>Journal du droit international</i> .
Cruchaga	Cruchaga-Tocornal, <i>Nociones de Derecho internacional</i> , 3rd ed., 2 vols. (1923-1925).
Dicey	Dicey, <i>Conflict of Laws</i> , 4th ed. (1927).
Dickinson,	Dickinson, <i>Cases and Other Materials on</i>
<i>Cases</i>	<i>International Law</i> (1950).
<i>Document</i>	<i>Documents on International Affairs</i> .
Fauchille	Fauchille, <i>Traité de droit international public</i> , 8th ed. of Bonfils' <i>Manuel de droit international public</i> , vol. i. part 1 (1922), vol. i. part 2 (1925), vol. i. part 3 (1926), vol. ii. (1921).
Fenwick	Fenwick, <i>International Law</i> , 3rd ed. (1948).
Fiore	Fiore, <i>Nouveau droit international public</i> . French translation by Antoine from the 2nd Italian edition, 3 vols. (1885).
Fiore, <i>Cod.</i>	Fiore, <i>International Law Codified</i> . Translation by Borchard from the 5th Italian edition (1918).
Fischer	Fischer Williams, <i>Chapter on Current International Law and the League of Nations</i> (1929).
William.	
<i>Chapters</i>	
<i>Fontes Juris Gentium</i>	<i>Fontes Juris Gentium</i> , edited by V. Bruns. For details see p. 112, n. 1.
Garner,	Garner, <i>Recent Developments in International Law</i> (1925).
<i>Development</i>	
Genina	Genina, <i>Appunti di diritto internazionale</i> (1923).
Genet	Genet, <i>Traité de diplomatie et de droit diplomatique</i> , 3 vols. (1931-1932).
Gidel	Gidel, <i>Le droit international public de la mer, le temps de paix</i> : vol. i. <i>Introduction</i> -- <i>La haute mer</i> (1932); vol. ii. <i>Les eaux intérieures</i> (1932); vol. iii. <i>La mer territoriale et la zone contiguë</i> (1934).
Grotius	Grotius, <i>De Jure Belli ac Pacis</i> (1625).
<i>Grotius</i>	<i>Grotius Annuaire International</i> .
<i>Annuaire</i>	

<i>Grotius Society</i>	=	Transactions of the Grotius Society.
Guggenheim	=	Guggenheim, Lehrbuch des Völkerrechts Parts I and II. (1947).
Hackworth	=	Hackworth, Digest of International Law, 7 vols. (1940-1943).
<i>Hague Recueil</i>	=	Recueil des cours, Académie de Droit Inter- national de La Haye.
Hall	=	Hall, A Treatise on International Law, 8th ed. (1924), by A. Pearce Higgins.
<i>Harvard Research</i>	=	Research in International Law. Under the Auspices of the Harvard Law School. Draft Conventions Prepared for the Codifi- cation of International Law. Directed by M. O. Hudson: (1929) I. Nationality. (Reporter: Flournoy); II. Responsi- bility of States (Borchard); III. Terri- torial Waters (G. G. Wilson).--(1932) I. Diplomatic Privileges and Immunities (Reeves), II. Legal Position and Func- tions of Consuls (Quincy Wright), III. Competence of Courts in regard to Foreign States (Jessup); IV. Piracy (Bingham); V. A Collection of Piracy Laws of Various Countries (Morrison).--(1935) I. Extra- dition (Burdick). II. Jurisdiction with respect to Crime (Dickinson) III. Treaties (Garner)
Heffter	=	Heffter, Das europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).
Heilborn, <i>System</i>	=	Heilborn, Das System des Völkerrechts ent- wickelt aus den völkerrechtlichen Be- griffen (1896).
Hertslet's <i>Commercial Treaties</i>	=	Hertslet, Collection of Treaties and Con- ventions between Great Britain and Other Powers, so far as they relate to Commerce and Navigation, vol. i. (1820), continued to date.
Higgins and Colombos	=	Higgins and Colombos, The International Law of the Sea, 2nd ed. (1951).
<i>H.J.R.</i>	=	Harvard Law Review.
Holland, <i>Lectures</i>	=	Holland, Lectures on International Law, edited by T. A. and W. L. Walker (1933).
Holland, <i>Studies</i>	=	Holland, Studies in International Law (1898).
Holtzendorff	=	Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885-1889).
Hudson, <i>Cases</i>	=	Hudson, Cases and Other Materials on International Law, 3rd ed. (1951).

Hudson,	=	Hudson, <i>International Legislation</i> : vols. i.-xi. (1931-1950).
<i>Legislation</i>		
Hyde	-	Hyde, <i>International Law</i> , chiefly as interpreted and applied by the United States, 2nd ed., 3 vols (1945).
<i>I.O.J.</i>	=	International Court of Justice.
<i>I.C.L.Q.</i>	=	International and Comparative Law Quarterly.
<i>J.C.L.</i>	-	Journal of Comparative Legislation and International Law.
Keith's		Wheaton's <i>Elements of International Law</i> , 6th English edition by A. Berriedale
Wheaton		Keith, vol. i. (1929) ; vol. ii. (7th ed., 1944).
Lapradelle-	-	Lapradelle-Politis, <i>Recueil des arbitrages internationaux</i> , vol. i. (1905), vol. ii. (1924).
Politis		
Lauterpacht,		Lauterpacht, <i>Private Law Sources and Analogies of International Law</i> (1927).
<i>Analogies</i>		
Lauterpacht,	-	Lauterpacht, <i>The Function of Law in the International Community</i> (1933).
<i>The Function of Law</i>		
Lawrence	--	Lawrence, <i>The Principles of International Law</i> , 7th ed., revised by P. H. Winfield (1923).
Lindley	-	Lindley, <i>The Acquisition and Government of Backward Territory in International Law</i> (1926).
Liszt	=	Liszt, <i>Das Völkerrecht</i> , 12th ed. by Fleischmann (1925).
<i>L.N.T.S.</i>	-	League of Nations Treaty Series. Publication of Treaties and International Engagements registered with the Secretariat of the League of Nations.
Lorimer		Lorimer, <i>The Institutes of International Law</i> , 2 vols. (1883-1884).
De Louter		De Louter, <i>Le droit international public positif</i> , French translation from the Dutch original, 2 vols. (1920).
<i>L.Q.R.</i>	=	Law Quarterly Review.
McNair		McNair, <i>The Law of Treaties: British Practice and Opinions</i> (1938).
Maine	-	Maine, <i>International Law</i> , 2nd ed (1894).
Martens	--	Martens, <i>Völkerrecht</i> , German translation from the Russian original, 2 vols. (1883-1886).
• Martens, G. F.		G. F. Martens, <i>Précis du droit des gens moderne de l'Europe</i> , new edition by Vergé, 2 vols. (1858).

Martens, R.		
Martens, N. R.		These are the abbreviated quotations of the different parts of Martens, <i>Recueil de Traités</i> , which are in common use.
Martens, N. S.		
Martens, N. R. G.		
Martens, N. R. G., 2nd ser.		
Martens, N. R. G., 3rd ser.		
Martons,	=	Martens, <i>Causés célèbres du droit des gens</i> , 2nd ed., 5 vols. (1858-1861).
<i>Causés célèbres</i>		
Mérignhac	=	Mérignhac, <i>Traité de droit public international</i> , vol. i. (1905), vol. ii. (1907), vol. iii. (1912).
Möller	=	Möller, <i>International Law in Peace and War</i> , English translation from the Danish, vol. i. (1931), vol. ii. (1935).
Moore	=	Moore, <i>A Digest of International Law</i> , 8 vols. (1906).
Moore,	=	Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> , 6 vols. (1898).
<i>International Arbitrations</i>		
Nordisk T.A.	=	Nordisk Tidskrift for International Ret. <i>Acta Scandinavica juris gentium</i> .
Nys	=	Nys, <i>Le droit international</i> , 2nd ed., 3 vols (1912).
Off. J.	=	Official Journal of the League of Nations.
Ö.Z.ö.R.	=	Österreichische Zeitschrift für öffentliches Recht.
P.C.I.J.	=	Publications of the Permanent Court of International Justice :
		Series A—Judgments.
		B—Advisory Opinions.
		A.B—Cumulative Collection of Judgments and Advisory Opinions given since 1931.
		C—Acts and Documents relating to Judgments and Advisory Opinions.
		D—Collection of Texts governing the Jurisdiction of the Court.
		E—Annual Reports.
Perels	=	Perels, <i>Das internationale öffentliche Seerecht der Gegenwart</i> , 2nd ed. (1903).
Phillimore	=	Phillimore, <i>Commentaries upon International Law</i> , 3rd ed., 4 vols. (1879-1888).
Praag	=	Pfaag, <i>Jurisdiction et droit international public</i> (1915).
Praag,	=	Supplement to the above (1935).
<i>Supplément</i>		

Pradier-Fodéré	=	Pradier-Fodéré, <i>Traité de droit international public</i> , 8 vols. (1885-1906).
Pufendorf	-	Pufendorf, <i>De Jure Naturæ et Gentium</i> (1672).
Ralston	=	Ralston, <i>The Law and Procedure of International Tribunals</i> , revised ed. (1926). Supplement (1936).
Ray, <i>Commentaire</i>	=	Ray, <i>Commentaire du Pacte</i> (1930).
<i>Recueil T.A.M.</i>	=	Recueil des décisions des tribunaux arbitraux mixtes.
Reddie, <i>Researches</i>	-	Reddie, <i>Researches, Historical and Critical</i> , in <i>Maritime International Law</i> , 2 vols. (1844).
<i>Répertoire</i>	--	Lapradelle et Niboyet, <i>Répertoire de droit international</i> . Founded by Darras in 1929.
<i>R.G.</i>	-	Revue générale de droit international public.
<i>R.I.</i>	-	Revue de droit international et de législation comparée.
<i>R.I. (Geneva)</i>	-	Revue de droit international, de sciences diplomatiques, politiques et sociales.
<i>R.I. (Paris)</i>	=	Revue de droit international.
<i>R.I.F.</i>	=	Revue internationale française du droit des gens.
Rivier	=	Rivier, <i>Principes du droit des gens</i> , 2 vols. (1896).
<i>Rivista</i>	-	<i>Rivista di diritto internazionale</i> .
Rousseau	=	Rousseau, <i>Principes généraux du droit international public</i> , vol. i. (1944)
Satow	-	Satow, <i>A Guide to Diplomatic Practice</i> , 3rd ed. by Ritchie (1932).
Scelle	-	Scelle, <i>Précis de droit des gens</i> vol. i. (1932). vol. ii. (1934)
Schucking und Wehberg	-	Schucking und Wehberg, <i>Die Satzung des Volkerbundes</i> , 2nd ed. (1924).
Schwarzenberger	-	Schwarzenberger, <i>International Law as Applied by International Courts and Tribunals</i> , vol. i (1945).
Sibert	=	Sibert, <i>Traité de droit international public</i> , 2 vols (1951).
Sirey	-	Recueil général des lois et des arrêts (founded by Sirey).
Smith	-	Smith, <i>Great Britain and the Law of Nations, a Selection of Documents</i> , vol. i. (1932), vol. ii (1935).
Spiropoulos	=	Spiropoulos, <i>Traité théorique et pratique du droit international public</i> (1933).
Stowell	=	Stowell, <i>International Law. A Restatement of Principles in Conformity with Actual Practice</i> (1931).

Strupp, <i>Éléments</i>	=	Strupp, <i>Éléments du droit international public, universel, européen et américain</i> , 2nd ed., 3 vols. (1930).
<i>Strupp, Wört.</i>	=	Wörterbuch des Völkerrechts und der Diplomatie, ed. by Strupp (begun by Hatschek), 3 vols. (1924-1929).
Suarez	=	Suarez, <i>Tratado de Derecho internacional público</i> , 2 vols. (1916).
Temperley	=	Temperley, <i>History of the Peace Conference of Paris</i> , 6 vols. (1920-1924).
Testa	=	Testa, <i>Le droit public international maritime</i> , translation from the Portuguese by Boutiron (1886).
Toynbee, <i>Survey</i>	=	Toynbee, <i>Survey of International Affairs</i> .
Travers	=	Travers, <i>Le droit pénal international</i> , 5 vols. (1920-1922).
Treaty Series	=	United Kingdom Treaty Series, vol. i. 1892, and a volume every year.
Twiss	=	Twiss, <i>The Law of Nations</i> , etc., 2 vols. 2nd ed., vol. i. (Peace, 1884). vol. ii. (War, 1875).
<i>U.N.T.S.</i>	=	United Nations Treaty Series.
Vattel	=	Vattel, <i>Le droit des gens</i> , 4 books in 2 vols., new edition (1773).
Verdross	=	Verdross, <i>Die Verfassung der Völkerrechtsgemeinschaft</i> (1926).
Walker	=	Walker, <i>A Manual of Public International Law</i> (1895).
Walker, <i>History</i>	=	Walker, <i>A History of the Law of Nations</i> , vol. i. (1899).
Walker, <i>Science</i>	=	Walker, <i>The Science of International Law</i> (1893).
Westlake	=	Westlake, <i>International Law</i> , 2 vols., 2nd ed. (1910-1913).
Westlake, <i>Chapters</i>	=	Westlake, <i>Chapters on the Principles of International Law</i> (1894).
Westlake, <i>Papers</i>	=	The Collected Papers of John Westlake on Public International Law, ed. by L. Oppenheim (1914).
Wharton	=	Wharton, <i>A Digest of the International Law of the United States</i> , 3 vols. (1886).
Wheaton	=	Wheaton, <i>Elements of International Law</i> , 8th American edition by Dana (1866).
<i>Z.I.</i>	=	<i>Zeitschrift für internationales Recht</i> .
<i>Zö.R.</i>	=	<i>Zeitschrift für öffentliches Recht</i> .
<i>Z.ö.V.</i>	=	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i> .
<i>Z.V.</i>	=	<i>Zeitschrift für Völkerrecht</i> .

TABLE OF CASES

[*Note*—The following is a list of cases which received judicial consideration. Throughout the Index at the end of the volume will be found a number of cases and incidents which were the subject of diplomatic discussion or contemporary record.]

I. CASES DECIDED BY THE INTERNATIONAL COURT

(THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL COURT OF JUSTICE)

- Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, 953
- Acquisition of Polish Nationality (Application of Article 4 of the Polish Minority Treaty), 644
- Admission to the United Nations cases—*See under* Competence of the General Assembly, etc. (1050 case) Conditions of Admission, etc. (1948 case)
- Albania—*See* Serbo-Croat-Slovene State—*See* Delimitation of the Serbo-Albanian Frontier
- Ambassadors case, 901, 905, 907, 923, 973
- Anglo-Iranian Oil Company case, 955, 973
- Anglo-Norwegian Fisheries case, 488-490, 507, 544, 632, 634, 875
- Asylum case (Colombia v. Peru), 26, 27, 53, 797-798, 901
- Austro-German Customs Union Regime, 155, 287, 895
- Brazilian Federal Loans case, 272, 941
- Certain German Interests in Polish Upper Silesia, 29, 150, 346, 910, 925, 934, 954
- Chinn case (Great Britain v. Belgium), 467, 688, 896
- Competence of the General Assembly for the Admission of a State to the United Nations, 346, 410, 436, 957
- Competence of the International Labour Organisation (Employment of Women during the Night), 719, 957
- Competence of the International Labour Organisation (Organisation and Development of Methods of Agricultural Production), 719
- Competence of the International Labour Organisation (Regulation of Conditions of Work of Persons Employed in Agriculture), 719
- Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer, 719, 724, 955
- Conditions of Admission of a State to Membership in the United Nations (Charter, Article 4), 346, 409
- Corfu Channel case (Great Britain v. Albania) 30, 290, 291, 310, 343, 366, 429, 512, 955, 957
- Danzig Railway Service Officials case—*See under* Jurisdiction of the Courts of Danzig
- Delimitation of the Polish-Czechoslovakian Frontier, 172, 535

- Delimitation of the Serbo-Albanian Frontier, 335, 956
- Denunciation of the Treaty of November 2, 1865, between China and Belgium, 684
- Diversion of Water from the Meuse (Belgium *v.* Holland), 460
- Eastern Greenland case. *See* Legal Status of Eastern Greenland
- Exchange of Greek and Turkish Populations, 553, 571, 648
- Factory at Chorow case, 29, 30, 347, 352, 353, 925, 947
- Fisheries case. *See* Anglo-Norwegian Fisheries case
- Free Zones of Upper Savoy and the District of Gex, 142, 345, 543, 888, 925, 940, 953
- Frontier between Turkey and Iraq case. *See under* Interpretation of the Treaty of Lausanne, Article 3 (2)
- Genocide Convention case. *See under* Reservations to the Convention, etc.
- Injuries case. *See under* Reparation for Injuries Suffered in the Service of the United Nations
- International Labour Organisation cases. *See under* Competence of the International Labour Organisation
- International Status of South West Africa, 168, 169, 213, 214, 225, 237, 431, 880, 927, 937, 957
- Interpretation of the Greco-Turkish Agreement, 29
- Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 352, 418, 441, 741, 955
- Interpretation of the Statute of the Memel Territory, 142, 287
- Interpretation of the Treaty of Lausanne, Article 3 (2), 396, 953
- Jaworzina Question. *See under* Delimitation of the Polish-Czechoslovakian Frontier
- Jurisdiction of the Courts of Danzig, 21, 30, 46, 142, 638, 924
- Jurisdiction of the European Commission of the Danube, 466, 468, 469, 955
- Legal Status of Eastern Greenland, 142, 561, 580, 764, 893, 896
- Liechtenstein *v.* Guatemala, 179
- Lighthouses case (France *v.* Greece), 888
- Lighthouses in Crete and Samos case, 455
- Lotus*, The, 39, 290, 331, 332, 333, 334, 461, 597, 603, 617, 683, 706, 875
- Mavrommatis Jerusalem Concessions case, 162
- Mavrommatis Palestine Concessions case, 19, 215, 867, 917
- Minority Schools in Albania case, 713
- Minquiers and Ecrehos case, 561, 876
- Monastery of Saint-Nicolas case. *See under* Delimitation of the Serbo-Albanian Frontier
- Morocco case. *See under* Rights of Nationals, etc.
- Mosul case. *See under* Interpretation of the Treaty of Lausanne, Article 3 (2)
- Nationality Decrees Issued by France in Tunis and Morocco, 193, 195, 290, 415, 418, 643, 644, 910
- Nomination of the Workers' Delegate for the Netherlands to the International Labour Conference, 953
- Panevezys-Saldutiskis Railway case, 348
- Peter Pázmány University *v.* The State of Czechoslovakia, 351, 956
- Polish Postal Service in Danzig, 194
- Railway Traffic between Poland and Lithuania, 144, 148, 322, 536, 890

- Reparation for Injuries Suffered in the Service of the United Nations, 21, 22, 348, 407, 421, 441, 442, 880, 929, 955
- Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 725, 751, 914, 915
- Rights of Nationals of the United States of America in Morocco, 27, 193, 986, 973
- Serbian Loans case, 272, 941
- Settlers of German Origin in
- Poland, 160, 351, 713, 954
 - South-West Africa case. *See under* International Status of, South-West Africa
 - Territorial Jurisdiction of the International Commission of the River Oder, 467, 471, 908
 - Treatment of Polish Nationals in Danzig, 46, 713
 - Tunis and Morocco Nationality Decrees case. *See under* Nationality Decrees, etc.
 - Wimbledon, *The*, 353, 480, 483, 484, 537

II. CASES DECIDED BY OTHER INTERNATIONAL TRIBUNALS AND MUNICIPAL COURTS

- Abraham v. Attorney-General, 656
- Abu Lutfi Arbitration, 30, 635, 893
- Adams case, 360
- Administrative Decision No. II (United States v. Germany), 30
- Administrator of German Property v. Knoop, 40, 638, 924
- Afghan Embassy case, 793
- Alabama Arbitration, 46
- Alaska Boundary Arbitration, 535
- Albert, *In re*, 663
- Alleganau, *The*, 507
- Allen case, 150
- Allied Forces (Czechoslovakia) case, 848
- Amand (No. 1), *In re*, 848
- Amand (No. 2), *In re*, 267, 848
- Amazon, *The*, 800
- Ambrose Light, *The*, 611, 612, 615
- Anderson v. N. V. Transandine Handelmaatschappij, 329, 332
- Anglo-Iranian Oil Co. v. Supor Oil Co., 269
- Anichab, *The*, 605
- Anna, *The*, 565
- Annette, *The*; *The Dora*, 137, 765, 857
- Apostolidis v. Turkish Government, 660
- Apt v. Apt, 270
- Arantzazu Mendi, *The*, 136
- Archdukes of the Habsburg-Lorraine House v. Polish State Treasury, 957
- Arizona v. California, 475
- Arkansas v. Mississippi, 532, 533
- Arkansas v. Tennessee, 532, 533, 576
- Arrietto, *In re*, 702
- Arrow River and Tributaries Slide and Boom Co., Ltd., *Re*, 40
- Artukovic v. Boyle, 153
- Assurance Compagnie Excelsior v. Smith, 809
- Attorney-General for British Columbia v. Attorney-General for Canada, 488, 492, 502, 511
- Attorney-General for Canada v. Attorney-General for Ontario, 40, 180, 888
- Attorney-General for Canada v. Cain, 691
- Attorney-General for Ontario v. Attorney-General for Canada, 205
- Auditeur Militaire v. Krumkamp, 746

- Auer v. Costa, 841
 Avenol v. Avenol, 822
 Azahz Kebbeda Tesema v. Italian Government, 152

 Baiz, *In re*, 784, 840
 Baja California, *The*, 837
 Banco de Bilbao v. Sancha and Rey, 136
 Banco de España v. Federal Reserve Bank of New York, 768
 Banco di Vizcaya v. Don Alfonso de Bourbon y Austria, 328
 Bank of Ethiopia v. National Bank of Egypt and Liguori, 136, 150, 766
 Bank voor Handel en Scheepvaart v. Slatford, 329
 Banque Internationale de Commerce de Petrograd v. Gonkassow, 140, 267
 Barbuitt's case, 840
 Barcs-Pakrac Railway Co. v. Yugoslavia, 941
 Baron Arnold de Cartier de Marchienne v. L. A. de Cartier, 793
 Baron Frédéric de Born v. Yugoslav State, 665
 Barthez de Montfort v. Treuhander Hauptverwaltung, 665
 Bartlett, *In re*, 459
 Bartram v. Robertson, 972
 Bathori, *The*, 550
 Baurdo, *The*, 269
 Beck, *In re*, 746
 Behring Sea Arbitration, 499, 501, 587, 618, 619, 621
 Belgenland, *The*, 603
 Bellon case, 363
 Bergen Prizes case, 127
 Berger v. Stevens, 688
 Bergman v. De Sieyes, 807
 Berizzi Brothers Co. v. The Steamship *Pesaro*, 273, 857
 Berns (City of) v. Bank of England, 137
 Bernstein v. Van Heyghen Frères, 269
 Bicknell v. Brosnan, 206
 Bindels, *In re*, 567
 Bishwanath Singh v. Commissioner of Income Tax, 190
 Blackmer v. The United States of America, 330, 701, 837
 Bland v. United States, 661
 Boffolo case, 692
 Boguslawski and Another v. Gdynia Ameryka Linie Zeglownic Spółka Akcyjna, 150
 Botiller v. Dominguez, 946
 Bradford v. Chase Bank of New York, 195
 Bradley v. Watkins, 694
 Bremen v. Prussia, 177
 British Coal Corporation v. The King, 203
 Broadmayne, *The*, 857
 Brown's Claim, 162, 339, 362
 Buron v. Denman, 336
 Buttel, *In re*, 459

 C.M. v. A.C., 821
 Calvin's case, 171
 Campbell v. Hall, 571
 Carbone v. Carbone, 806
 Carrera v. Carrera, 811
 Carthage, *The*, 355
 Cartier case. *See* Baron Arnold de Cartier, etc.
 Casa Blanca Arbitration, 851
 Cashin v. The King, 504
 Castioni, *Ex parte*, 708
 Catz and Lapps v. S. A. Union Versicherung, 1007
 Cayuga Indians case, 51, 350
 Chamizal Arbitration (United States of America v. Mexico), 533, 578
 Chandler v. United States, 706
 Charkueh, *The*, 736
 Charlton v. Kelly, 700, 947, 948
 Chartered Mercantile Bank of India, London and China v. The Nether-

- lands India Steam Navigation Co., 603
- Cherokee Tobacco, The*, 946
- Chevreaux Arbitration (Great Britain v. France), 361
- Chicago Sanitary District case, 475
- Chile-Peru Arbitration, concerning the Treaty of Alliance of 1865, 917
- Chilean Electric Co. v. State Railway Enterprise, 1007
- Chow Hung Ching v. The King, 848
- Chung Chi Cheung v. The King, 40, 853, 854
- Cibrario v. Russian Trade Delegation in Italy, 137
- Che Nord de Moscou v. Phenix Espagnol, 139
- Civil Air Transport Inc. v. Central Air Transport Corporation, 150, 274
- Civilian War Rights Association v. The King, 638, 924
- Clotte, *In re*, 784, 810
- Clot v. Schpoliansky, 671
- Coale v. Société Co-opérative Suisse des Charbons, 265
- Colombian-Venezuelan Boundary Arbitration, 534, 550
- Colmán, *In re*, 707
- Comina v. Kite, 800
- Commercial and Estates Co. of Egypt v. Board of Trade, 40, 336
- Compagnie des Services Contractuels v. Tito Landi, 708
- Compagnie Française des Câbles Télégraphiques v. Administration Française des Douanes, 487
- Compañía de Navegación Nacional v. United States, 496
- Compañía Mercantil Argentina v. United States Shipping Board, 265, 266, 856
- Confiscation of Property of Sudeten Germans case, 269
- Connecticut v. Massachusetts, 475
- Connell v. Vermilya Brown Co., 458
- Constitution, The*, 264, 853
- Cook case, 349
- Cook v. Sprigg, 160, 336
- Cook v. United States, 42, 499
- Co-operative Committee on Japanese Canadians v. Attorney-General for Canada, 45, 695
- Costa Rica Packet Co. case (Holland v. Great Britain), 361, 607
- Coules v. Pharris, 698
- Craft Captured on the Victoria Nyauza, *In re*, 477
- Crichton v. Samos Navigation Co. and Others, 601
- Crimdon, The*, 857
- Cristina The*, 40, 227, 273, 296, 857
- Croft v. Dunphy, 45, 497
- Croxteth Hall, The*, 951
- Cunard Steamship Co. et Al. v. Mellon, 495
- Curran v. City of New York, 822
- Cushin and Lewis v. The King, 607
- Cutting's case, 332
- Dangin v. Paturau, 842
- Dargie's Estate, *In re*, 835
- David, The*, 494
- De Bruijn, *Re*, 848
- de Campos Moledo, *In re*, 692
- De Fallois v. Piatnicki, 827
- De Haber v. Queen of Portugal, 264
- De Jager v. The Attorney-General for Natal, 682
- De Merigny v. Langlais, 209
- De Wutz v. Hendricks, 39
- Debtor, *In re A*, 333
- Delagoa Bay Arbitration (England v. Portugal), 580-581
- Denham case, 360
- Denmark (Collaboration with the Enemy) case, 707
- Denny, The*, 145
- Dermitt v. Sergeant Bluff Consolidated Independent School District, 533

- Deutsche Continental Gas-Gesellschaft v. Polish State, 120, 531
 Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen, 268
 di Sorbello, *In re*, 804
 Duz case, 302
 Dickinson v. Del Solar, 793, 801, 811
 Dillon, *In re*, 42
 Diplomatic Immunity (German Foreign Office) case, 784
 Direct United States Cable Co. v. Anglo-American Telegraph Co., 506
 Distribution of Petroleum, *In re*, 265
 Dobrovolsky and Goukovitch, *In re*, 366
 Dollus Mieg et Cie S.A. v. Bank of England, 273, 274
 Dora, *The*, 137, 745, 857
 Dos Reis v. Nicolls, 606
 Doss v. Secretary of State for India, 336
 Dougherty v. The Equitable Life Assurance Society, 329
 Duff Development Company v. Government of Kelantan, 103, 264, 266, 766, 854
 Dujay case, 348
 Duke of Brunswick v. King of Hanover, 762
 Duke of Château Thierry, *Ex parte*, 691
 Dzierzicki v. District Electrical Association of Czeszochova, 162
 Eastern Extension, Australasia and China Telegraph Company, Ltd., case, 688
 Eastern States Petroleum Co. v. Asiatic Petroleum Corporation, 268
 Eck v. Nederlandsch Amerikaansche Stoomvaart, 138
 Egyptian Debt case, 336
 Eisler, *In re*, 503, 701
 Eisler v. United States, 679
 El Condado, *The*, 329
 Eleanor, *The*, 504
 Elise, *The*, 146, 329
 Ellerman Lines, Ltd. v. Murray (The *Crookth Hall*), 951
 Elliott, *Ex parte*, 295
 Emerie Kulin v. Roumania, 161
 Emmet v. Lomakin, 841
 Emperor of Austria v. Day, 39
 Engelke v. Musmann, 784, 812
 Enterprise, *The*, 504
 Entick v. Carrington, 336
 Eolo, *The*, 857
 Ersson, *The*, 857
 Ervin v. Quintanilla, 206
 Esposende, *The*, 856
 État de Ceara v. Dott, 177
 État Roumain v. Pascalet, 274
 Exchange, *The*, v. McFadden, 264, 267, 852, 853, 856, 857
 Factor v. Laubenhiet and Haggard, 701, 952
 Fagerus, *The*, 460, 506, 508, 766
 Fama, *The*, 550
 Fashender v. Attorney-General, 662
 Federal Motorship Corporation v. Johnson and Higgins, 272
 Fenton Textile Association v. Krasin, 137, 789, 861
 Frost v. Stevenson, 200
 Fmck v. Egyptian Minister of the Interior, 336
 Finnish Vessels in Great Britain during the War Arbitration, 362
 Fiscal v. Sampo, 703
 Florsheim v. Delgado, 292
 Folliott v. Ogden, 328
 Ford v. United States, 499
 Fort case, 707
 Foster v. Drusdell, 34, 328
 Foster v. Globb Venture Syndicate, 766
 France v. Switzerland, 887
 Franconia, *The*. See R. v. Keyn

- Frankfurter v. Exner, 328
 French Claims against Peru, 164
 Frend v. United States, 789
 Freyberger, *Ex parte*, 663, 665
 Friedberg v. Santa Cruz, 799
 Friedman, *In re*, 682
 Fujii v. State of California, 741

Gagara, The, 135, 136, 765
 Galatioto v. Ochpa, 682
 Gatti, *In re*, 708
 Gentini case, 340
 German Immunities in Poland case, 265.
 German Railway Station at Basle case, 289, 537
 Girouard v. United States, 661
 Godman v. Winterton and Others, 261, 379
 Goralschvili, *In re*, 223
 Gordon case, 363
 Gout v. Cimitian, 572
 Government of India and Mubarak Ali Ahmed, *In re*, 708
 Government of Morocco v. Laurens, 193
 Governo Rumeno v. Trutta, 271
 Great Britain v. Costa Rica, 132, 135
 Great Britain-Venezuela Boundary Arbitration, 316, 467, 577
 Green, *Ex parte*, 51
 Grein v. Imperial Airways, 522, 951
 Gustafsdarna Arbitration (Sweden v. Norway), 578
 Gschwind v. Swiss Confederation, 638
 Guaranty Trust Company of New York v. United States, 150, 272
 Guatemala-Honduras Boundary Arbitration, 534, 559

 Haak and Others v. Minister of External Affairs, 848
 Haile Selassie v. Cable & Wireless Ltd. (No. 1), 271
 Haile Selassie v. Cable & Wireless Ltd. (No. 2), 136, 152, 159
 Halig Limited v. Polish State, 264
 Hannes v. Kingdom of Roumania Monopolies Institute, 265
 Harfry, *The, et Al*, 603
 Harwood and Cooper v. Wilkinson, 34
 Hausen v. Polish State, 161
 Hawaiian Claims case, 162
 Hawaiian Trust Co. v. Smith, 972
 Heathfield v. Chilton, 39
 Hellfeld v. The Russian Government, 43, 266
 Herman v. Apetz, 813
 Hulson v. Germany, 347
 Hilton v. Guyot, 34
 Hines (Pennsylvania) v. Davidowitz, 180, 690
 H. M. Procurator v. Deutsches Kohlen Depot, 481
 Hoani Te Heuheu Tukino v. Aotea District Maori Land Board, 160
 Hochbaum case, 692
 Hogue v. Stricker Land and Timber Co., 533, 564
 Holzer v. Deutsche Reichsbahn-Gesellschaft, 329
 Home Missionary Society case, 367
 H. v. v. United States, 940, 947
 Hopkins' Claim, 163, 351
 Hullet v. King of Spain, 759
 Hume Pipe & Co. Concrete Construction Co., Ltd. v. Moracrete Ltd., 206
 Huntington v. Attrid, 270
 Hurd v. Hodge, 741

 Iholo Arbitration (Great Britain v. United States), 917
 I'm Alone, *The*, 347, 355, 498, 605, 606
 Imperial Japanese Government v. Peninsular and Oriental Steam Navigation Co., 588
 Insull case. See United States v. Insull

- Interest on Indemnities Arbitration (Russia v. Turkey), 940
- International Institute of Agriculture v. Profilli, 379
- Interocean Transportation Company of America v. United States, 362
- Interpretation of Article 181 of the Treaty of Neuilly (Greece v. Bulgaria), 302
- Ionian Ships case, 193
- Iowa v. Illinois, 532
- Isaacson v. Durant, 171
- Island of Clipperton Arbitration, 559
- Island of Palmas Arbitration, 545, 559, 560, 578
- Island of Samos Arbitration, 191
- Island of Timor Arbitration, 493
- Jackson v. Olson, 295
- Jacobsen v. Norwegian Government, 555
- Jacquin case, 709
- Janes' Claim, 338, 353, 355, 366
- Janson v. Driefontein Consolidated Mines, 766
- Janusis v. Long, 689
- Jassy, *The*, 856
- Johann Friedrich, *The*, 603
- John T. Bill Co. v. United States, 973
- Johnstone v. Pedlar, 336
- Jolis, *In re*, 295
- Jolly v. Mainka, 200
- Jones v. Garcia del Rio, 137
- Joyce v. Director of Public Prosecutions, 332, 680
- Jupiter, *The*, 137, 138, 150, 856
- Jupiter, *The* (No. 2), 271
- Jupiter, *The* (No. 3), 271, 329
- Kabalo, *The*, 271
- Kahan v. Federation of Pakistan, 274
- Kahane v. Parisi and the Austrian State, 349, 643, 669
- Kahler v. Midland Bank Ltd., 328, 1007
- Kämpfer v. Public Prosecutor of Zürich, 296
- Kansas v. Missouri, 533
- Kaphengst, *In re*, 708
- Karnuth v. United States, 947
- Kasenkina case, 841
- Katuna, *The*, 605
- Katrantsios v. Bulgarian State, 191
- Kawasaki Kisen Kaisha Ltd. v. Nippon Yusen Kaisha, 767
- Kemeny v. Yugoslav State, 910
- Kenip v. Rubin, 741
- Kessler v. Strecker, 693
- King of the Two Sicilies v. Wilcox, 103
- Kingdom of Roumania v. Guaranty Trust Co. of New York, 271
- Kleih v. Republic of Austria, 162
- Kleizkowski v. Watkins, 694
- Kosackichatko and Others v. Attorney General for Trinidad, 700
- Kotkas, *The*, 145
- Koursk, *The*, 857
- Krajina v. Tass Agency, 265, 274
- Kramer v. Attorney General, 600
- Kremer, *In re*, 161
- Kronprinz Gustaf Adolf, *The*, 952
- Krupp, *In re*, 268
- Labrador Boundary case, 560
- Lahalle and Levard v. The American Battle Monuments Commission, 265
- Lakhowsky v. Gouvernement fédéral suisse, 274
- Lakos et Al. v. Salarias, 503
- Lam Mow v. Ngale, 652
- Lambert v. Jordan, 14
- Lamirande case (Great Britain v. France), 703

- Lamont v. Travelers Insurance Company, 271, 768
 Land Oberösterreich v. Gude, 180
 Latson v. Domestic and Foreign Corp., 273
 Latvian and Estonian Vessels case, 360
 Latvian State Cargo and Passenger Line v. Clark, 145
 Latvian State Cargo and Passenger Line v. McGrath, 145
 Lazard Bros. v. Banque Industrielle de Moscou, 140
Le Louis, The, 733
 Lena Goldfields Arbitration, 30
Lola, The, 33, 42
 Lopez, *Ex parte*, 295
 Lorentzen v. Lydden, 329
 Louisiana v. Mississippi, 532, 564
 Luck v. Mecklenburg-Schwerin, 505, 508, 577
 Lucerne and Argau (Cantons of) case, 940
Luigi, The, 34
 Luckenbach Steamship Co. v. United States, 459
 Lurie v. Steinmann, 800
Lusitania, The (United States v. Germany), 354, 954
 Luther & Co. v. Sagor & Co., 136, 138, 139, 148, 150, 267, 268, 765
 Luzon Sugar Refining Company case, 364

 Macartney v. Garbutt, 782, 803, 812
Macedonian, The, 127
 McCandless v. United States, *ex rel.* Paul Diabo, 924
 Macintosh v. United States, 661
 McLeod's case, 850
 Madrazo v. Willes, 733
 Magalidis v. Turkey, 910
 Magdalena Steam Navigation Co. v. Martin, 800
 Magellan Pirates case, 613
 Mallén case, 360
 Malero v. Ministère Public, 848
 Mangold's Patent, *Re*, 658
Maori King, The, 596
Maret, The, 145
Maria, The, 32
Marianna Flora, The, 604
 Marshall v. Murgatroyd, 597
 Martinez v. Fox Valley Bus Lines, Inc., 669
 Martin case, 355
 Maryland v. West Virginia, 577
 Massein v. The King, 688
 Massip v. Cruzel, 194
May, The, v. The King, 504
Mazel Tow, The. See *Cook v. United States*
Meandros, The, 857
Messicano, The, 857
 Meunier, *In re*, 708
 Mexican Union Railway Company case, 345, 362
 Middleton v. United States, 501
 Mighell v. Sultan of Johore, 193, 261, 266, 761, 766
 Miller et al. v. Ferrocarril del Pacifico de Nicaragua, 768
 Minerva Automobiles Inc. v. United States, 42
 Ministère Public v. Dame Veuve Pacory, 793
 Missouri (State of) v. Holland, United States Game Warden, 40, 180
 Molvan v. Attorney-General for Palestine, 328, 333, 596
 Monaco v. Monaco, 283
 Mong Man On v. Commonwealth of Australia, 222
Montezuma, The, 611
 Moore and Others v. Attorney-General for the Irish Free State and Others, 203, 208
 Moraitis v. Dolany, 694
 Moray Firth case, 508

- Moriggi, *In re*, 793
 Mortensen v. Petors, 39, 45, 509
 Moscow Fire Insurance Company v. Bank of New York and Trust Co., 328
 Mowat v. McFee, 506
 Murray v. Parkes, 206, 208, 553, 572
 Musgrove v. Chun Teong Toy, 676
 Musmann v. Engelke, 766, 788, 809, 831, 840
 Musurus Bey v. Gadban, 790, 814
 Najera case (France v. Mexico), 647, 921
 Nankivel v. Omsk All Russian Government, 137
 Nanni and Others v. The Maltese Order, 252
 National Bank of Egypt v. Austro-Hungarian Bank, 647
 Navemar, *The*, 271, 296, 329
 Nelson v. Braisby, 200
 Nereide, *The*, 42
 Netz v. Ede, 568
 New Chile Gold Mining Co. v. Blanco, 806
 New Jersey (State of) v. State of Delaware, 33, 532
 New Rochelle (City of) v. Page-Sharp, 822
 Niederstrasse v. Polish State, 161
 Nielsen v. Johnson, 952
 Ning Yi-Ching and Others, *In re*, 457, 956
 Nissho Maru, *The*, 269
 Nobili v. Charles I of Austria, 760
 Noble and Wolf, *Re*, 741
 North American Dredging Co. case, 345
 North Atlantic Coast Fisheries case, 377, 506, 508, 511, 537, 540
 North Charterland Exploration Company (1910). Ltd. v. The King, 766
 Norway v. United States, 351
 Nun's Dress, *In re A*, 252, 253
 Ockert, *In re*, 708
 Octjen v. Central Leather Co., 139, 150, 268
 Oriental Navigation Company case, 141
 Ottoman Debt Arbitration, 155, 165, 166
 Oyama v. California, 741
 Paladini case, 700
 Paquete Habana, *The*; *The Lola*, 33, 42
 Parker v. Boggan, 801
 Parkinson v. Potter, 803
 Parlement Belge, *The*, 34, 40, 264, 272, 856
 Parounak v. Turkish Government, 455
 Pavan case, 708
 Peerless Motor Car Company's Claim, 164
 Penati, *Re*, 682
 People v. Lo-Li and Saraw, 615
 People v. Stralla and Adams, 496, 507
 Perrucchetti v. Ping y Cassauro, 800
 Pescarhu, *The*, 605
 Philipsson and Others v. Imperial Airways, Ltd., 904
 Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox, Ltd., 465, 953
 Pilger v. United States Steel Corporation, 265
 Pindos, *Heligoland and Bostock, The*, 481
 Pinson case, 16, 368
 Pious Fund Arbitration (United States v. Mexico), 349
 Piracy *jure gentium*, *In re*, 33, 615
 Plesch v. Banque Nationale de la République d'Haiti, 270, 328

- Polimeni, *In re*, 848
 Polish Mining Corporation v. District of Ratibor, 159
 Politis v. The Commonwealth of Australia, 45, 681
Portna, The, 611
 Porter v. Freudenberg, 40
Porto Alexandre, The, 856
 Portugal v. Germany (Naulilan case), 354
 Pouble case, 332
 Powers of the Corporation of the City of Ottawa case. *See* Reference as to the Powers, etc.
 Price v. Griffin, 766, 811, 831
 Princess Olga Paley v. Wersz, 268, 775
 Princess Zizianoff v. Kalin and Bicklow, 841
 Principality of Monaco v. The State of Mississippi, 177
 Priolean v. United States, 266
 Prussia v. Bremen, 941
 Public Prosecutor v. Drechsler, 682
 Public Prosecutor v. G., 283
 Putnam case, 360

Queen City, The, v. The King and Other Ships, 504
 Queen of Holland v. Drukker. *See In re Visser*

 R. v. Ahlers, 838, 841
 R. v. Antonelli, 284
 R. v. Bottrill, *ex parte* Kirchenmeister, 568, 766
 R. v. Burgess, *ex p.* Henry, 40, 180
 R. v. Christian, 200, 221, 222, 286
 R. v. Commanding Officer, 659
 R. v. Conrad, 501
 R. v. Corrigan, 702
 R. v. Cunningham, 460, 500
 R. v. Finlayson, 597
 R. v. Flahaut, 607
 R. v. Ganz, 608
 R. v. Governor of Brixton Prison, 699
 R. v. Graham Campbell, 646
 R. v. Holm, 330
 R. v. Home Secretary, *ex parte* L., 658
 R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft, 272
 R. v. Kent, 814
 R. v. Ketter, 221
 R. v. Keyn, 33, 40, 47, 460, 461, 503
 R. v. Kizo Furazawa, 460
 R. v. Lesley, 597
 R. v. Lunan, 790
 R. v. Lynch, 662
 R. v. Mason, 605
 R. v. Neumann, 682
 R. v. Offen, 200
 R. v. Peltier, 298
 R. v. Rose, 790, 796
 R. v. Vint, 283
 R. v. Wilson, 699
Ramara, The, 145
Rebecca, The, 504
 Receiver in Bankruptcy of the N.V. 'Zeilschip Nest' v. The State of the Netherlands, 638
 Reeves v. Deane-Freeman, 848
 Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences, In the Matter of a, 803
 Refund of Canadian Duties case, 351
Reidun, The, 496
 Rekstin v. Severo Sibirsko Gosudarstvennoe, 793
 Renault et Société des Usines v. Société Rousski Renault, 925, 946
 Reparations Levy (Aliens in Germany) case, 43

- Republic of Bolivia v. Indemnity Mutual Marine Assurance Co., 609
 Republic of Bolivia Exploration Syndicate, *In re*, 799, 811, 854
 Republic of China v. Merchants' Fire Assurance Corporation of New York, 163
 Republic of China v. National City Bank, 266
 Republic of China v. Pang Tsu Mow, 266
 Republic of Costa Rica v. Erlangor, 266
 Republic of Italy v. Hambro's Bank, 40
 Republic of Mexico v. Hoffmann, 273, 768
 Republic of Panama v. Schwartzfiger, 459, 848
 Republic of Peru, *Ex parte*, 767
 Republic of Peru v. Dreyfus Brothers Co., 135, 154, 268
Resolution, The, 605
 República v. De Longchamps, 42, 789
 Ricaud v. American Metal Co., 139, 150, 268
 Riccio v. Little, 264
Rignor, The, 854
 Robert's case, 350
 Robin v. British Consul, 275
Rose Mary, The, 269
 Rothschild & Sons v. Gouvernement égyptien, 941
 Royal Holland Lloyd v. United States, 362
 Rush v. Rush, Bailey and Pimenta, 807
 Russian and English Bank v. Baring Bros. & Co., 140
 Russian Bank for Foreign Trade, *Re*, 140, 271
 Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse and Others, 139, 267
 Russian Indemnity case, 353
 Russian Socialist Federated Soviet Republic v. Cibrario, 34, 137
 Russian State v. Cie Ropit, 139
 Russian Volunteer Fleet v. United States, 139
 Russo-Asiatic Bank, *Re*, 140
 Salimoff v. Standard Oil Co., 138, 268
 Salm v. Frazier, 814
 San Salvador v. Nicaragua, 508
 Santovincenzo v. Egan, 42
Sapphire, The, 264
 Sarropoulos v. Bulgarian State, 349, 368
 Savarkur case (France v. Great Britain), 703
 Savini, *In re*, 155
 Sayce v. Ameer of Bahawalpur State, 190
 Schragar v. Workmen's Accident Insurance Institute, 910
Scotia, The, 42, 857
 Scott, *Ex parte*, 295
 Secretary of State for India v. Kamachee Boye Sahaba, 336
 Secretary of State for India v. Sardar Rustam Khan, 160
 Secretary of State for India v. Sir Raja Chellikani Rama Rao, 565
 Sedgwick, Collins & Co. v. Russia Insurance Co., 140
 Setton *et Al.* v. Land Bank of Egypt, 1007
 Shapleigh v. Mier, 269
 Shedden v. Patriick, 656
 Sheriff Es Shanti v. Attorney-General for Palestine, 218
 Shoshone Indians v. United States, 953
Siena, The, 265, 858
Signe, The, 145
 Simonac v. Community of Jette St. Priné, 1007
 Sinclair v. H.M. Advocate, 295

- Sipes v. McGhee, 741
 Sirka v. Subnemonia Iyen, 190
Sitka, The, 854
 Skiriotes v. State of Florida, 330, 619
 Sobhuza II. v. Miller, 196, 336, 567
 Société Commerciale de Belgique v. L'État Hellénique, 274
 Société de Nickel, *Re*, 194
 Société de Phosphates Tunisiens, *In re*, 195
 Société Énergie Électrique du Littoral Méditerranéen v. Compagnia Imprese Elettriche Liguri, 475
 Société Koehl v. Hildebrand, 459
 Société Potassa Ibericas v. Nathan Bloch, 269
 Sokoloff v. National City Bank, 138
 Solomon case, 360
 South African Republic v. La Compagnie Franco-Belge, 266
 Southern Rhodesia, *In re*, 51, 567
 Spanish Government v. North of England Steamship Co., 141
 Spanish Zone of Morocco Claims, 195, 647
 Spelar v. United States, 458
 Spieckens, *In re*, 707
 Standard Oil Company Tankers case, 351, 643
 Staniszewski v. Watkins, 694
 State v. Ruvido, 501, 507
 State of Ceara v. D'Archer de Montgascon, 177
 State of Russia v. National City Bank of New York, 764
 Statham v. Statham and the Gaekwar of Baroda, 190
 Steenworden v. Société des Auteurs, 42
 Steiner and Gross v. Polish State, 638, 925
 Sterilisation (Germany) case, 688
Stigand, The, 766
 Stoeck v. Public Trustee, 668, 956
 Suarez, *In re* (Suarez v. Suarez), 788, 799, 800, 814, 815
Sudmark, The, 481
 Sullivan v. State of São Paulo, 177, 768
 Sulman, *Ex parte*, 854
 Sultan of Johore v. Abubakar, Tunku Aris Bendahara and Others, 193, 266, 273, 274
 Superintendent, Government Soap Factory, Bangalore v. Commissioner of Income Tax, 190
 Suspense et Al. v. Compania Transatlantica Centro-americana, 195
Sylvan Arrow, The, 857
 Tagaloa v. Inspector of Police, 199
 Tallinna Laevauhisus (A.S) v. Estoman State Steamship Line, 146
 Tamasee, *In re*, 200
 Tatem v. Gamboa, 141
 Taylor v. Barclay, 137
 Taylor v. Best, 800
 Telkes v. Hungarian National Museum (No. 1), 842
 Telkes v. Hungarian National Museum (No. 2), 266
Terrace, The, 854, 856
 Thamis v. Minister of Finance, 804
 Threaut case, 487
Three Friends, The, 141, 612
 Thurgau (Canton of) v. Canton of St. Gallen, 177, 537, 941
 Tillett's case, 694
Tolten, The, 603
 Tomoya Kawakita v. United States, 666
 Toomer v. Witsell, 502
 Totus v. United States, 51
 Trail Smelter Arbitration, 291, 346
 Trelea v. Ragoneai, 793
 Triandafilou v. Ministère Public, 855
 Triquet and Others v. Bath, 39

- Trust-Maatschappij 'Helvetia' (N.V.) v. N.V. Assurantie-Maatschappij 'De Nederlanden en 1845,' 269
- Tulop and Sziber, *In re*, 503
- Ucayali, The*, 767
- Ulen & Co. v. (Polish) National Economic Bank, 265
- Underhill v. Hernandez, 137, 267, 268
- Union des Républiques Socialistes Soviétiques v. Intendant Général, 269
- Union of Soviet Socialist Republics v. Belaiew, 138, 266
- Union of Socialist Soviet Republics v. Luxembourg and Saar Co., 147
- Union of Socialist Soviet Republics v. Onou, 138
- United States v. Bank of New York and Trust Co., 328
- United States v. Belmont, 150, 268, 328
- United States v. Benner, 789
- United States v. California, 181, 502, 634
- United States v. Carillo, 507
- United States v. Claus, 42
- United States v. Coplon and Gubitchev, 784
- United States v. Corlova, 521
- United States v. Curtiss-Wright Export Co., 180
- United States v. Fullard-Leo, 555
- United States v. Insull *et al.*, 295, 503, 701, 702, 703
- United States v. Keeney, 822
- United States v. McRae, 163, 164
- United States v. Milligan, 702
- United States v. National City Bank of New York, 266
- United States v. New York Trust Co., 266
- United States v. Percheman, 166, 57
- United States v. Pink, 139, 149, 150, 180, 329
- United States v. Priolcan, 159, 162
- United States v. Rauscher, 702
- United States v. Ravara, 840
- United States v. Repentigny, 571
- United States v. Rodgers, 477
- United States v. Santos Flores, 499, 503, 597
- United States v. Schwimmer, 661
- United States v. Smith, 42
- United States v. Texas, 634
- United States v. Trumbull, 139, 840
- United States v. Untersagt, 295
- United States v. Wagner, 264
- United States *ex rel.* Donnelly v. Mulligan, 702
- United States *ex rel.* Hudak v. Uhl, 694
- United States *ex rel.* Klovis v. Davis, 692
- United States *ex rel.* Schwarzkopf v. Uhl, 658
- United States *ex rel.* Weinberg v. Schotfeldt, 692
- United States *ex rel.* Zdonic v. Uhl, 820
- Urrutia and Amollobieta v. Martiarena, 269
- Vaccaro v. Collier, 295
- Vaghi v. Reichsbank, 269
- Valentine *et al.* v. United States, *ex rel.* Neidecker, 699
- Validity of the Separate Representation of Voters Act case, 205
- Vallerini v. Grandi, 703
- van Hoogstraten (H.C.) v. Low Lum Seng, 193
- Vavasseur v. Krupp, 264
- Vecht v. Taylor, 662, 665
- Voevodine v. Government of the Commander-in-Chief of the Armed Forces in the South of Russia, 138

- Village of Fort Erie and Buffalo, *In re*, 532
- Villareal v. Hammond, 295
- Vinces, *The*, 605
- Visser, *In re*: The Queen of Holland v. Drukker, 328
- Vissurgis, *The*, and the *Sicna*, 265, 858
- Vitianu, *In re*, 784
- Viveash v. Becker, 39, 840
- Vladikavkazsky Rly. Co. v. New York Trust Co., 130, 328
- Volatron v. Moulin, 269
- Vorovsky case, 789
- Vynheid, *The*, 953
- Vuhotitch, *In re*, 842
- Walker v. Baird, 40, 336
- Walkerville Brewing Co., Ltd. v. Mavnard, 34
- Washington, *The*, 508
- Watson v. R.C.A. Victor Company, 523
- West case, 360
- West Rand Central Gold Mining Co. v. The King, 33
- Westchester County v. Ranella, 827
- Westgate v. Harris, 34
- White, Child & Benev. Ltd. v. Eagle Star and British Dominions Insurance Co., Ltd., 150
- White, Child & Benev. Ltd. v. Simmons, 767
- Whitney v. Robertson, 946, 972
- Wiercinski v. Seyyid Ali Ben Hamond, 760
- Wildenhuis' case, 503
- Wilkening v. Belgian State, 269
- Williams case, 349
- Williams v. Bruffy, 139
- Wilson v. Blanco, 806
- Winter v. Minister of Defence and Others, 200
- Wisconsin v. Illinois, 475
- Wisconsin v. Michigan, 532
- Wolf v. Oxholm, 268
- Wong Man On v. Commonwealth of Australia, 651
- Wren, *In re*, 741
- Wolfsohn v. Russian Socialist Republic, 137, 264, 267
- Wurttemberg v. Baden, 177, 475
- Yim-Tso Hsung v. Toronto, 942
- Youmans' Claim, 364
- Yulle, Shortridge and Co. Arbitration (Great Britain v. Portugal), 924
- Yulu, *The*, 973
- Zachariasen v. United States, 495
- Zafra, *The*, 362, 852
- Zahwsky's Estate, *In re*, 544
- Zamora, *The*, 766
- Zivnostenska Banka National Corporation v. Frankmun, 1007

CONTENTS

OF

THE FIRST VOLUME

INTRODUCTION

FOUNDATION AND DEVELOPMENT OF THE LAW OF NATIONS

CHAPTER I

FOUNDATION OF THE LAW OF NATIONS

I *The Law of Nations as Law*

SUBJECT	PAGE
1. Conception of the Law of Nations	4
2. Denial of the Legal Force of the Law of Nations	7
3. Characteristics of Rules of Law	8
4. Law giving Authority as a condition of the Existence of Law	8
5. The Essential Conditions of Law	10
6. Law and Municipal Law	10
7. The Existence of a Community	11
8. Rules of Conduct in the International Community	13
9. External Power for the Enforcement of Rules of International Conduct	13
10. Practice and the Legal Nature of the Law of Nations	14

II. *Basis of the Law of Nations*

11. Common Consent as the Basis of Law	15
12. Common Consent as the Basis of International Law	17
13. States as the Normal Subjects of the Law of Nations	19
13a. Persons other than States as Subjects of International Law	19
14. Equality an Inference from the Basis of International Law	22

III *Sources of the Law of Nations*

15. Source in contradistinction to Cause	24
16. The two Sources of International Law	25
17. Custom in contradistinction to Usage	25
18. Treaties as a Source of International Law	27
19. General Principles of Law as a Source of International Law	29
19a. Decisions of Tribunals as a Source of International Law	31
19b. Writings of Authors as a Source of Law	33
19c. International Comity	33

IV. *Relation between International Law and Municipal Law*

SECT	PAGE
20. International Law and Municipal Law. The Dualist View	37
21. The Monistic Doctrine	38
21a. Law of Nations as Part of Municipal Law	39
22. Rules of Municipal Law prescribed by International Law	44
23. Presumption against Conflicts between International Law and Municipal Law	45
24. Presumption of the Existence of certain necessary Municipal Rules	46
25. Presumption of the Existence of certain Municipal Rules in conformity with the Law of Nations	46

V. *Dominion of the Law of Nations*

26 and 27. Dominion of International Law controversial	48
28. Present Range of Dominion of the Law of Nations	48
29. Treatment of States outside the Family of Nations	50
29a. Universal and Regional International Law	51
29b. So-called American International Law	52
29c. The so-called Anglo-American and Continental Schools of International Law	54
29d. National Conceptions of International Law	55

VI. *Codification of the Law of Nations*

30. Movement in favour of Codification	57
31. Work of the First Hague Peace Conference	58
32. Work of the Second Hague Peace Conference	59
33. Codification in the period after the First World War	60
34. Codification under the Auspices of the League of Nations	60
35. The Hague Codification Conference of 1930	62
36. The Limits and Prospects of the Codification of International Law	64
37. Codification and Development of International Law	68
37a. International Legislation and the Revision of International Law	69

CHAPTER II

DEVELOPMENT AND SCIENCE OF THE LAW OF NATIONS

I. *Development of the Law of Nations before Grotius*

37b. Law of Nations in Antiquity	72
38. The Jews	73
39. The Greeks	74
40. The Romans	75
41. Law of Nations during the Middle Ages	77
42. The Fifteenth and Sixteenth Centuries	79

II. *Development of the Law of Nations after Grotius*

43-50. The Time of Grotius	84
51. Lessons of the History of the Law of Nations	86

III. *The Science of the Law of Nations*

SECT.	PAGE
52. Forerunners of Grotius	89
53. Grotius	91
54. Zouche	94
55. The Naturalists ✓	95
56. The Positivists ✓	96
57. The Grotians	98
58. Treatises of the Nineteenth and Twentieth Centuries	99
59. The Science of the Law of Nations in the Nineteenth and Twentieth Centuries	106
60. Collections of Treaties	108
61. Bibliographies	112
62. Periodicals	113

PART I

THE SUBJECTS OF THE LAW OF NATIONS

CHAPTER I

INTERNATIONAL PERSONS

I. *Sovereign States as International Persons*

63. Real and apparent International Persons	117
64. Conception of the State	118
65. Not-full Sovereign States	119
66. Divisibility of Sovereignty contested	120
67. Meaning of Sovereignty in the Sixteenth and Seventeenth Centuries	120
68. Meaning of Sovereignty in the Eighteenth Century	121
69. Meaning of Sovereignty in the Nineteenth Century	122
70. The Problem of Sovereignty in the Twentieth Century	122

II. *Recognition of States as International Persons*

71. Recognition a Condition of Membership of the Family of Nations	125
71a. Recognition of States	127
72. Precipitate Recognition	128
73. Recognition of New Heads and Governments of Old States	129
73a. When coming into Power normally and constitutionally	130
73b. When coming into Power abnormally and in a revolutionary manner	130
73c. The Legal Nature of Recognition of Governments	131
73d. Recognition of Governments and Representation in the United Nations	133
74. <i>De facto</i> Recognition	134
75. Consequences of Recognition of New Heads and Governments	137
75a. Recognition of Insurgency	140

SECT. ^a	PAGE
75b. Recognition of New Territorial and International Situations	141
75c. The Obligation of Non-recognition	142
75d. Implied Recognition	146
75e. Conditional Recognition	148
75f. Retroactivity of Recognition	149
75g. Withdrawal of Recognition	150

III. *Changes in the Condition of International Persons*

76. Important in contradistinction to Indifferent Changes	153
77. Changes not affecting States as International Persons	153
78. Changes affecting States as International Persons	154
79. Extinction of International Persons	155

IV. *Succession of International Persons*

80. Common Doctrine regarding Succession of International Persons	157
81. How far Succession actually takes place	158
82. Succession in consequence of Absorption	158
82a. Succession on the Suppression of a Revolt	163
83. Succession in consequence of Dismemberment	164
84. Succession in case of Separation or Cession	165
84a. Succession in International Organisation	168

V. *Composite International Persons*

85. Real and apparent Composite International Persons	170
86. States in Personal Union	171
87. States in Real Union	171
88. Confederated States (<i>Staatenbund</i>)	173
89. Federal States (<i>Bundesstaaten</i>)	175
89a. Federal Structure and Development of International Law	179
89b. Imperfect and Functional Federations and Associations of States	182

VI. *Vassal States*

90. The Union between Suzerain and Vassal State	188
91. International Position of Vassal States	190

VII. *States under Protectorate*

92. Conception of Protectorate	192
93. International Position of States under Protectorate	192
94. Non-European Protectorates	194

VIII. *The British Commonwealth of Nations*

94a. Position of Self-Governing Dominions before the First World War	198
94b. Progress towards Independent Statehood	199
94ba. Dominions as Sovereign States	203
94bb. The Legal Nature of the Commonwealth	209

IX. *Mandated Areas*

SECT.	PAGE
94c. The General Features of the Mandate System	212
94d. The Different Types of Mandate	215
94e. National Status of the Inhabitants	220
94f. 'Third States' and the Mandate System	222

IXA. *Territories under the System of Trusteeship*

94g. In General	223
94h. Territories under the Trusteeship System	224
94i. The Objects of the Trusteeship System	226
94j. The Trusteeship Agreements	228
94ja. The Terms of the Trusteeship Agreements	230
94k. Strategic Trust Areas	232
94l. The Functions of the United Nations with regard to Trust Territories	233
94m. The Trusteeship Council	233
94n. Sovereignty over Trust Territories	235
94o. Dependent Peoples outside the Trusteeship System	239

X. *Neutralised States*

95. Conception of Neutralised States	243
96. Act and Condition of Neutralisation	244
97. International Position of Neutralised States	244
98. Switzerland	244
99. Belgium	246
100. Luxemburg	248
101. The Free Territory of Trieste	249

XI. *Non-Christian States*

102 and 103. Omitted : see § 24 above	250
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XII. *The Holy See*

104. The Former Papal States	250
105. The Italian Law of Guarantee	251
106. The Lateran Treaty, 1929	252
107. The Status of the Vatican City in International Law	254

* XIII. *States at Present International Persons*

108. European States	255
109. American States	256
110. African States	257
11. Asiatic States	257
11a. Australasian States	258

CHAPTER II

POSITION OF THE STATES IN INTERNATIONAL LAW

I. *International Personality*

SECT.	PAGE
112. The so-called Fundamental Rights	259
113. International Personality a Body of Qualities	261
114. Other Characteristics of the Position of the States within the Community of Nations	262

II. *Equality, Rank, and Titles*

115. Equality of States and International Legislation	263
115a. Equality of States and Immunity from Jurisdiction	264
115aa. State Equality and Recognition of Foreign Official Acts	267
115ab. Limits of Recognition of Foreign Legislation	267
115ac. Limitations of Jurisdictional Immunity	271
115ad. Jurisdictional Immunities and the Principles of International Law	272
116. Political and Legal Hegemony of Great Powers	275
116a. State Equality and International Organisation	277
116b. State Equality and the Charter of the United Nations	279
117. Rank of States	280
118. The 'Alternat'	281
119. Titles of States	281

III. *Dignity*

120. Dignity a Quality	282
121. Consequences of the Dignity of States	282
122. Maritime Ceremonials	285

IV. *Independence and Territorial and Personal Supremacy*

123. Independence and Territorial as well as Personal Supremacy as Aspects of Sovereignty	286
124. Consequences of Independence and Territorial and Personal Supremacy	286
125. Violations of Independence and Territorial and Personal Supremacy	288
126. Restrictions upon Independence	249
127. Restrictions upon Territorial Supremacy	290
127a. Subversive Activities against Foreign States	292
128. Restrictions upon Personal Supremacy	294

V. *Self-preservation*

129. Self-preservation an Excuse for Violations	297
130. What Acts of Self-preservation are Excused	298
131. Case of the Danish Fleet (1807)	299
132. Case of Amelia Island (1817)	300
133. Case of the <i>Caroline</i> (1837)	300
133a and 133b. American Expeditions into Mexico, 1910-1919	301

RECT.	PAGE
133c. The German Invasion of Luxemburg and Belgium (1914)	301
133d. The Japanese Invasion of Manchuria (1931)	302
133e. Sinking of the French Fleet at Oran, 1940	303
133f. Modification of Neutrality Obligations by the United States during the Second World War	303

VI. *Intervention*

✓134. Conception and Character of Intervention	305
135. Intervention by Right	306
136. Admissibility of Intervention in default of Right	310
137. Humanitarian Intervention	312
✓138. The Monroe Doctrine	313
139. Merits of the Monroe Doctrine	316
140. The Development of the Monroe Doctrine	317
140a. The Limits of Prohibition of Intervention	319

VII. *Intercourse*

141. Intercourse a Presupposition of International Personality	321
141a. Rights of Intercourse and Economic Co operation	321
142. Consequences of Intercourse as a Presupposition of International Personality	324

VIII. *Jurisdiction*

143. Restrictions upon Territorial Jurisdiction	325
144. Relaxation of Territorial Supremacy in Favour of Allied Govern- ments and Allied Armed Forces	326
144a. Territorial Supremacy and Enforcement of Foreign Public Law	327
145. Jurisdiction over Citizens abroad	330
146. Jurisdiction on the Open Sea	330
147. Criminal Jurisdiction over Foreigners in Foreign States	331
147a. The <i>Lotus</i> Case	333

CHAPTER III

RESPONSIBILITY OF STATES

I. *On State Responsibility in General*

148. Nature of State Responsibility	336
149. Original and Vicarious State Responsibility	337
150. Difference between Original and Vicarious Responsibility	338

II. *State Responsibility for International Delinquencies*

151. Conception of International Delinquencies	338
152. Subjects of International Delinquencies	339
153. State Organs as Subjects of International Delinquencies	340
•153a. Individuals as Subjects of International Delinquencies	341
154. Requirement of Malice or Culpable Negligence	343
155. Objects of International Delinquencies	343

SECT. *	PAGE
155a. Non-payment of Contract Debts and Damages	344
155aa. Abuse of Rights	345
155b. Nationality of Claimants	347
155c. Bar by Lapse of Time (Extinctive Prescription)	349
155d. The Plea of Non-Discrimination	350
156. Reparation as a Consequence of International Delinquencies	352
156a. Penal Damages	354
156b. Criminal Responsibility of States	355

III. *State Responsibility for Acts of State Organs*

157. Responsibility varies with Organs concerned	357
158. Internationally Injurious Acts of Heads of States	358
159. Internationally Injurious Acts of Members of Governments	358
160. Internationally Injurious Acts of Diplomatic Envoys	359
161. Internationally Injurious Activity of Parliaments	359
162. Internationally Injurious Acts of Judicial Functionaries . Denial of Justice	359
162a. Exhaustion of Local Remedies	361
163. Internationally Injurious Acts of Administrative Officials and Military and Naval Forces	362

IV. *State Responsibility for Acts of Private Persons*

164. Vicarious in contradistinction to Original State Responsibility for Acts of Private Persons	365
165. Vicarious Responsibility for Acts of Private Persons relative only	365
165a. Municipal Law as to Offences against Aliens	366
165b. Responsibility for Acts of Insurgents and Rioters	366

CHAPTER IV

THE LEGAL ORGANISATION OF THE INTERNATIONAL COMMUNITY

I. *The Principles of International Organisation*

166. General International Organisation and International Law	370
166a. The Objects of the Political Organisation of Mankind	371
166b. State Sovereignty and International Organisation	371
166c. The Universality of the International Organisation of State	372
167. The Rational Principles of International Organisation	373
167a. Specialised Organs of International Administration and Co- operation	375
167aa. Impact of International Organisations upon International Law	378

II. *The League of Nations*

i. *Membership and General Character of the League*

167ab. How the League arose	381*
167b. The Membership of the League	382
167c. Legal Nature of the League	384

ii. *The Constitution of the League*

SECT.	PAGE
167d. The Constitution of the League	385
167dd. Amendments to the Covenant	386
167e. The Assembly	386
167f. The Council	388
167g. The Secretariat	390
167h. International Unions and Organisations under the Direction of the League	391

iii. *The Function of the League*

167i. The two Purposes of the League	392
167k. Peaceful Settlement of International Disputes	392
167l. Reduction of Armaments	393
167m. Guarantee against Aggression	393
167n. Open Diplomacy	395
167o. Reconsideration of Treaties and International Conditions	395
167oo. Inconsistency with the Covenant of the League	397
167p. Mandates	400

III. *The United Nations* ✓i. *The Objects and the Legal Nature of the United Nations*

168. The Establishment of the United Nations	400
168a. The Purposes of the United Nations	403
168b. The Principles of the United Nations	405
168c. Membership of the United Nations	408
168d. Termination of Membership	411
168e. The Principle of Sovereign Equality of the Member Nations of the United Nations	412
168f. Matters of Domestic Jurisdiction	414
168g. The Legal Nature of the United Nations	420

ii. *The Organs and the Constitution of the United Nations*

168A. The General Character of the Organs of the United Nations	423
168i. The General Assembly	424
168j. The Security Council	427
168k. Voting in the Assembly and in the Council	430
168l. The Relation of the Assembly and the Council	435
168m. The Economic and Social Council	437
168n. The Trusteeship Council	440
168o. The International Court of Justice	440
*168p. The Secretariat	440
168r. Centralisation and Co-ordination of International Administration	444
168s. Revision of and Amendments to the Charter	447

PART II

THE OBJECTS OF THE LAW OF NATIONS

CHAPTER I

STATE TERRITORY

I. *On State Territory in General*

SECT.	PAGE
169. Conception of State Territory	451
170. Importance of State Territory	452
171. Divisibility of Territorial Sovereignty	452

II. *The Different Parts of State Territory*

172. Land, National Waters, Territorial Waters	460
172a. Fictional Parts of Territory	461
173. Territorial Subsoil	461
174. Territorial Atmosphere	462
175. Inalienability of Parts of Territory	463

III. *Rivers*

176. Rivers as State Property of Riparian States	464
177. Navigation on National, Boundary, and not-National Rivers	465
178. Navigation on International Rivers	466
178d. Other European Rivers after the First World War	470
178b. The Barcelona Convention of 1921	471
178c. Utilisation of the Flow of Rivers	474

IV. *Lakes and Land locked Seas*

179. Lakes and Land-locked Seas as State Property of Riparian States	476
180. So-called International Lakes and Land locked Seas	477
181. The Black Sea	478

V. *Canals*

182. Canals as State Property of Riparian States	480
183. The Suez Canal	480
183a. The Kiel Canal	482
184. The Panama Canal	483

VI. *Maritime Belt*

185. State Property of Maritime Belt contested	487
186. Breadth of Maritime Belt	488
187. Fisheries, Cabotage, Police, and Maritime Ceremonials within the Belt	492
188. Navigation within the Belt	493
189. Jurisdiction within the Belt	495
190 (i). Zone for Revenue and Sanitary Laws	495
190 (ii). Claims to Protective Jurisdiction outside the Maritime Belt	497

THE FIRST VOLUME

xliii

SECT.	PAGE
190 (iii). Protective Jurisdiction with regard to Fisheries	499
190a. Maritime Belt around Lighthouses in the Sea	501
190b. The Surface and Subsoil of the Sea Bed beneath the Maritime Belt	501
190c. Ports, Harbours, and Roadsteads	502

VII. *Gulfs and Bays*

191. Territorial Gulfs and Bays	505
192. Non-territorial Gulfs and Bays	508
193. Navigation, Fishery, and Jurisdiction in Territorial Gulfs and Bays	509

VIII. *Straits*

194. What Straits are Territorial	510
195. Navigation, Fishery, and Jurisdiction in Straits	511
196. The Forner Sound Dues	513
197. The Bosphorus and the Dardanelles	513

IX. *The Air and Aerial Navigation*

197a. Theories as to the Air Space	517
197b. British Legislation	518
197c. Convention of 1919 for the Regulation of Aerial Navigation	518
197d. Other International Conventions	522
197e. Customary International Law	523
197ea. The Drawbacks of the Air Navigation Convention of 1919	523
197eb. The Chicago Civil Aviation Agreements of 1944	525
197f. Wireless Communications	529

X. *Boundaries of State Territory*

198. Natural and Artificial Boundaries	531
199. Boundary Waters	532
200. Boundary Mountains	534
201. Boundary Disputes	534
202. Natural Boundaries <i>sensu politico</i>	535

XI. *State Servitudes*

203. Conception of State Servitudes	536
204. Subjects of State Servitudes	538
205. Object of State Servitudes	538
206. Different Kinds of State Servitudes	540
207. Validity of State Servitudes	541
208. Extinction of State Servitudes	542

XII. *Modes of Acquiring State Territory*

209. Who can acquire State Territory ?	544
210. Former Doctrine concerning Acquisition of Territory	545
211. Modes of Acquisition of Territory	546
212. Original and Derivative Modes of Acquisition	546

XIII. *Cession*

SECT.	PAGE
213. Conception of Cession of State Territory	547
214. Subjects of Cession	547
215. Object of Cession	548
216. Form of Cession	548
217. Tradition of the Ceded Territory	550
218. Veto of Third Powers	550
219. Plebiscite	551
219a. Option of Nationality and of Emigration	552

XIV. *Occupation*

220. Conception of Occupation	555
221. Object of Occupation	555
222. Modes of Occupation	557
223. Inchoate Title of Discovery	558
224. Notification of Occupation to other States	559
225. Extent of Occupation	559
226. Protectorate as Precursor of Occupation	561
227. Spheres of Influence	561
228. Consequences of Occupation	562

XV. *Accretion*

229. Conception of Accretion	563
230. Different Kinds of Accretion	563
231. Artificial Formations	564
232. Alluvions	564
233. Deltas	565
234. New-born Islands	565
235. Abandoned River-beds	566

XVI. *Subjugation*

236. Conception of Conquest and of Subjugation	566
237. Subjugation in contradistinction to Occupation	567
237a. The Status of Germany after the Second World War	568
238. Justification of Subjugation as a Mode of Acquisition	570
239. Subjugation of the Whole or of a Part of Enemy Territory	570
240. Consequences of Subjugation	571
241. Veto of Third Powers	573
241a. Renunciation of War and Title by Conquest	574

XVII. *Prescription*

242. Conception of Prescription	575
243. Mode of effecting Prescription	576

XVIII. *Loss of State Territory*

244. Six Modes of losing State Territory	578
245. Operations of Nature	579
246. Revolt	579
247. Dereliction	579

CHAPTER II

THE OPEN SEA

✓ I. *Rise of the Freedom of the Open Sea*

SECT.	PAGE
248. Former Claims to Control over the Sea	582
249. Practical Expression of Claims to Maritime Sovereignty	584
250. Grotius' Attack on Maritime Sovereignty	584
251. Gradual Recognition of the Freedom of the Open Sea	586

✓ II. *Conception of the Open Sea*

252. Difference between the Open Sea and Territorial Waters	587
253. Clear Instances of Parts of the Open Sea	588

✓ III. *The Freedom of the Open Sea*

254. Meaning of the Term 'Freedom of the Open Sea'	589
255. Legal Provisions for the Open Sea	590
256. Freedom of the Open Sea and War	591
257. Navigation and Ceremonials on the Open Sea	591
258. Claim of States to Maritime Flag	592
259. Rationale for the Freedom of the Open Sea	593

IV. *Jurisdiction on the Open Sea* ✓

260. The Flag and Jurisdiction on the Open Sea	594
261. Claim of Vessels to sail under a certain Flag	595
262. Ship's Papers	596
263. Names of Vessels	597
264. Territorial Quality of Vessels on the Open Sea	597
265. Safety of Traffic on the Open Sea	598
265a. Collisions at Sea	601
266. Powers of Men-of-war over Merchantmen of all Nations	603
267. How Verification of Flag is effected	605
268. How Visit is effected	606
269. How Search is effected	606
270. How Arrest is effected	606
271. Shipwreck and Distress on the Open Sea	607

✓ V. *Piracy*

272. Conception of Piracy	608
273. Private Ships as Subjects of Piracy	609
273a. Public Ships as Subjects of Piracy	612
274. Mutinous Crew and Passengers as Subjects of Piracy	614
275. Object of Piracy	614
276. How Piracy is effected	614
277. Where Piracy can be committed	615
278. Jurisdiction over Pirates, and their Punishment	616
279. <i>Pirata non mutat dominium</i>	616
280. Piracy according to Municipal Law	617

VI. *Fisheries in the Open Sea*

SECT.	PAGE
281. Fisheries in the Open Sea free to all Nations	618
282. Fisheries in the North Sea	619
283. Bumboats in the North Sea	620
284. Fisheries in the North Pacific Ocean	620
284a. Fisheries in the North-West Atlantic	622
285. Fisheries around the Farøe Islands and Iceland	622
285a. Regulation of Whaling	623
285b. International Regulation of Fisheries	624

VII. *Telegraph Cables in the Open Sea*

286. Telegraph Cables in the Open Sea permitted	625
287. International Protection of Submarine Telegraph Cables	626

VIII. *Wireless Communication on the Open Sea*

287a and 287b. Wireless Communication on the Open Sea	627
---	-----

IX. *The Surface of the Bed of the Open Sea*

287bb. The Surface of the Bed of the Open Sea	628
---	-----

X. *The Subsoil beneath the Bed of the Open Sea*

287c. Rules concerning the Subsoil beneath the Bed of the Open Sea	629
287d. The Continental Shelf	631

CHAPTER III

INDIVIDUALS

I. *Position of Individuals in International Law*

288. Importance of Individuals to the Law of Nations	636
289. Individuals as Subjects of the Law of Nations	636
290. Individuals as Objects of the Law of Nations	639
291. Nationality the Link between Individuals and the Law of Nations	640
292. International Law and the Rights of Mankind	640

II. *Nationality*

293. Conception of Nationality	642
294. Function of Nationality	645
295. So-called <i>Protégés</i> and <i>de facto</i> Subjects	646
296. Nationality and Emigration	647
296a. The Right of Expatriation	648

III. *Modes of Acquiring and Losing Nationality*

297. Five Modes of Acquisition of Nationality	650
298. Acquisition of Nationality by Birth	651

NOTE.	PAGE
298a. Citizenship within the British Commonwealth of Nations	652
299. Acquisition of Nationality through Naturalisation	654
300. Acquisition of Nationality through Redintegration	656
301. Acquisition of Nationality through Subjugation and Cession	656
302. Modes of losing Nationality	657

IV. *Naturalisation in Especial*

303. Conception and Importance of Naturalisation	660
304. Object of Naturalisation	661
305. Conditions of Naturalisation	661
306. Effect of Naturalisation upon Previous Citizenship	662
307. Naturalisation in Great Britain	663

V. *Double Nationality and Statelessness*

308. Possibility of Double and Absent Nationality	664
309. How Double Nationality occurs	665
310. Position of Individuals with Double Nationality	666
310a. Hague Codification Conference and Double Nationality	666
311. How Statelessness occurs	668
312. Position of Individuals destitute of Nationality	668
313. Regulation of Statelessness by Treaty	669
313a. Abolition of Statelessness	673

VI. *Reception of Aliens and Right of Asylum*

314. Admission of Aliens	675
315. Reception of Aliens under Conditions	676
316. The so-called Right of Asylum	676

VII. *Position of Aliens after Reception*

317. Aliens as Subject to Territorial Supremacy	679
318. Aliens in certain Asian and African Countries	682
319. Aliens and the Protection of their Home State	686
320. Protection Afforded to the Persons and Property of Aliens	687
321. How far Aliens can be treated according to Discretion	689
322. Departure from the Foreign Country	690

VIII. *Expulsion of Aliens*

323. Competence to expel Aliens	691
324. Just Causes of Expulsion of Aliens	693
325. How Expulsion is effected	694
326. Reconduction in contradistinction to Expulsion	694

IX. *Extradition*

327. Absence of Legal Duty of Extradition	696
328. Rise of Extradition Treaties	696
329. Municipal Extradition Laws	697
330. Object of Extradition	698

	PAGE
331. Extraditable Crimes	700
332. Conditions of Extradition	702
<i>X. Principle of Non-Extradition of Political Criminals</i>	
333. How Non-Extradition of Political Criminals became the Rule	704
334. Difficulty concerning the Conception of Political Crime	707
335. The so called Belgian <i>Attentat</i> Clause	709
336. The Russian Project of 1881	709
337. The Swiss Solution of the Problem in 1892	709
338 340a. The Proposed Convention against Terrorism	710
<i>XI. The Protection of Minorities</i>	
340b. Until the End of the First World War	712
340c. After the First World War	712
340d. The Sanctions of the Minority Clauses	713
340e. The Nature of the Guarantee of Protection of Minorities	715
<i>XII. The International Labour Organisation</i>	
340f. Origin of the I L O	717
340g. Objects and Competence of the I L O	718
340ga. Membership of the I L O	719
340gb. Tripartite Character of the I L O	720
340gc. Functions of the International Labour Office	722
340gd. International Labour Conventions	723
340ge. I L O. Conventions and Federal States	725
340gf. Obligations in respect of Unratified Conventions	726
340gg. The Sanction of Labour Conventions	729
340gh. The Essential Character of the I L O	731
<i>XIII. Slavery, Slave Traffic, and Forced Labour</i>	
340h. Slavery and the Slave Traffic	733
340i. Abolition of Forced Labour	735
<i>XIV. International Protection of Human Rights</i>	
340k. The Bases of the International Protection of the Rights of Man	736
340l. The Charter of the United Nations and the Rights of Man	738
340m. The Proposed International Bill of Human Rights	743
340n. The Universal Declaration of Human Rights	744
340o. The European Convention on Human Rights	746
340p. The Genocide Convention	749
340q. Crimes against Humanity	752
340r. Rights of Women	753

PART III

ORGANS OF THE STATES FOR THEIR
INTERNATIONAL RELATIONS

CHAPTER I

HEADS OF STATES, AND FOREIGN OFFICES

I <i>Position of Heads of States according to International Law</i>		149A
341. Necessity of a Head for every State		757
342. Recognition of Heads of States		757
343. Competence of Heads of States		757
344. Heads of States as Objects of the Law of Nations		758
345. Honours and Privileges of Heads of States		758
II <i>Monarchs</i>		
346. Sovereignty of Monarchs		758
347. Consideration due to Monarchs at Home		759
348. Consideration due to Monarchs Abroad		759
349. The Retinue of Monarchs Abroad		760
350. Monarchs travelling <i>Incognito</i>		760
351. Deposed and Abdicated Monarchs		761
352. Regents		761
353. Monarchs in the Service of Foreign Powers		761
III <i>Presidents of Republics</i>		
354. Presidents not Sovereigns		762
355. Position of Presidents in general		762
356. Position of Presidents Abroad		763
IV <i>Foreign Offices</i>		
357. Position of the Secretary for Foreign Affairs		763
357a. Conclusiveness of Statements of Foreign Offices before Municipal Courts		765

CHAPTER II

DIPLOMATIC ENVOYS

I *The Institution of Legation*

358. Development of Legations	769
359. Diplomacy	770
359a. The Language of Diplomacy	771

II *Right of Legation*

360. Conception of the Right of Legation	773
361. What States possess the Right of Legation	774
362. By whom the Right of Legation is exercised	774
362a. Rupture of Diplomatic Relations	775

III. *Kinds and Classes of Diplomatic Envoys*

3807.		PAGE
363.	Envoys Ceremonial and Political	775
364.	Classes of Diplomatic Envoys	776
365.	Ambassadors	777
366.	Ministers Plenipotentiary and Envoys Extraordinary	777
367.	Ministers Resident	778
368.	Chargés d'Affaires	778
369.	The Diplomatic Corps	778

IV. *Appointment of Diplomatic Envoys*

370.	Person and Qualifications of the Envoy	779
371.	Letters of Credence, Full Powers, Passports	780
372.	Combined Legations	781
373.	Appointment of Several Envoys	781

V. *Reception of Diplomatic Envoys*

374.	Duty to receive Diplomatic Envoys	781
375.	Refusal to receive a certain Individual	782
376.	Mode and Solemnity of Reception	783
377.	Reception of Envoys to Congresses and Conferences and to the United Nations	783

VI. *Functions of Diplomatic Envoys*

378.	On Diplomatic Functions in general	785
379.	Negotiation	785
380.	Observation	786
381.	Protection	786
382.	Miscellaneous Functions	786
383.	Abstention from Interference in Internal Politics	787

VII. *Position of Diplomatic Envoys*

384.	Diplomatic Envoys Objects of International Law	787
385.	Privileges due to Diplomatic Envoys	788

VIII. *Inviolability of Diplomatic Envoys*

386.	Protection due to Diplomatic Envoys	789
387.	Exemption from Criminal Jurisdiction	790
388.	Limitation of Inviolability	791

IX. *Exterritoriality of Diplomatic Envoys*

389.	Reason for and Fictional Character of Exterritoriality	792
390.	Immunity of Domicile	793
390a.	So-called Diplomatic Asylum	796
390b.	The <i>Asylum</i> Case between Colombia and Peru	797
391.	Exemption from Civil Jurisdiction	799
391a.	Waiver of Immunity and Abuse of Diplomatic Privilege	800
392.	Exemption from Subpoena as Witnesses	801
393.	Exemption from Police	802
394.	Exemption from Taxes and the like	802
395.	Right of Chapel	804
396.	Self-jurisdiction	806

X. Position of Diplomatic Envoys as regards Third States

NOT	PAGE
397. Possible Cases	806
398. Envoy travelling through Territory of Third State	806
399. Envoy found by Belligerent on Occupied Enemy Territory	808
400. Envoy interfering with Affairs of a Third State	808

XI The Retinue of Diplomatic Envoys

401. Different Classes of Members of Retinue	809
402. Privileges of Members of Legation	810
403. Privileges of Private Servants	811
404. Privileges of Family of Envoy	812
405. Privileges of Couriers of Envoy	813

XII Termination of Diplomatic Mission

406. Termination in contradistinction to Suspension	814
407. Accomplishment of Object of Mission	814
408. Expiration of Letter of Credence	815
409. Recall	815
410. Promotion to a Higher Class	816
411. Dismissal	817
412. Request for Passport	817
413. Outbreak of War	817
414. Constitutional Changes	817
415. Revolutionary Changes of Government	818
416. Extinction of sending or receiving State	819
417. Death of Envoy	820

XIII Diplomatic Privileges of Non Diplomatic Persons

417a. Diplomatic Privileges of Non Diplomatic Persons	821
---	-----

CHAPTER III

✓ CONSULS

I The Institution of Consuls

418. Development of the Institution of Consuls	829
419. Nature of Consular Activity	830

II Consular Organisation

420. Different Kinds of Consuls	832
421. Consular Districts	832
422. Different Classes of Consuls	833
423. Consuls subordinate to Diplomatic Envoys	834

III Appointment of Consuls

424. Qualifications of Candidates	834
425. Obligation to admit Consuls	834
426. Right to appoint Consuls	835
427. Mode of Appointment and of Admittance	835
428. Appointment of Consuls and Recognition	836

IV. *Functions of Consuls*

NO.	PAGE
429. Consular Functions in general	837
430. Promotion of Commerce and Industry	838
431. Supervision of Navigation	838
432. Protection	838
433. Notarial Functions	839

V. *Position and Privileges of Consuls*

434. Position of Consuls	840
435. Consular Privileges	840

VI. *Termination of Consular Office*

436. Undoubted Causes of Termination	843
437. Doubtful Causes of Termination	843
438. Change in Headship of States	844

VII. *Consuls in Non-Christian States*

439-442. Position of Consuls in certain Non-Christian States	845
--	-----

CHAPTER IV

MISCELLANEOUS AGENCIES

I. *Armed Forces on Foreign Territory*

443. Armed Forces as State Organs	846
444. Occasions for Armed Forces to be Abroad	846
445. Position of Armed Forces Abroad	847
446. Case of <i>McLeod</i>	850

II. *State Ships in Foreign Waters*

447. Men of war as State Organs	851
448. Proof of Character as Men-of-war	852
449. Occasions for Men-of-war to be Abroad	852
450. Position of Men-of-war in Foreign Waters	853
451. Position of Crew when on Land Abroad	855
451a. State Ships other than Men-of-war	856

III. *Agents without Diplomatic or Consular Character*

452. Agents lacking Diplomatic or Consular Character	859
453. Public Political Agents	859
454. Secret Political Agents	860
454a. Commercial Agents	860
455. Spies	862
456. Commissaries	862
457-476. Bearers of Despatches	863

PART IV

INTERNATIONAL TRANSACTIONS

CHAPTER I

ON INTERNATIONAL TRANSACTIONS IN GENERAL

I. *Negotiation*

SECT	PAGE
477. Conception of Negotiation	867
478. Parties to Negotiation	867
479. Purpose of Negotiation	868
480. Persons who conduct Negotiations	868
481-482. Form of Negotiation	868

II. *Congresses and Conferences*

483. Conception of Congresses and Conferences	869
484. Parties to Congresses and Conferences	869
485. Procedure at Congresses and Conferences	870

III. *Transactions besides Negotiation and Treaties*

486. Different Kinds of Transactions	872
487. Declaration	872
488. Notification	874
489. Protest	874
490. Renunciation	875

CHAPTER II

TREATIES

I. *Character and Function of Treaties*

491. Conception of Treaties	877
492. So called Law-making Treaties	878
493. Binding Force of Treaties	880

II. *Parties to Treaties*

494. The Treaty-making Power	882
494a. Treaty-making Power of Organisations or States	883
495. Treaty-making Power exercised by Heads of States or their Governments •	884
496. Minor Functionaries exercising Treaty-making Power	885
496a. Members of the British Commonwealth and Treaty-making Power	885
497. Constitutional Restrictions	887
498. Mutual Consent of the Contracting Parties	890
499. Effect of Coercion	891
500. Mistake and Error in Contracting Parties	892

III. *Objects of Treaties*

NO.	PAGE
501. Objects in general of Treaties	803
502. Obligations as Limited to Contracting Parties	804
503. Treaties Inconsistent with former Treaty Obligations	804
503a. Treaties Inconsistent with the Charter of the United Nations	805
504. Object must be physically possible	806
505. Immoral Obligations	806
506. Illegal Obligations	807

IV. *Form and Parts of Treaties*

507. No Necessary Form of Treaties	808
508. Acts, Conventions, Declarations, etc	808
508a. The Existence of Legal Obligations	809
509. Parts of Treaties	900
509a. Inter-Governmental and Inter Departmental Agreements	901

V. *Ratification of Treaties*

510. Conception and Function of Ratification	903
511. <i>Rationale</i> for the Institution of Ratification	905
512. Requirement of Ratification	906
513. Length of Time for Ratification	908
514. Refusal of Ratification	908
515. Form of Ratification	910
516. Who effects Ratification	910
517. Partial and Conditional Ratification	911
517a. Reservations	913
517b. Exchange and Deposit of Ratifications	916
518. Effect of Ratification	917
518a. Acceptance of Treaties	918

VI. *Registration and Publication of Treaties*

518b. Registration of Treaties under the Covenant	919
518c. Registration of Treaties under the Charter	921

VII. *Effect of Treaties*

519. Effect of Treaties upon Contracting Parties	923
520. Effect of Treaties upon the Subjects of the Parties	924
521. Effect of Changes in Government upon Treaties	925
522. Effect of Treaties upon Third States	925
522a. Indirect Imposition of Obligations upon Non Parties	928

VIII. *Means of Securing Performance of Treaties*

523-525. Some Obsolete Means	930
526. Charges	931
527. Occupation of Territory	931
528. Guarantee	932
528a. Enforcement by International Action	932

IX. *Participation of Third States in Treaties*

ARTICLE	PAGE
529. Interest and Participation	933
530. Good Offices and Mediation	934
531. Intervention	934
532. Accession	934
533. Adhesion	935

X. *Expiration and Dissolution of Treaties*

534. Expiration and Dissolution in contradistinction to Fulfilment	936
535-536. Expiration through Expiration of Time	937
537. Mutual Consent	937
538. Withdrawal by Notice	938
539. Vital Change of Circumstances	938

XI. *Voidance of Treaties*

540-544. Grounds of Voidance	944
--	-----

XII. *Cancellation of Treaties*

545. Grounds of Cancellation	945
546. Inconsistency with subsequent International Law	946
547. Violation by One of the Contracting Parties	947
548. Subsequent Change of Status of One of the Contracting Parties	948
549. War	949

XIII. *Renewal, Reconfirmation, and Redintegration of Treaties*

550. Renewal of Treaties	949
551. Reconfirmation	949
552. Redintegration	950

XIV. *Interpretation of Treaties*

553. Authentic Interpretation, and the Compromise Clause	950
554. Rules of Interpretation which commend themselves	951
554a. Preparatory Work in the Interpretation of Treaties	957
555-568. [Omitted]	

CHAPTER III

IMPORTANT GROUPS OF TREATIES

I. *Alliances*

560. Conception of Alliances	959
570. Parties to Alliances	961
571-572. Different kinds of Alliances	961
573. <i>Causa Poderis</i>	963

II. *Treaties of Guarantee and of Protection*

574. Conception and Objects of Treaties of Guarantee	964
575. Effect of Treaties of Guarantee	966

	PAGE
576. Effect of Collective Guarantee . . .	966
577 Pseudo Guarantees . . .	968

III *Treaties of Neutrality*

577a Treaties of Neutrality . . .	969
-----------------------------------	-----

IV *Commercial Treaties*

578 Commercial Treaties in general	970
579 [Omitted]	
580 Meaning of Most favoured Nation Clause	971
581 International Commodity Agreements	971

APPENDIX SPECIALISED AGENCIES OF INTERNATIONAL CO-OPERATION AND ADMINISTRATION

I *Health and Education*

(i) The World Health Organisation	977
(ii) The United Nations Educational, Scientific and Cultural Organisation	986

II *Agriculture, Trade and Finance*

(i) The Food and Agriculture Organisation	993
(ii) The Proposed International Trade Organisation, the General Agreement on Tariffs and Trade and Community Council	998
(iii) The International Monetary Fund	1000
(iv) The International Bank for Reconstruction and Development	1007
(v) The Bank for International Settlements	1010

III *Transport and Communications*

(i) The International Civil Aviation Organisation	1011
(ii) The Inter Governmental Maritime Consultative Organisation	1014
(iii) The Universal Postal Union	1018
(iv) The International Telecommunication Union	1023
(v) The World Meteorological Organisation	1027

INDEX	1031
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INTRODUCTION

FOUNDATION AND DEVELOPMENT
OF THE LAW OF NATIONS

CHAPTER I

FOUNDATION OF THE LAW OF NATIONS

I

THE LAW OF NATIONS AS LAW

Hall, pp. 13-16 Maine, pp. 50-53 Lawrence, §§ 1-3, Phillimore, i. §§ 1-12—Brierly, pp. 42-57—Rousseau, pp. 1-105—Twiss, i. §§ 104-105—Moore, i. §§ 1-2 Westlake, i. pp. 1-13, and *Papers*, pp. 292-413—Walker, *History* i. §§ 1-8 Hyde, i. §§ 1-5—Fenwick, ch. II.—Heffter, §§ 1-5—Holtzendorff in Holtzendorff i. pp. 19-26 Nys i. pp. 138-151—Rivier, i. § 1—Fauchille, §§ 5-31—Pradier-Fodère, i. §§ 1-23 Meinhac, i. pp. 5-28—Fiore, i. §§ 186-206, and *Code*, §§ 1-31 Strupp, *Elements*, § 1—Cavaglieri, pp. 3-18, 34-50 De Loutch i. pp. 1-17, 58-76 Cruchaga, i. §§ 69-83, 94-101—Suarez, i. §§ 1-3, 12-14 Bustamante, pp. 2-56 Scelle, i. pp. 1-27 and ii. pp. 1-14 Keiths Wheaton pp. 1-10 Smith, i. pp. 1-14—Balladore Paterni, pp. 3-54 Anzilotti, pp. 41-48—Fischer Williams, *Chapters*, pp. 1-27 Lauterpacht *The Function of Law* pp. 399-438 and in *Hague Recueil*, vol. 62 (1937) (iv), pp. 190-128 Sibert pp. 2-21—Higgins, *The Binding Force of International Law* (1910)—Oppenheim, *The Future of International Law* (1911) (English translation, 1921) Heilborn, *Grundbegriffe des Völkerrechts* (1912), §§ 1-15 Grosse, *Der Zustand im Völkerrecht* (1912), pp. 1-38, 109-137—Praeg, §§ 1-3—Krabbe, *The Modern Idea of the State* (1917) (English translation, 1921), pp. 233-262—Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp. 102-274, *Allgemeine Staatslehre* (1925), pp. 119-132, *Law and Peace in International Relations* (1942), pp. 3-82, *General Theory of Law and State* (1945), pp. 328-354, and *Principles of International Law* (1952), pp. 3-14 196-201—Verdross, pp. 1-42 and 92-96, *Die Einheit des rechtlichen Weltbildes* (1923), pp. 36-135, and in *Z.I.*, 29 (1921), pp. 65-91—Spiropoulos, *Théorie générale du droit international* (1930), pp. 1-83 Walz, *Das Wesen des Völkerrechts und Kritik der Völkerrechtstheorie* (1930) Bluhdorn, *Einführung in das angewandte Völkerrecht* (1934), pp. 1-106 Schiffer, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur* (1937) Zaccardi, *La costituzione dell' ordinamento internazionale* (1943), pp. 19-157 Srepduti, *La fonte suprema dell' ordinamento internazionale* (1946)—Constantantopoulou, *Verbindlichkeit und Konstruktion des positiven Völkerrechts* (1948)—Giuliano, *La comunità internazionale e il diritto* (1950)—Ago, *Scienza giuridica e il diritto internazionale* (1950)—Corbett, *Law and Society in International Relations* (1951), pp. 36-53—Pollock in *L.Q.R.*, 18 (1902), pp. 418-429—Scott in *A.J.*, 1 (1907) pp. 831-866, and in *R.J. (Paris)* 1 (1927), pp. 637-657—Willoughby and Root in *A.J.*, 2 (1908), pp. 357-366 and 451-457—Nys in *A.J.*, 6 (1912) pp. 1-29, 219-315—Foulke in *Columbia Law Review*, 19 (1919), pp. 429-466—Salvioli in *Rivista*, 3rd ser., i. (1921-1922), pp. 20-80—Cavaglieri *ibid.*, pp. 289-311, 479-506—Brierly in *Hague Recueil*, vol. 23 (1928) (iii.), pp. 467-549 and vol. 58 (1936) (iv), pp. 5-34—Bruns in *Z.S.V.*, 1 (1929) pp. 1-56 Spiropoulos in *R.J. (Paris)*, 3 (1929), pp. 97-130—Heydt in *Z.o.R.*, 9 (1931), pp. 526-546—Redlob in *R.J.*, 3rd ser., 14

(1933), pp. 488-513, 615-633—Salvioli in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 5-17—Schindler, *ibid.*, pp. 233-322—Strupp, *ibid.*, vol. 47 (1934) (i.), pp. 263-300—Rundstein in *R.I.*, 3rd ser., 12 (1931), pp. 491-512, 669-689—Le Fur, *Hague Recueil*, vol. 54 (1935) (iv.), pp. 5-193—Corbett in *University of Toronto Law Journal*, 1 (1) (1935), pp. 3-16—Jones in *B.Y.*, 16 (1935), pp. 5-10—Wengler in *Z.o.R.*, 16 (1936), pp. 322-392—Goodhart in *Grotius Society*, 22 (1936), pp. 31-44—Scrimali in *Z.o.R.*, 21 (1941), pp. 190-216—Hurst in *Grotius Society*, 30 (1944), pp. 119-127—Glanville Williams in *B.Y.*, 22 (1945), pp. 146-163—Kelsen in *O.Z.o.R.*, 1 (1946), pp. 20-83—Paradisi in *Comunicazioni e Studi*, 3 (1950), pp. 55-78—Campbell in *Grotius Society*, 35 (1950), pp. 113-132—Quadri in *Hague Recueil*, 80 (1952) (i), pp. 585-630.

Concep-
tion of the
Law of
Nations.²

§ 1. Law of Nations or International Law (*Droit des gens*, *Völkerrecht*) is the name for the body of customary and treaty rules which are considered legally¹ binding by

¹ In contradistinction to mere usages, to morality, and to rules of so-called International Comity (see below, §§ 3, 9, and 19c).

² One effect of the First World War was to produce among international lawyers widespread dissatisfaction with the inadequacies of existing laws and legal philosophy and a conviction of the necessity of restating much of the law and finding a new basis for it. Amongst a mass of literature the following may be mentioned: Fauchille, §§ 1711-1721; Stowell, pp. 729-762; Alvarez, *Le droit international de l'avenir* (1916); Eltzbacher, *Totes und lebendes Völkerrecht* (1916); Niemeyer, *Aufgaben künftiger Völkerrechtswissenschaft* (1917); Nippold, *The Development of International Law after the World War* (1917) (translated by Hershey, 1923); Lammasch, *Das Völkerrecht nach dem Kriege* (1917); Schücking, *Die völkerrechtliche Lehre des Weltkrieges* (1917); Nelson, *Rechtswissenschaft ohne Recht* (1917); Jitta, *The Renovation of International Law* (1919); Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (1918); Zitelmann, *Die Unvollkommenheiten des Völkerrechts* (1919); Woltzendorf, *Die Lüge des Völkerrechts* (1919); Garner, *Developments*, pp. 1-42, 775-818, and in *R.G.*, 28 (1921), pp. 413-440; Feilchenfeld, *Völkerrechtspolitik als Wissenschaft* (1922); Niemeyer, *Rechtspolitische Grundlegung der Völkerrechtswissenschaft* (1923); Burekhardt, *Die Unvollkommenheit des*

Völkerrechts (1923); Nathan, *The Renaissance of International Law* (1925); Politis, *Les nouvelles tendances du droit international* (1927), and in *R.I. (Paris)*, 1 (1927), pp. 57-75; Bluhdorn, *op. cit.*, pp. 214-243; Fischer Williams, *Chapters*, pp. 68-85; Breschi, *Di alcuni recenti sviluppi del diritto internazionale* (1931); Cavaglieri, *La rinnovazione del diritto internazionale ed i suoi limiti* (1931); Mullereisert, *Die Dynamik des revolutionären Staatsrechts, des Völkerrechts und des Gewohnheitsrechts* (1933); Kraus, *Die Krise des zurechnungsethischen Denkens* (1933); Laun, *Der Wandel der Ideen Staat und Volk* (1933); Scott, *Le progrès du droit des gens* (1934); Van Vollenhoveff, *The Law of Peace* (translated from Dutch, 1936), pp. 113-261; Griziotti, *Riflessioni di diritto internazionale* (1936); Alvarez, *Le nouveau droit international* (1924), and *La psychologie des peuples et la reconstruction du droit international* (1936); Rolin in *R.G.*, 26 (1919), pp. 129-141; De Louter in *R.G.*, 26 (1919), pp. 76-110; Pound in *Bibliotheca Visseriana*, 1923, i, pp. 73-90; Kunz in *Grotius Society*, 10 (1925) pp. 115-142, and in *Strupp, Wört.*, iii, pp. 294-302; Hudson in *A.J.*, 22 (1928), pp. 330-350; Dickinson in *West Virginia Law Quarterly*, 32 (1925), pp. 4-32, and in *Michigan Law Review*, 25 (1927), pp. 622-644; Alvarez in *Grotius Society*, 15 (1929), pp. 35-48; Garner in *R.G.*, 37 (1930), pp. 225-240, and in *Hague Recueil*, vol. 35 (1931) (i), pp. 609-720; Del Vecchio, *ibid.*, vol. 38 (1931) (iv.),

States in their intercourse with each other.) Such part of these rules as is binding upon all States without exception, as, for instance, the law connected with the right of legation and treaties, is called *universal* International Law, in contradistinction to *particular* International Law which is binding on two or a few States only. But it is also necessary to distinguish *general* International Law. This name must be given to the body of such rules as are binding upon a great many States, including the leading States. General International Law, as, for instance, the Declaration of Paris of 1856, has a tendency to become universal International Law.¹ It must be noted that although the rules of International Law

pp. 545-649; Le Fur, *ibid.*, vol. 41 (1932) (n.). pp. 548-598; Ladyženskij in *Théorie du droit*, 6 (1932), pp. 23-40; Keller in *Z.V.*, 17 (1933), pp. 342-372; Martin in *Canadian Bar Review*, 12 (1934), pp. 227-241; Scelle in *R.I. (Paris)*, 15 (1935), pp. 7-35; Le Fur, *ibid.*, 17 (1936), pp. 7-25; Brierly in *Nordisk T.L.*, 7 (1936), pp. 3-17. See also the literature in regard to the recent criticism of the conception of Sovereignty at § 66 (n. 1), the bases of the Law of Nations at § 11 (n. 1), and that relating to the recent 'Natural Law' tendencies in the science of International Law, at § 59 (p. 107, n. 1).

The international crisis which preceded and followed the Second World War, and the fact that organised international society proved unable to check frequent and flagrant breaches of the law of nations, gave rise both to further criticisms of international law and to attempts to answer them. See, for instance, Fischer Williams, *Aspects of Modern International Law. An Essay* (1939); Niemeyer, *Law Without Force* (1941); Kelsen, *Law and Peace in International Relations* (1942); Brierly, *The Outlook for International Law* (1944), and in *International Affairs*, 22 (1946), pp. 352-360; Sauver, *Völkerrecht und Weltfrieden* (1948); Dickinson, *Law and Peace* (1951); Ch. de Visscher, *Théorie et réalité en droit international public* (1953); Vedel in *R.G.*, 46 (1939), pp. 9-36; Jessup in *Foreign Affairs* (U.S.A.), 18 (1939-1940), pp. 244-263; Keeton in *Ordnus Society*, 27 (1941),

pp. 31-58; Feldt in *Z.o.R.*, 22 (1942), pp. 193-208; Schwarzenberger in *A.J.*, 37 (1943), pp. 460-479, and *A Manual of International Law* (1947), pp. 130-152; Kunz in *American Political Science Review*, 38 (1944), pp. 354-369; Dickinson in *California Law Review*, 33 (1945), pp. 506-542.

It is important to distinguish between the criticism of International Law and that of the science of International Law. The latter cannot be held responsible, to any appreciable degree, for the shortcomings of International Law whose growth and authority must depend upon the willingness of States to accept, through progressive limitations of their sovereignty, the normal restraints of law. The science of International Law can assist in that development by disclosing the shortcomings of existing law, by examining the possibilities of its improvement, and by exercising restraint in rationalising its defects as being inherent in the nature of States and in the impossibility of subjecting their vital interests to the rule of law. See also Briggs, *The Progressive Development of International Law*, and Smith, *The Crisis of the Law of Nations* (both in the form of publications of the Turkish Institute of International Law, 1947). And see, in particular, Jessup, *A Modern Law of Nations* (1948), an important work of a general character.

¹ See Ric in *Ordnus Society*, 36 (1930), pp. 200-228, as to the Congress of Vienna and the origins of the notion of 'public law of Europe.'

are primarily those which govern the relations of States, the latter are not the only subjects of International Law. International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by International Law.¹

International Law in the meaning of the term as used in modern times did not exist during antiquity or the first part of the Middle Ages. It is in its origin essentially a product of Christian civilisation, and began gradually to grow from the second half of the Middle Ages. But it owes its existence as a systematised body of rules largely to the Dutch jurist Hugo Grotius, whose work, *De Jure Belli ac Pacis, libri iii.*, appeared in 1625, and became the foundation of all later development.

It must be noted that only the so-called public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called Private International Law is not, at any rate not as a rule.² The latter concerns mainly such matters between individuals as fall at the same time under the jurisdiction of two or more different States. And as the municipal laws of different States are frequently in conflict with each other respecting such matters, there has evolved a body of principles for avoiding or limiting such conflicts.³ What is now

¹ See below, §§ 13a and 248-292

² Pillet in *R.I.*, 3rd ser., 4 (1923), pp. 345-355, regards this so-called private International Law not so much as Municipal Law but as a cosmopolitan customary law based on general convenience. Upon which see Pollock's comment in *L.Q.R.*, 40 (1924), pp. 271-274. See also Frankenstein, *Internationales Privatrecht* (1926), § 3; Plaisant, *Les règles de conflit de lois dans les traités* (1946).

³ See an article by Beckett in *B.Y.*, 7 (1926), pp. 73-96, entitled: 'What is Private International Law?'; Cheeshire, *Private International Law* (2nd ed., 1938), pp. 3-24, 82-92; Wolff, *Private International Law* (1945), pp. 11-15; Arminjon in *R.I.*, 3rd ser., 10 (1929), pp. 680-698; Rundstein in *Théorie du*

droit, 9 (1935), pp. 255-269; Nussbaum in *Columbia Law Review*, 42 (1942), pp. 189 *et seq.* On the relation of Public and Private International Law see Siotto-Pintor in *L'Égypte contemporaine*, 26 (1935), pp. 237-267; Scelle, *l.* pp. 42-49; Rundstein in *R.I.*, 3rd ser., 17 (1936), pp. 314-349; Starke in *L.Q.R.*, 42 (1936), pp. 395-401; Niederer in *Annuaire Suisse*, 5 (1948), pp. 63-82; Kopelmanas in *Études Georges Scelle* (1950), vol. II, pp. 753-804; Stevenson in *Columbia Law Review*, 52 (1952), pp. 561-588. See also Plaisant, *Les règles de conflit de lois dans les traités* (1946). On a projected international tribunal on questions of Private International Law see Carlinder in *Nordisk T.A.*, 2 (1931), pp. 49-60. On the codification of Private International Law see Nolde in *Hague Recueil*, vol. 55

termed Private International Law may, however, at the same time become International Law in proportion as States agree by law-making treaties¹ upon rules the application of which would solve such conflicts.

§ 2. Almost from the beginning of the science of the Law of Nations the question has been discussed whether the rules of International Law are *legally* binding. Hobbes² and Pufendorf³ had already answered the question in the negative. During the nineteenth century Austin⁴ and his followers took up the same attitude. They defined law as a body of rules for human conduct set and enforced by a sovereign political authority. If indeed this definition of law be correct, the Law of Nations cannot be called law. For International Law is a body of rules governing the relations of sovereign States between one another. There is not a sovereign political authority above the sovereign States which could enforce such rules. However, this definition of law is not correct. It covers only the written or statute law within a State, that part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some other sovereign authority in a non-constitutional State. It does not cover that part of Municipal Law which is termed unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law. This customary law has never been expressly enacted by any law-giving body, or it would not be merely customary law. Those who define law as rules set and enforced by a sovereign political authority do not deny the existence of customary law. But they maintain that the customary law has the character of law only through that indirect recognition on the part of the State which is to be found in the fact that courts of justice apply the customary in the same way as the

Denial of
the Legal
Force of
the Law of
Nations.

(1936) (b), pp. 303-427. For a survey of the decisions of the Permanent Court on questions of Private International Law see Hammarbyöld in *Revue critique du droit international*, 30 (1934), pp. 315-344. As to conflict of laws before international tribunals see

Lapatin in *Gratius Society*, 27 (1941), pp. 141 181, and 29 (1943), pp. 51-84.

¹ See *slay*, § 18

² *De Cive*, xiv 1.

³ *De Jure Naturae et Gentium*, ii, c. iii § 22.

⁴ *Lectures on Jurisprudence*, vi.

written law, and that the State does not prevent them from so doing. This is, however, nothing else than a fiction. Courts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law before that recognition, and States recognise unwritten rules as law only because courts of justice do so.

Charac-
teristics
of Rules
of Law.

§ 3. For the purpose of finding a correct definition of law it is indispensable to compare morality and law with each other, for both lay down rules, and to a great extent the same rules, for human conduct. Now a characteristic of rules of morality is that they apply to conscience, and to conscience only. An act loses all value before the tribunal of morality if it was not done out of free will and conscientiousness but was enforced by some external power or was done from some consideration which lies outside the boundaries of conscience. On the other hand, a characteristic of rules of law is that they shall, if necessary, be enforced by external power.¹ Rules of law apply, of course, to conscience quite as much as rules of morality. But the latter require to be enforced by the internal power of conscience only, whereas the former require to be enforced by some external power.²

Law-
giving
Authority
as a
condition
of the
Existence
of Law.

§ 4. If these are the characteristic signs of morality and of law, we are justified in stating the principle: A rule is a rule of morality, if by common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common consent of the community it will eventually be enforced by external power. Without some kind both of morality and of law no community has ever existed, or could possibly exist. But there need not be, at least not among primitive communities, a law-giving authority within the community. Just as the rules of morality are growing through the influence of many different factors, so the law can grow without being expressly laid down and set by a law-giving authority. Wherever we

¹ See Westlake, *Papers*, p. 12, and Twiss, i. § 105.

² This distinction between rules of law and of morality is, however, by no means generally recognised. See,

for instance, Heilborn, *Grundbegriffe des Völkerrechts* (1912), pp. 3-10. And see Vinogradoff in *Michigan Law Review*, 23 (1924), pp. 1-8 and pp. 138-153; and, as to international morality, below, p. 35, n. 2.

have an opportunity of observing a primitive community, we find that some of its rules for human conduct apply to conscience only, whereas others will be enforced by common consent of the community; the former are rules of morality only, whereas the latter are rules of law. For the existence of law neither a law-giving authority nor courts of justice are essential. Whenever a question of law arises in a primitive community, it is the community itself and not a court which decides it. Of course, when a community is growing out of the primitive condition of its existence and becomes gradually so enlarged that it turns into a State in the proper sense of the term, the necessities of life and altered circumstances of existence do not any longer allow the community itself to shape the law in every respect. It is for this reason that we find in every State a legislature, which makes laws, and courts of justice, which administer them. It is for the same reason that the absence of a legislature in the relations of States can be explained only by reference to the assumption that their relations are those of a primitive community. But that assumption cannot be easily reconciled with the fact that we are here concerned with relations of modern civilised States. We must not attach exaggerated importance to the argument affirming the legal nature of International Law by reference to primitive communities.¹

If we ask whence comes the power of the legislature to make laws, there is no other answer than this: from the common consent of the community. Thus, in Great Britain, Parliament is the law-making body by common consent. An Act of Parliament is law, because the common consent of Great Britain is behind it. That Parliament has law-making authority is law itself, but unwritten and customary law. It follows that all statute or written law is based on unwritten law in so far as the power of Parliament to make statute law is given to Parliament by unwritten

¹ See Lauterpacht, *The Function of Law*, p. 406. And see Westlake, *Collected Papers*, p. xxii: 'if we give the name of law to anything which we so discover in a remote state of society

before we have fixed in our minds what we mean by that name, we beg the question, and have no security that our language has any consistent, or therefore useful, sense.'

law. It is by the common consent of the British people that Parliament has the power of making rules which shall be enforced by external power. But besides the statute laws made by Parliament there exist and are constantly growing other laws, unwritten or customary, which are day by day recognised through courts of justice.

The
Essential
Condi-
tions of
Law.

§ 5. On the basis of the results of these previous investigations we are now able to give a definition of law. We may say that *law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external¹ power.*

The essential conditions of the existence of law are, therefore, threefold. There must, first, be a community. There must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power. It is not an essential condition either that such rules of conduct should be written rules, or that there should be a law-making authority or a law-administering court within the community concerned. If we find this definition of law correct, and accept these three essential conditions of law, the existence of law is not limited to the State community only, but is to be found everywhere where there is a community.

Law and
Municipal
Law.

§ 6. But it must be emphasised that, if there is law to be found in every community, law in this meaning must not be wholly identified with the law of States, the so-called Municipal Law,² just as the conception of State must not be identified with the conception of community. The conception of community is a wider one than the conception of State. A State is a community, but not every community is a State. Likewise the conception of law pure and simple is a wider one than that of Municipal Law. Municipal Law is law, but not every law is Municipal Law; for instance, the Canon Law is not. Municipal Law is a narrower con-

¹ That is, external to the person against whom they are enforced.

² Throughout this work the term 'Municipal Law' is used in the sense of national or State law in con-

tradistinction to International Law. *Municipium* was 'a town, particularly in Italy, which possessed the right of Roman citizenship . . . but was governed by its own laws': Lewis and Short, *Latin Dictionary*.

ception than law pure and simple. The body of rules which is called the Law of Nations or International Law may, therefore, be law in the strict sense of the term, although it may not possess all the characteristics of Municipal Law, and although the divergence from generally recognised principles of Municipal Law may, as a rule, be regarded as expressive of the weakness of the Law of Nations *qua* law.¹ To form a view whether the Law of Nations is or is not law, we have to inquire whether the three essential conditions of the existence of law are to be found in the Law of Nations.

§ 7. As the first condition is the existence of a community, The the question arises whether an international community ^{Existence of a Com-} exists whose law could be the Law of Nations. Before this munity. question can be answered, the conception of a community must be defined. A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals. This definition of a community covers not only a community of individual men, but also a community of individual communities such as individual States. But is there in existence a universal international community of all individual States? ² This question had already, before the two World

¹ See below, § 51 (3), where the progress of International Law is described as dependent on its development on the lines of Municipal Law. Care must, therefore, be taken not to exaggerate the so-called specific character of International Law as a reason for acquiescing in or justifying solutions radically different from general principles of law as adopted within the State and from rules of morality embodied in those principles. See, as to the dangers of the insistence on the specific character of International Law, Lauterpacht, *The Function of Law*, pp. 403-407.

² For a discussion of this question see Hold-Forneck, *Völkerrecht*, i. (1930) pp. 17-26, 84-110 (an able denial of the existence of an international community); Ballardore Pallieri, pp. 3-30; Bustamante, pp. 431-445; Burockhard, *Die Organisation der Rechtsgemeinschaft* (1927), pp. 374-

416; Meinecke, *Weltbürgertertum und Nationalstaat* (1928); Knubben, *Die Subjekte des Völkerrechts* (1928), pp. 191-201, 351-371; Delon, *La société internationale et les principes du droit public* (1929); Stratton, *Social Psychology of International Conduct* (1929), pp. 293-305; Wals, *Das Wesen des Völkerrechts und Kritik der Völkerrechtstheorien* (1930), pp. 157-162; De la Brière, *La communauté des Puissances* (1932); Maim, *Völkerbund und Staat* (1932), Part I.; Laun, *Der Wandel der Ideen Staat und Volk als Äusserung des Weltbewusstseins* (1933), pp. 327-445; Bluhdorn, *Einführung in das angewandte Völkerrecht* (1934), pp. 90-100; Oorbu, *Essai sur la notion de règle en droit international* (1935); Seele in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 339-346; Zimmermann in *Grotius Society*, 20 (1934), pp. 25-44; Walsh in *Hague Recueil*, vol. 53 (1935) (iii.), pp. 101-170; Del Vecchio

Wars, been decided in the affirmative as far as the States of the civilised world were concerned. Science and art, which are by their nature to a great extent international, created a constant exchange of ideas and opinions between the subjects of the several States. Of the greatest importance were, however, agriculture, industry, and, in particular, trade. It is international trade which has fostered navigation on the high seas and on the rivers flowing through different States. It is, again, international, commercial, and other interests which have called into existence the nets of railways which cover the continents, and the international postal, telegraphic, radiotelegraphic and radiotelephonic arrangements.

Cultural, scientific, and humanitarian interests have called for international co-ordination and organisation.¹ In addition to the various permanent organs and institutions of the League of Nations, of the United Nations, and of the International Labour Organisation, a number of international offices and international commissions¹ have been established for the administration of international business, and a Permanent Court of Arbitration and, later, an International Court of Justice have been set up at The Hague. Though the individual States are sovereign and independent of each other, though there is no international Government above them, there exists a powerful unifying factor, namely, their common interests. The influence of that unifying factor is liable to suffer a set-back whenever economic nationalism, political intolerance and the pursuit of self-sufficiency on the part of sovereign States tend to create artificial barriers among the peoples composing them. Whenever that happens, the authority and reality of International Law are likely to weaken. But such retrogression, being contrary to the natural tendencies of development and to the realities of national intercourse between States, must be regarded as temporary and as leaving essentially intact the existence of an international community. Neither

in *Théorie du droit*, 10 (1936), pp. 1-13. On some psychological and sociological aspects of international relations see Hodges, *The Background of International Relations* (1931), and Alvarez, *La psychologie des peuples et*

la reconstruction du droit international (1936). See also West, *Conscience and Society* (1942), pp. 176-212, and in *Grotius Society*, 28 (1942), pp. 133-160.

¹ See below, Appendix.

do differences in culture, in the economic structure, or in the political system, affect as such the existence of the international community as one of the basic factors of International Law. The object and resulting scope of the rules of International Law being limited,¹ its existence is not conditioned by a uniformity of outlook and tradition which plays an important, although not indispensable, part in securing the rule of law within the State.

§ 8. Thus the first essential condition for the existence of law is, at least in the long run, a reality. But the second condition cannot be denied either. For hundreds of years more and more rules have grown up for the conduct of the States between each other. These rules are to a great extent customary rules. But side by side with these customary and unwritten rules more and more written rules are daily created by international agreements, such as the Declaration of Paris of 1856, the Hague Rules concerning land warfare of 1899 and 1907, and the vast number of general conventions often referred to as law-making or legislative treaties.

§ 9. Equally, an affirmative answer must be given to the question whether there exists a common consent of the community of States that the rules of international conduct shall be enforced by external power. Governments of States, and the public opinion of the whole of civilised humanity, agrees that International Law shall, if necessary, be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations. In the absence of a central authority for the enforcement of the rules of the Law of Nations, States have on occasions to take the law into their own hands. Self-help,² and intervention on the part of other States which sympathise with the wronged one, are the means by which the rules of the Law of Nations

¹ They are limited for the reason that, in view of the immense diversity of the component parts of the international community, the legal rules binding upon States must be limited to the relatively restricted scope of matters capable of uniform regulation. For a somewhat different explanation

see Brierly in *Acta Scandinavica*, 7 (1936), p. 9

² For a stimulating discussion of this question from the point of view of legal history see Lambert, *La vengeance privée et les fondements du droit international public* (1936).

can be and actually are enforced. And, subject to the obligations of the Charter of the United Nations and of the General Treaty for the Renunciation of War,¹ war is the ultimate instrument for defending violated legal rights vital to the existence of States. Moreover, the Covenant of the League and now the Charter, by providing for a system of sanctions for repressing the violation of its principal obligation, have elevated enforcement of the law to the authority of a recognised principle of conventional² law. It is true that there is at present no central Government above the Governments of the several States, which could in every case secure the enforcement of the rules of International Law. For this reason, compared with Municipal Law and the means available for its enforcement, the Law of Nations is certainly the weaker of the two.³ This weakness becomes particularly conspicuous in time of war, for belligerents who fight for their existence will always be apt to brush aside such rules of the Law of Nations concerning warfare as are deemed to hinder them in the conduct of their military operations. But a weak law is nevertheless still law.

Practice
and the
Legal
Nature
of the
Law of
Nations.

§ 10. In practice International Law is constantly recognised as law. The Governments of the different States are of opinion that they are legally, as well as morally, bound by

¹ See below, vol. II, §§ 529-529.

² The term 'conventional rule' is used throughout this work to indicate a rule created by express agreement.

³ As to the sanctions of International Law see the following: Root in *A.J.*, 2 (1908), pp. 451-457; Higgins, *The Binding Force of International Law* (1910); Siotto-Pintor in *Rivista*, 12 (1918), pp. 208-228; Roxburgh in *A.J.*, 14 (1920), pp. 26-37; Hyde, i. § 4; Stowell, pp. 11-15; Dupuis in *Hague Recueil*, 1924 (i.), pp. 407-444; Mitrany, *The Problem of International Sanctions* (1925); Buell and Dewey, *Are Sanctions Necessary to International Organisation?* (1932); Spaight, *An International Air Force* (1932); Brück, *Les sanctions en droit international public* (1933); Morgenthau, *La réalité des normes* (1934), pp. 214-226; the

same in *R.I.*, 3rd ser., 16 (1935), pp. 474-503, 809-836; Widmer, *Der Zwang im Völkerrecht* (1936); Kelsen, *Law and Peace in International Relations* (1942), pp. 3-26; Brierly in *Grotius Society*, 17 (1931), pp. 67-78; Scott in *A.S. Proceedings*, 1933, pp. 5-33; Hyde, *ibid.*, pp. 34-40; Foster in *American Political Science Quarterly*, 49 (1934), pp. 372-386; Wehberg in *Hague Recueil*, vol. 48 (1934) (ii.), pp. 7-132; Scelle, *ibid.*, vol. 55 (1936) (i.), pp. 156-177, 193-196; Cavaré in *R.G.*, 44 (1937), pp. 385-445 and, as to the sanctions under the United Nations Charter, in *Hague Recueil*, 1952 (i.); Hummel in *University of Chicago Law Review*, 12 (1945), pp. 115-139; Hau Mo in *Grotius Society*, 35 (1949), pp. 4-16; Cavaré in *Hague Recueil*, 80 (1952) (i.), pp. 195-288. And see vol. II, § 52b. See also below, §§ 156, 528a.

the Law of Nations. Likewise, the public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations—although the inadequacy of public opinion as a compelling and motivating force is in itself an expression of the weakness of International Law as a body of legal rules. States not only recognise the rules of International Law as legally binding in innumerable treaties, but affirm constantly the fact that there is a law between themselves. They recognise this law by their Municipal Law ordering their officials, their civil and criminal courts, and their subjects to observe such conduct as is in conformity with the duties imposed upon their sovereign by the Law of Nations.

Violations of International Law are certainly frequent, especially during war. But the offenders always try to prove that their acts do not constitute a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts. The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations as justifying their conduct. While the frequency of the violations of International Law may strain its legal force to breaking point, the formal, though often cynical, affirmation of its binding nature is not without significance.

II

BASIS OF THE LAW OF NATIONS

§ 11. If law is, as defined above (§ 5), a body of rules for human conduct within a community which by common consent of this community shall be enforced through external power, then common consent is the basis of all law.¹ What, Common
Consent as
the Basis
of Law.

¹ It will be noted that 'common consent' is a sociological rather than a legal explanation of the validity of the law. In law the question still arises: Why is consent binding? Probably the answer to that question as to the validity of the first source of law cannot itself be a legal one. Its

validity cannot be proven as a legal proposition; it must be assumed by reference to what has been called the initial hypothesis (see Salmond, *Jurisprudence*, § 48) adopted on the basis of non-legal considerations. See especially Kelsen, *Das Problem der Souveränität und die Theorie des*

now, does the term 'common consent' mean? If it means that all the individuals who are members of a community

Völkerrechts (1920), *passim*; *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928); *Reine Rechtslehre* (1934), pp. 129-154; and in *Hague Recueil*, vol. 14 (1926) (iv.), and vol. 42 (1932) (iv.). See also Lauterpacht, *The Function of Law*, pp. 420-423; Briefly in *Hague Recueil*, vol. 23 (1928) (iii.), pp. 467-549; Cavaglieri, *ibid.*, vol. 26 (1929) (i.), p. 362; Bourquin, *ibid.*, vol. 35 (1931) (i.), pp. 75-80; Métall in *Z.o.R.*, 11 (1931), pp. 416-428; Le Fur in *Hague Recueil*, vol. 54 (1935) (iv.), pp. 146-166; Walz in *Archiv des öffentlichen Rechts*, vol. 58 (1936), pp. 1-16; Giuliano, *La comunità internazionale e il diritto* (1950). And see below, § 493, on the binding force of treaties. The doctrine of the initial hypothesis as the basis of International Law has been clearly formulated by Kelsen, the originator of what has become known as the Vienna School, in a series of writings referred to above. As to the influence of Kelsen and of the Vienna School on International Law see Lauterpacht in *Modern Theories of Law* (1933), pp. 123-129; Kunz, *Völkerrechtswissenschaft und reine Rechtslehre* (1923), and in *New York University Law Quarterly Review*, 11 (1933-1934), pp. 370-421; Jaeger, *Le problème de la souveraineté dans la doctrine de Kelsen* (1932); Schiffer, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur* (1937); Man, *L'école de Vienne et le développement du droit des gens* (1938); Akzin in *R.I. (Paris)*, 1 (1927), pp. 342-372; Balladore Pallieri in *Rivista*, 27 (1935), pp. 24-28; J. M. Jones in *B.Y.*, 16 (1935), pp. 42-55; Starke, *ibid.*, 17 (1936), pp. 66-81; Stern in *American Political Science Review*, 30 (1936), pp. 736-741. That influence has extended in particular to such matters as the relation of the systems of International and Municipal Law, State sovereignty, the subjects of International Law, personification of the State, etc. On these questions there is a striking similarity of view between the Vienna School and the views of the French writer Duguit and his followers. Duguit's principal works

in this connection are *Traité du droit constitutionnel*, 3 vols. (2nd ed., 1921), and *Le droit social et le droit individuel et la transformation de l'État* (3rd ed., 1922). On Duguit's contribution to International Law see Le Fur in *Archives de philosophie du droit*, 1932, pp. 175-212, and in *Hague Recueil*, vol. 54 (1935) (iv.), pp. 72-94; and, in particular, Réglaide in *R.G.*, 37 (1930), pp. 381-419. See also Bonnard in *Théorie du droit*, 1 (1926), pp. 18-40, and iii. (1928), pp. 55-70; Kunz, *ibid.*, 1. (1926), pp. 146-152 and 204-221. The theories of Duguit have been amplified and applied to International Law in a creative manner on a biological basis by Scelle in his *Précis de droit des gens*, vol. 1. (1932), vol. II. (1934). See also his *La théorie juridique de la révision des traités* (1936). And see Segal in *Théorie du droit*, 9 (1935), pp. 186-194. According to Scelle there exists over and above the legal order a natural order concerned as the sum total of biological laws whose observance imposes itself upon the legislator with absolute necessity; his task is to translate these laws into legal rules; the concordance of the legal and biological law is the intrinsic basis of the validity of the law. It may be of some interest to compare Scelle's sociological and biological foundation of International Law with Westlake's attempt to base it on 'the social nature of man and his material and moral surroundings': (*Collected Papers*, p. 81. See also Reeves in *Hague Recueil*, vol. 3 (1924) (ii.), pp. 5-94. And see Chklaver, *Le droit international dans ses rapports avec la philosophie du droit* (1929); Alvarez, *Le nouveau droit international* (1924); the same, *La philosophie des peuples et la reconstruction du droit international* (1936); and, for comment thereon, Le Fur in *Hague Recueil*, vol. 54 (1935) (iv.), pp. 124-146. See also Djuvara in *Hague Recueil*, vol. 64 (1938) (ii.), pp. 485-616; Rousseau, pp. 55-105; Ziccardi, *La costituzione dell'ordinamento internazionale* (1943), pp. 10-157. And see the literature quoted above, § 1. and below, §§ 15, 20, and 52.

must at every moment of their existence expressly consent to every point of law, such common consent could never be proved. The individuals, who are the members of a community, are successively born into it, grow into it together with the growth of their intellect during adolescence, and die away successively to make room for others. The community remains unaltered, although a constant change takes place in its members: 'Common consent' can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance as compared with the community viewed as an entity in contradistinction to the wills of its single members. The question whether there be such a common consent in a special case is not a question of theory, but of fact only. It is a matter of observation and appreciation, and not of logical and mathematical decision, just as is the answer to the question, 'How many grains make a heap?' It is for that reason that custom is at the background of all law, whether written or unwritten.

§ 12. The customary rules of International Law have grown up by common consent of the States—that is, the different States have acted in such a manner as to imply their tacit consent to these rules. As far as the process of the growth of a usage and its turning into a custom can be traced back, customary rules of the Law of Nations came into existence in the following way. The intercourse of States with each other necessitated some rules of international conduct. Single usages, therefore, gradually grew up, the different States acting in the same or in a similar way when occasion arose. As some rules of international conduct were from the end of the Middle Ages urgently wanted, the writers on the Law of Nature prepared the ground for their growth by constructing certain rules on the basis of religious, moral, rational, and historical reflections. Hugo Grotius's work, *De Jure Belli ac Pacis, libri iii.* (1625), offered a systematised body of rules which commended themselves so much to the needs and wants of the time that they became the basis of the subsequent development. When afterwards, especially in the nineteenth century, it

became apparent that customs and usages alone were not sufficient, or not sufficiently clear, new rules were created through law-making treaties being concluded which laid down rules for future international conduct. Thus conventional rules gradually grew up side by side with customary rules.

New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in force at the time of their admittance. It is therefore not necessary to prove for every single rule of International Law that every single member of the international community has consented to it. No single State can say on its admittance into the community of nations that it desires to be subjected to such and such rules of International Law, and not to others. The admittance includes the duty to submit to all the rules in force, with the sole exception of those which, like the rules of the Geneva Conventions, are binding upon such States only as have concluded, or later on acceded to, a certain international treaty creating the rules concerned.

On the other hand, no State can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations.¹ The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State. This applies not only to customary rules, but also to such conventional rules as have been called into existence through a law-making treaty for the purpose of creating a permanent mode of future international conduct without a right of the signatory Powers to give notice of withdrawal. It would, for instance, be a violation of International Law on the part of a signatory of the General Treaty for the Renunciation

¹ See De Louter, i. p. 17: 'La doctrine qu'un État souverain n'est engagé par sa volonté qu'autant longtemps que cette volonté persiste est inacceptable parce qu'elle même qu'elle sape les bases essentielles du droit international. La seule différence entre le droit international et le

droit national se trouve dans leur origine; leur caractère obligatoire est parfaitement identique.' See also, to the same effect, Kelsen, *Der Begriff der Souveränität*, etc., pp. 162-174; Lauterpacht, *Analogue*, pp. 54-59, and the literature there quoted.

of War of 1928 to declare that it has ceased to be a party.

§ 13. Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as an alien or an ambassador, for example, is not directly a subject of International Law. Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not, as a rule, international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the State concerned by International Law. Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are, on the traditional view, not international duties, but duties imposed by Municipal Law in accordance with a right granted to, or a duty imposed upon, the State concerned by International Law.¹

§ 13a. While it is of importance to bear in mind that primarily States are subjects of International Law, it is essential to recognise the limitations of that principle.²

¹ See the *Mavrommatis Palestine Concessions case*, P.C.I.J., Series A, No. 2, p. 12, line 10.

² In the first three editions of this treatise the view was expressed that States only and exclusively are the subjects of International Law. See also Knuibben, *Die Subjekte des Völkerrechts* (1928); Wolgast, *Völkerrecht* (1934), § 144. But see Arangio Ruiz *Gli enti soggetti dell'ordinamento internazionale* (1952), Koster in *B.I.L.* 9 (1923), pp. 1-31, Lord Phillimore in *Hague Recueil*, vol. 1 (1923) pp. 63-68, E. Kaufmann in *Hague Recueil*, vol. 54 (1935) (iv.), pp. 402-427; Schoen in *Z.V.*, 23 (1939), pp. 411-448. But see for a rejection or qualification of the traditional view: Kaufmann, *Die Rechtskraft des internationalen Rechts*

(1899), *passim*; Fiore, *International Law Codified* (Borchard's transl., 1918), § 66; Wendlake, *Collected Papers*, Rehrman Z.V., 1 (1907), p. 53; Diena in *R.G.*, 16 (1909), pp. 57-76; Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), and in *Hague Recueil*, vol. 42 (1932) (iv.), pp. 141-172; Krabbe, *The Modern Idea of the State* (English transl., 1921), pp. 240-245; Duguit, *Traité de droit constitutionnel* (1923), pp. 551-560; Niemeyer, *Völkerrecht* (1923), p. 86; Politis, *Les nouvelles tendances du droit international* (1927), pp. 55-93, and in *Hague Recueil*, vol. 6 (1925) (i.), pp. 8-10; Verdross, *Vorfassung*, p. 160; Ansilotti, pp. 121-136; Balladore Pallieri, pp. 167-172; 277-279; Scelle, i. pp. 42-44; Lauter-

correct meaning is that States only create International Law ; that International Law is primarily concerned with the rights and duties of States and not with those of other persons ; and that States only possess full procedural capacity before international tribunals. Further than this that principle does not go. In particular, when we say that International Law regulates the conduct of States we must not forget that the conduct actually regulated is the conduct of human beings acting as the organ of the State. As Westlake said, 'The duties and rights of States are only the duties and rights of the men who compose them.'¹ If that view is accepted, then it is scientifically wrong and practically undesirable to divorce International Law from the general principles of law and morality which underlie the main systems of municipal jurisprudence regulating the conduct of human beings. Also, although States are the normal subjects of International Law they may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of International Law. Persons engaging in piracy are subject to duties imposed, in the first instance, not by the municipal law of various States but by International Law. The same

pacht, *Analogies*, pp. 73-82, in *Economica*, 1925, pp. 309-315, and in *Hague Recueil*, vol. 62 (1937) (iv.), pp. 207-243; Stowell, pp. 8, 9; Schwarzenberger, pp. 35-42; Spiropoulos, *L'individu en droit international* (1928), and in *Hague Recueil*, vol. 30 (1929) (v.), pp. 126-266; von der Luhe, *Die internationale juristische Person* (1931); Negal, *L'individu en droit international* (1932); Mazzoleni, *Personalità giuridica e soggetti del diritto internazionale* (1933); Ténékidès, *L'individu dans le droit international* (1933); Jessup, *A Modern Law of Nations* (1948), pp. 15-42; Sibert, pp. 87-98; Speriduti, *L'individuo nel diritto internazionale* (1950); Kelsen, *Principles of International Law* (1952), pp. 94-147; Corbett, *Law and Society in International Relations* (1951), pp. 53-60; Cavaglieri in *Rivista*, 17 (1925), pp. 18-32, 168-187; Hamburger in *Z.I.*, 26 (1926), pp. 11-12; Akai

in *RI (Paris)*, 4 (1920), pp. 451-459; Bourquin in *Hague Recueil*, vol. 35 (1931) (i.), pp. 33-47; Fischer Williams in *B.Y.*, 13 (1932), pp. 33-35; Hostie in *Hague Recueil*, vol. 40 (1932) (ii.), pp. 488-509; Siotto-Pintor, *ibid.*, vol. 41 (1932) (iii.), pp. 251-357; Scelle, *ibid.*, vol. 46 (1933) (iv.), pp. 363-373; Strupp, *ibid.*, vol. 47 (1934) (i.), pp. 418-422, 463-468; Coore in *R.I. (Genève)*, 12 (1934), pp. 119-134; Herz in *Théorie du droit*, 10 (1936), pp. 100-111; Preuss in *R.I.F.*, 8 (1930), pp. 160-174; Aufrecht in *American Political Science Review*, 37 (1943), pp. 217-243; Bourquin in *Etudes Georges Scelle* (1950), vol. I., pp. 37-54; De Soto, *ibid.* vol. II., pp. 687-716; Wengler in *Revista Española*, 4 (1951), pp. 831-859. See also Lauterpacht in *L.Q.R.*, 63 (1947), pp. 438-460, and 64 (1948), pp. 97-119.

¹ *Collected Papers*, p. 78.



applies to the rights and duties of political communities recognised as belligerents. Prior to 1929 the Holy See, though not at that time a State, was a subject of international rights and duties. Although individuals cannot appear as parties before the International Court of Justice,¹ States may confer upon them the right of direct access to international tribunals.² As the Permanent Court of International Justice expressly recognised in the Advisory Opinion concerning the *Jurisdiction of the Courts of Danzig*, States may expressly grant to individuals direct rights by treaty; such rights may validly exist and be enforceable without having been previously incorporated in municipal law.³ Moreover, it is an established principle of customary International Law that individual members of armed forces of the belligerents—as well as individuals generally—are directly subject to the law of war and may be punished for violating its rules.⁴ The doctrine adopted in many municipal systems to the effect that International Law is part of the law of the land is upon analysis yet another factor showing that International Law may act *per se* upon individuals, who become, to that extent, subjects of International Law.⁵ Municipal tribunals have on occasions expressly recognised the international personality of international administrative unions and of their organs.⁶ By virtue of their constitutions many international organisations, i.e. organisations of States, possess a distinct measure of international personality, including the capacity to conclude treaties.⁷ In the case concerning *Reparation for*

¹ Article 34 of the Statute of the International Court of Justice provides as follows: 'Only States may be parties in cases before the Court'. See below, vol. II, § 25a.

² See below, § 288.

³ While admitting that in principle a treaty 'cannot, as such, create direct rights and obligations for private individuals,' the Court said: 'It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national

courts', P.C.I.J., Series B, No. 15, p. 17. See for comment thereon Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 50-53.

⁴ See below § 153a.

⁵ See below, § 21a.

⁶ See below, p. 379, n. 3.

⁷ See below, §§ 167a, 167aa. Moreover, it is legitimate to deduce from the unanimous finding of the Court in the *Reparation for Injuries* case that international personality is a necessary attribute of any public international organisation which possesses a personality distinct from its members and

Injuries Suffered in the Service of the United Nations the International Court of Justice expressly rejected the view that States only can be subjects of International Law. In affirming the international personality of the United Nations¹ as being indispensable for the fulfilment of the purpose for which it was created, the Court pointed out that 'throughout its history, the development of International Law has been influenced by the requirements of international life' and that 'the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.'² Such new subjects of International Law, the Court explained, need not necessarily be States or possess the rights and obligations of statehood. For 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.'³ It must also be noted that international practice has gradually recognised a measure of international personality of territorial units which are not States but which nevertheless are admitted to participation in their own name in important public organisations of States such as the Universal Postal Union, the World Health Organisation and the International Trade Organisation.⁴

Equality
an Inference
from
the Basis
of Inter-
national
Law

§ 14. Since the Law of Nations is based on the common consent of States as sovereign communities, the member-States of the international community are equal to each

whose rights and duties, in the light of its constitution and practice, are such that they cannot be effective without the attribution of international personality to the organisation in question. *I.C.J. Reports*, 1949, pp. 178, 190). And see below, § 167*aa*, on the Personality of International Organisations.

¹ See below, § 168*g*.

² *I.C.J. Reports*, 1949, p. 178.

³ *Ibid.* As international personality is not limited to States, the latter are bound to fulfil international duties—i.e. duties prescribed by general International Law—not only in relation to other States but, in proper cases, to international persons generally. This explains why in the *Reparation*

for *Injuries* case the International Court of Justice held that the United Nations was entitled to bring a claim also against a non-member State although in the same case the Court held that the basis of the claim by the United Nations is a breach of a duty due to it. For, once the Court found that the United Nations was endowed by the Charter with international personality not only in relation to its members but *erga omnes* (*ibid.*, pp. 185), it followed that all States—whether members of the United Nations or not—owed it duties as prescribed by general International Law. *Sed quaerit*. See Fitzmaurice in *B.Y.*, 29 (1952), p. 21.

⁴ See below, Appendix.

other as subjects of International Law. States are by their nature certainly not equal as regards power, territory and the like. But as members of the community of nations they are, in principle, equal, whatever differences between them may otherwise exist. This is a consequence of their sovereignty in the international sphere.¹ As such, the abstract principle of State equality, while still forming part of International Law, is open to objections of the kind levelled against other extreme manifestations of State sovereignty.² The Charter of the United Nations, although professedly based on the principle of 'sovereign equality'³ of States, embodies far-reaching derogations from the conception of equality of States in the accepted sense.⁴

III

SOURCES OF THE LAW OF NATIONS

Hall pp 5 13 Mann pp 1 25 Phillimore i §§ 17 33 Twiss i §§ 42 103—Westlake i pp 14 19 Wheaton § 15 Hyde i § 3 Heffter § 3 Holtzendorff in *Holtzendorff* i pp 79 155 Heilborn *Grundbegriffe des Völkerrechts* (1912) §§ 69 and in *Hague Recueil* 1926 (i) pp 5 60—Lasz 2—Schwarzenberger pp 5 26 Strupp *Elements* § 2A Rivier i § 2 Nys, i pp 152 173 Jauchille §§ 46 63 (3) Rousseau pp 106 125 515 950—Pradier Fodere i §§ 24 35 Meuznach i pp 79 113 Martens i § 43 Fiore, i §§ 224 238 Calvo i §§ 27 38—Praug §§ 7 15—Cavaglieri, pp 50 74 De Loutre i pp 42 58 Cruchaga i §§ 102 111 Sealle i pp 298 316 345 365—Bustamante pp 56 80 Keith & Wheaton pp 1 23 35 38 Fenwick ch iv Stowell pp 26 34 Holland *Lectures* pp 16 28 Smith vol i pp 1 14 Ballardou Pillieri pp 80 146 Anzilotti pp 66 86 Lauterpacht *Analogies (par sim) Function of Law* pp 51 135 and in *Hague Recueil* vol 62 (1937) (iv) pp 149 187 Spiropoulos *Theorie generale du droit international* (1930) pp 83 114 Bergbohm *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877) Jellinek *Die rechtliche Natur der Staatsverträge* (1880) Cavaglieri, *La consuetudine giuridica internazionale* (1907), in *R.G.* 18 (1911), pp 259 292 and in *Rivista*, 14 (1921), pp 149 187 269 314 479 506 Verdross pp 42 75 Sobert pp 30 43 Bluhdorn *Die Einführung in das angewandte Völkerrecht* (1934) pp 112 185 Korte, *Grundfragen der vollrechtlichen Rechtsfähigkeit* (1934) pp 56 102—Borchard in *Revue d'Etudes sur Genéve* 3 (1934), pp 128 361 Fitch *The Sources of Modern International Law* (1937) and also from *Hague Recueil*,

¹ See below, §§ 115 116.

² See below, § 116a.

³ For a critical examination of this

term see Kelsen in *1st Law Journal* 53 (1944), pp 207-220.

⁴ See below, § 168a.

vol. 53 (1935) (iii.), pp. 535-627—Redslob, *Les principes du droit des gens moderne* (1937), pp. 9-20, 29-47—Ziaccari, *La costituzione dell'ordinamento internazionale* (1943), pp. 161-449—Sørensen, *Les sources de droit international* (1940)—Kelsen, *Principles of International Law* (1952), pp. 301-366—Oppenheim in *Z.I.*, 25 (1915), pp. 1-13—Perassi in *Rivista*, 2nd ser., 6 (1917), pp. 195-223, 285-314—Sherman in *A.J.*, 15 (1921), pp. 349-360—Reeves, *ibid.*, pp. 361-374—Corbett in *B.Y.*, 1925, pp. 20-30—Mulder in *R.I.*, 3rd ser., 7 (1926), pp. 555-576—Brierly in *Hague Recueil*, vol. 23 (1928) (iii.), pp. 478-488 and vol. 58 (1936) (iv.), pp. 69-81—Verdross, *ibid.*, vol. 30 (1929) (v.), pp. 275-305—Bourquin, *ibid.*, vol. 35 (1931) (i.), pp. 48-80—Métall in *Z.o.R.*, 11 (1931), pp. 416-428—Heydte in *Z.V.*, 16 (1931-1932), pp. 461-478—Hostie in *Hague Recueil*, vol. 40 (1932) (ii.), pp. 476-487—Morelli in *Rivista*, 24 (1932), pp. 388-404, 483-506—Gihl in *Nordisk T.A.*, 3 (1932), pp. 38-64—Castberg in *Hague Recueil*, vol. 43 (1933) (i.), pp. 313-381—Strupp, *ibid.*, vol. 47 (1934) (i.), pp. 301-388—Le Fur, *ibid.*, vol. 55 (1935) (iv.), pp. 192-213—Kaufmann, *ibid.*, vol. 55 (1935) (iv.), pp. 491-524—Gardner in *J.C.L.*, 3rd ser., 17 (1935), pp. 251-259—Wengler in *Z.o.R.*, 16 (1936), pp. 333-392—Basdevant in *Hague Recueil*, vol. 58 (1936) (iv.), pp. 497-522—Kopelmanas in *R.I.*, 3rd ser., vol. 18 (1937), pp. 88-143, in *B.Y.*, 18 (1937), pp. 127-151, and in *R.I. (Paris)*, vol. 21 (1938), pp. 101-150—Maranini in *Annuario di diritto internazionale*, 2 (1939) pp. 141-171—Blühdorn in *Z.o.R.*, 1 (1946) pp. 136-171. And see below, § 59, for the literature on positivism and the law of nature.

Source in
contra-
distinc-
tion to
Cause.

§ 15. The different writers on the Law of Nations disagree widely with regard to the kinds and number of sources of this law. The fact is that the term 'source of law'¹ is used in different meanings by the different writers on International Law, as on law in general. It seems that most writers confuse the conception of 'source' with that of 'cause,' and through this mistake come to a standpoint from which certain factors which influence the growth of International Law appear as sources of rules of the Law of Nations. This mistake can be avoided by going back to the meaning of the term 'source' in general. Source means a spring or well, and has to be defined as the rising from the ground of a stream of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water. Source signifies only the natural rising of water from a

¹ On the different meanings of this term see Corbett, *op. cit.*

certain spot on the ground, whatever natural causes there may be for that rising. If we apply the conception of source in this meaning to the term 'source of law,' the confusion of source with cause cannot arise. Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning. Where we find that such rules come into existence, there is the source of them. They rise from facts in the historical development of a community. Thus in Great Britain a good many rules of law arise every year by virtue of Acts of Parliament. 'Source of law' is therefore the name for an historical fact out of which rules of conduct come into existence and legal force.

§ 16 As the basis of the Law of Nations is the common consent of the member-States of the Family of Nations, it is evident that there must exist as many sources of International Law as there are facts through which such common consent can possibly come into existence. A State, just as an individual, may give its consent either directly by an express declaration, or tacitly by conduct which it would not follow in case it did not consent. The sources of International Law are therefore twofold, namely: (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties: (2) *tacit* consent, that is, implied consent or consent by conduct, which is given through states having adopted the custom of submitting to certain rules of international conduct. Subject, therefore, to what has been said above (§§ 11 and 12) as to the meaning of 'common consent' and below (§ 19) as to the binding force of general principles of law, treaties and custom must be regarded as the exclusive sources of the Law of Nations.

§ 17. Custom is the older and the original source of International Law in particular as well as of law in general.¹ For

¹ See Gianni, *La coutume en droit international* (1931); Gouet, *La coutume en droit constitutionnel interne et en droit constitutionnel international* (1932); Kuntzel, *Unge-schriebenes Völkerrecht* (1935); Haem-

The two
Sources
of Inter-
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Law.

Custom in
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this reason, although an international court is bound in the first instance to consider any available treaty provisions binding upon the parties, it is by reference to international custom that these treaties are interpreted in case of doubt. This explains why the International Court,¹ whose jurisdiction has been most frequently invoked for the purpose of interpreting treaties, has largely relied upon and, in turn, made a substantial contribution to, the 'development of customary International Law.'² Custom must not be confused with usage. In everyday life and language both terms are used synonymously, but in the language of the international jurist they have two distinctly different meanings. International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the ægis of the conviction that these actions are, according to International Law, obligatory or right. On the other hand, they speak of a *usage* when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to International Law, obligatory or right. Some conduct of States concerning their international relations may therefore be usual without being the outcome of customary³ International Law. In the *Asylum* case between Colombia and Peru the International Court, relying on Article 38 of its Statute, formulated the requirements of custom in International

merle, *La coutume en droit des gens d'après la jurisprudence de la Cour Permanente de Justice Internationale* (1936); Balladore Pallieri in *Rivista*, 20 (1928), pp. 338-374; Zaccardi, *La costituzione dell' ordinamento internazionale* (1943), pp. 317-370; Bourquin in *Hague Recueil*, 35 (1931) (i), pp. 61-75; Raestad in *Nordisk T A . Acta Scandinavica*, 4 (1933), pp. 61-384, 128-146; Neférades in *R G*, 43 (1936), pp. 129-196; Kopelmanas in *B. Y.*, 18 (1937), pp. 127-161; Rousseau, pp. 815-888; Guggenheim in *Études Georges Scelle* (1950), vol. 1, pp. 275-284.

¹ And 'whose function,' as the revised Statute lays down in Article 38, 'is to decide in accordance with international law such disputes as are sub-

mitted to it'

² See Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 13-15, and Beckett in *Hague Recueil*, 39 (1932) (i), pp. 135-272, and 50 (1934) (iv), pp. 193-305. And see below, § 19a. And see Wilson, *The International Law Standard in Treaties of the United States* (1953), for an instructive exposition of incorporation, in treaties, of rules and principles of International Law.

³ The distinction between custom and usage in International Law is not always referred to in the sense suggested in the text. See, for instance, Hall, § 139, where he says, 'this custom has since hardened into a definite usage.'

Law as follows: 'The party which relies on custom' . . . must prove that this custom is established in such a manner that it has become binding on the other party . . . that the rule invoked . . . is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. . . .'¹ The Court declined to acknowledge, in the case before it, the existence of a custom as claimed by Colombia.²

As usages have a tendency to become custom, the question presents itself at what stage does a usage turn into a custom? This question is one of fact, not of theory. All that theory can say is this: Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary International Law.

§ 18. Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes,³ usually such treaties only are regarded as a source of International Law as stipulate new general rules for future international conduct or confirm, define, or abolish existing customary or conventional rules of a general character. Such treaties may conveniently⁴ be

¹ *I.C.J. Reports* 1950 pp. 276-277.

² The Court said: 'The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage.' For a denial, on somewhat similar grounds, of the claim of existence of a

custom in the *United States Nationals in Morocco* case see *I.C.J. Reports*, 1952 p. 200.

³ See below, § 492.

⁴ But such convenience may become a source of confusion if we fail to keep in mind that: (a) all treaties are in a real sense law-making inasmuch as they lay down rules of future conduct for the parties in a way similar to that in which a private contract lays down the law governing the conduct of the part in the future; (b) the term 'law-making' does not imply that there exists among States international legislation in the accepted meaning of the term, namely, the enactment of laws overriding the will

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called *law-making treaties*. Since the Family of Nations is not at present a State-like community, there is no central authority which can make law for it in the way that Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is by the members of the Family of Nations concluding treaties in which certain rules for their future conduct are stipulated.¹ Of course, such law-making treaties create law for the contracting parties only. *Universal International Law* is created when all or practically all the members of the Family of Nations are parties to these treaties. Thus the General Treaty for the Renunciation of War of August 27, 1928,² may accurately be regarded as an example of a universal treaty. Many law-making treaties are concluded by a few States only, so that the law which they create is *particular International Law*. On the other hand, many law-making treaties have been concluded which contain *general International Law*, because the majority of States, including the leading Powers, are parties to them. General International Law has a tendency to become universal because such States as hitherto did not consent to it will in future either expressly give their consent or recognise the rules concerned tacitly through custom.³ But it must be emphasised that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations that treaties are binding upon the contracting parties.⁴

of a dissenting minority. See, on the use of the term 'international legislation,' McNair in *Iowa Law Review*, 19 (1933-1934), pp. 177-189; Hudson, *Legislation*, v. p. viii. See also Brierly in *Problems of Peace*, 5th ser. (1930), pp. 205-229; Gihl, *International Legislation* (1937); Jenks in *B.Y.*, 29 (1952), pp. 107-110, and, on the concept of legislation in general, Akrim in *Iowa Law Review*, 21 (1936), pp. 713-750. It is of interest to note that Scelle, who seems to attach importance to the distinction between law-

making and other treaties, admits in effect that practically all treaties are 'law making' *La théorie juridique de la révision des traités* (1936), p. 41.

¹ The most important of law-making treaties is the Charter of the United Nations, which is discussed below, §§ 168-168s.

² See vol. II, § 524.

³ For instances, of law-making treaties see below, § 492.

⁴ See below, § 493. And see Finch in *Hague Recueil*, vol. 53 (1935) (int.), pp. 588-604.

§ 19. Thus custom and treaties are the two principal sources of International Law. The Statute of the International Court of Justice¹ recognises this expressly in laying down that the Court shall apply: '(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (b) international custom, as evidence of a general practice accepted as law.' But although these are the principal sources of the Law of Nations, they cannot be regarded as its only sources. Consent, in so far as it is regarded as the basis of International Law, must be understood as implying the consent of States to abide by the general principles of law resulting from the fact that they are members of a legal community. Thus the Statute of the International Court of Justice authorises it to apply, in addition to treaties and custom: '(3) The general principles of law recognised by civilised nations.' The meaning of that phrase has been the subject of much discussion.² The intention is to authorise the Court to apply the general principles of municipal jurisprudence, in particular of private law,³ in so far as they are applicable to relations of States. The Court has seldom found occasion to apply 'general principles of law.'⁴ This is so for the reason that as a rule

General Principles of Law as a Source of International Law.

¹ See below, vol. ii. § 25ae.

² Vol. ii., p. 62, n. 1. And see Grapin, *Valeur internationale des principes généraux du droit* (1934); Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit* (1934), pp. 70-84; Blühdorn, *op. cit.*, pp. 142-157; Cogle, *Die Bedeutung der allgemeinen Rechtsgrundsätze*, etc. (1936); Zaccardi, *La costituzione dell'ordinamento internazionale* (1943), pp. 399-412; Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction* (1946); Guttridge, *Comparative Law* (2nd ed., 1949), Chapter v.; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953); Petraschek in *Archiv für Rechts- und Sozialphilosophie*, 28 (1935), pp. 61-88; Heydte in *Z.N.R.*, 11 (1931), pp. 526-546; Verdross in *Hague Recueil*, vol. 52 (1935) (ii.), pp. 195-

250, and in *R.G.*, 45 (1938), pp. 44-52; Cosentini in *R.J. (Geneva)*, 13 (1935), pp. 102-118; Kopelmanas in *R.G.*, 43 (1936), pp. 285-308, and 45 (1938), pp. 14-52; Giuliano in *Rivista*, 33 (1941), pp. 69-121; Cheng in *Current Legal Problems*, 4 (1951), pp. 35-53.

³ See Lauterpacht, *Analogies, passim*; Blühdorn, *op. cit.*, pp. 142-146; Laun, *Der Wandel der Ideen Staat und Volk* (1933), pp. 70-85; Knubben in *Z.V.*, 16 (1931-1932), pp. 146-159, 300-313; Ripert in *Hague Recueil*, vol. 44 (1933) (ii.), pp. 566-660; Scheuner, *ibid.*, 68 (1939) (ii.), pp. 99-199. And see the literature cited above, n. 2, as to 'general principles of law.'

⁴ See *Chorzów Factory case*, Series A, No. 17, p. 29 (reparation for breach of an engagement); *German Interests in Polish Upper Silesia*, Series A, No. 6, p. 20 (litispendency); *Interpretation of the Greco-Turkish Agree-*

conventional and customary International Law have been deemed sufficient to supply the necessary basis of decision. But paragraph 3 of Article 38 nevertheless constitutes an important landmark in the history of International Law inasmuch as the States parties to the Statute did expressly recognise the existence of a third source of International Law independent of, although merely supplementary to, custom or treaty. This was in fact the practice of international arbitration before the establishment of the Court¹, since its establishment a number of international tribunals, although not bound by the Statute, have treated paragraph 3 of Article 38 as declaratory of existing law.² The formal incorporation of that practice in the Statute of the Court marks the explicit abandonment of the positivist view, according to which treaties and custom are the only sources of International Law, with the result that in their absence international tribunals are powerless to render decisions. It equally signifies the rejection of the naturalist attitude, according to which the law of nature is the primary source of the Law of Nations. It amounts to an acceptance of what has been called the Grotian view³ which, while

ment, Series B, No. 16 (action by individual members of corporate bodies); *Chorzów Factory* case Jurisdiction, Series A, No. 9, p. 31, *Jurisdiction of the Courts of Danzig*, Series B, No. 15, p. 27 (a person cannot plead his own wrong). It is probable that these 'general principles of law' include the 'elementary considerations of humanity, even more exacting in peace than in war' which the International Court of Justice in the *Corfu Channel* case, adduced as one of the grounds of the responsibility of Albania for failure to give warning of the existence of mine fields in her waters: *I C J Reports* 1949, p. 22. See also *Corfu Channel* case (*ibid.*, p. 18) on circumstantial evidence as being admitted in all systems of law. See Grapin, *op. cit.*, pp. 48-168; Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), pp. 670-612; Rousseau, pp. 890-930, Guggenheim, pp. 139-147. And see the *Abu Dhabi* award given by Lord Asquith in 1951

in a case between a private company and Abu Dhabi a British protected State, on 'the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of "modern law of nature"'. *I C J Q 1* (1952) p. 251.

¹ For a survey of that practice see Lauterpacht, *Analogies*, pp. 60-67; Verdross, *Die Einheit des rechtlichen Weltbildes* (1923), pp. 120-124, and *Verfassung*, pp. 67-69.

² See e.g. *Administrative Decision No. 11* by Judge Paiker, Mixed Claims Commission between the United States and Germany, November 1, 1923: *Annual Digest*, 1923-1924, Case No. 205, *Goldenberg & Sons v. Germany*, Special Arbitral Tribunal between Roumania and Germany, September 27, 1928: *Annual Digest*, 1927-1928, Case No. 369; *Lena Goldfields Arbitration*, September 2, 1930: *Annual Digest*, 1929-1930, Case No. 1.

³ See below, §§ 46-57.

giving due—and, on the whole, decisive—weight to the will of States as the authors of International Law, does not divorce it from the legal experience and practice of mankind generally.¹

§ 19a. Decisions of courts and tribunals are a subsidiary and indirect source of International Law. Article 38 of the Statute of the International Court of Justice provides that, subject to certain limitations,² the Court shall apply judicial decisions as a subsidiary means for the determination of rules of law. In the absence of anything approaching the common law doctrine of judicial precedent, decisions of international tribunals are not a direct source of law in international adjudications. In fact, however, they exercise considerable influence as an impartial and well-considered statement of the law by jurists of authority made in the light of actual problems which arise before them. They are often relied upon in argument and decision. The International Court, while prevented from treating its previous decisions as binding,³ has referred to them with increasing frequency.⁴ It is probable that in view of the difficulties surrounding the codification of International Law, international tribunals will in the future fulfil, inconspicuously but efficiently, a large part of the task of developing International Law. Decisions of municipal courts are not a source of law in the sense that they directly bind the State from whose courts they emanate. But the cumulative effect of uniform decisions of the courts of the most important States is to afford evidence of inter-

¹ The indirect result of that Article must be the termination of the controversy between the positivist and naturalist schools. But there has been a tendency to minimise the significance of that Article (see e.g. Strupp, *op. cit.*, Chapter II, § 9). See on the other hand, Verdross in *Gesellschaft, Staat und Recht. Festschrift für Kelsen* (1931), p. 362, who is inclined to regard Article 38 (3) as the basic hypothesis of International Law (see above, p. 29, n. 2).

² See Article 59 of the Statute.

³ See Article 59 of the Statute and,

for a discussion thereof, below, vol. II, § 25a, pp. 62, 63.

⁴ For a survey of the practice of the Court in this matter see Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 5-7, and in *B.Y.*, 12 (1931), p. 60. P.C.I.J., Series E, No. 3, pp. 217, 218. No. 4, pp. 292, 293; No. 6, p. 300. *Annual Digest*, 1925-1926, Case No. 329, *ibid.*, 1927-1928, Case No. 355; Beckett in *Hague Recueil*, vol. 39 (1932) (I.), p. 138. On the authority in English courts of the decisions of the Permanent Court see Jenks in *B.Y.*, 20 (1939), pp. 1-36.

national custom.¹ Although courts are not organs of the State for expressing in a binding manner its views on foreign affairs, they are nevertheless organs of the State giving, as a rule,² impartial expression to what they believe to be International Law.³ For this reason, as well as for those stated with regard to international decisions, judgments of municipal tribunals are of considerable practical importance for determining what is the correct rule of International Law. This is now being increasingly recognised, and periodical unofficial collections of decisions of both international and municipal courts are being published.⁴

¹ See Lauterpacht in *B Y.* 10 (1929), pp. 65-95, for a detailed discussion; Finch in *Haque Recueil*, vol. 53 (1935) (iii), pp. 605-627. See also De Louter, *i* pp. 56, 57; Fauchille, Nos 55 57; Westlake, *Collected Papers*, p. 83; Rivier, *i* p. 35; Brierly, p. 52; Triepel, *Völkerrecht und Landesrecht* (1899), pp. 28 32, 99 101, 127; Anzilotti, *La teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), pp. 30 *et seq.* On the interpretation of municipal law by the Permanent Court see Jenks in *B Y.* 19 (1938), pp. 67 103.

² Prize courts, acting as they do in time or under the influence of war, may not always be in a position to preserve an attitude of detached impartiality. See the judgment of Lord Stowell in *The Maria*, 1 Ch. Rob 350, for an affirmation of the universality and impartiality of the law administered by the British Prize Court. As to the character of prize courts see below, vol. II § 434. And see Walker, *The Science of International Law* (1893), p. 49, for an expression of the hope that in the future 'municipal courts may become the trusted mouthpieces of International Law as local divisions of the great High Court of Nations.' A possible line of development may lie in voluntarily conferring upon the International Court of Justice jurisdiction on appeal from judgments of municipal courts in matters bearing upon International Law.

³ Unlike in the case of treaties, it is not necessary for the creation of

international custom that there should be on the part of the acting organs of the State an intention to incur mutually binding obligations, it is enough if the conduct in question is dictated by a sense of legal obligation in the sphere of International Law. For the same reason uniform municipal legislation constitutes in a substantial sense evidence of international custom (see to the same effect, Giannini, *La coutume en droit international* (1931), p. 129). The same applies to other manifestations of the views of competent State organs on questions of International Law in so far as they partake of an undoubted degree of uniformity, e.g. governmental instructions, State papers, etc. The difference between custom and evidence of custom is not in practice as clear cut as may appear at first sight.

⁴ See, in particular *Annual Digest and Reports of Public International Law Cases* and *Fontes Juris Gentium* (see below, p. 112, n. 1). Verbatim reports or digests of the more important decisions of municipal and international tribunals in matters of International Law are (or were) included in the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, *Revue générale de droit international public*; and, to a smaller extent, in the *British Year Book of International Law*, *Journal de Droit International* (Clunet), *American Journal of International Law*, *Rivista di diritto internazionale*, *Zeitschrift für Völkerrecht*, and *Zeitschrift für Internationales Recht*. See also

§ 19b. The Statute of the International Court of Justice^{Writings} enumerates as a subsidiary source of International Law^{of} 'the teachings of the most highly qualified publicists^{Authors/} of the various nations.'^{as a} ^{Source of} It is indicative of the present Law. potentialities of that particular source that the Court has so far found no occasion to rely on it. In pleadings before international tribunals the disputants still fortify their arguments by reference to writings of international jurists, but with the growth of international judicial activity and of the practice of States evidenced by widely accessible records and reports, it is natural that reliance on the authority of writers as evidence of International Law should tend to diminish.² For it is as evidence of the law and not as a law-creating factor that the usefulness of teachings of writers has been occasionally admitted in judicial pronouncements.³ But inasmuch as a source of law is conceived as a factor influencing the judge in rendering his decision, the work of writers may continue to play a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinise critically the practice of States by reference to legal principle.

§ 19c. A factor of a special kind which also influences the Inter- growth of International Law is the so-called *Comity* (*Comitas*^{national} *Comity*).

Dickinson in *Hague Recueil*, vol. 40 (1932) (ii), pp. 372-392, for a critical survey of the contribution of English and American courts; Pergler, *Judicial Interpretation of International Law in the United States* (1928). Hyde in *B.Y.*, 18 (1937), pp. 1-16. And see Chailine, *Le droit international public dans la jurisprudence française de 1789 à 1848* (1934). As to the interpretation and application of treaties by English courts see McNair in *Hague Recueil*, vol. 43 (1933) (i.), pp. 251-302. As to Germany see Bruns, *Fontes Juris Gentium*, Series A, No. 2 (1), for digests of decisions of the German *Staatsgerichtshof* from 1879 to 1929. See also below, p. 112, n. 1.

¹ For an example of direct reference to judicial writings as a source of law see Article 1 of the Swiss Civil Code which instructs the judge, when filling the gaps in the law, to follow, among

others, recognised legal authorities.

² For a comparison of the authority of writers on International Law in the early period with the response of the Roman jurists see Buckland and McNair, *Roman Law and Common Law* (1936), p. 13.

³ See *Queen v. Keyn*, 2 Ex. Div. 63, 202; *West Rand Central Gold Mining Co. v. The King* [1905] 2 K.B. 391, 401; *The Paquete Habana and The Lola*, 175 U.S. Reports 677 (where Mr. Justice Gray discussed the matter in some detail). On the other hand, where owing to the scarcity of actual practice judges find it necessary to decide a matter by reference to principle and analogy, they do not hesitate to avail themselves of published work. See e.g. the copious references to writers in *New Jersey v. Delaware* (1934) 291 U.S. 361, and in *Re Piracy* *Juris Gentium* [1931] A.C. 586.

Gentium, Convenance et Courtoisie Internationale, Staaten-gunst).¹ In their intercourse with one another States observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of Comity. Thus, for instance, it is as the result of a rule of Comity and not of International Law that States grant to diplomatic envoys exemption from customs duties.² In the sphere of the law of war chivalry fulfils the same function. The Comity of Nations is not a source of International Law. But many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law. The distinction, although clear-cut in logic, is not always observed in practice. English and American courts often refer to 'international comity' in situations to which there ought to be more properly applied the term 'international law.'³ It is probable that many a

¹ Meaning of the word *comity*: this word is or has been used from time to time in connection with International Law in the following not easily reconcilable senses:

(1) (as in the text and in Hall, p. 16 (n.)) the rules of politeness, convenience, and goodwill observed by States in their mutual intercourse without being legally bound by them. It is probably in this connection that some English judges have expressed the view that it 'would be contrary to our obligations of international comity as now understood' to enforce in England a contract made abroad with a view to deriving profit from the commission of a criminal act in a foreign country and that a decision to enforce it would furnish a just cause of complaint on the part of the foreign government: *Foster v. Driscoll* [1929] 1 K.B. 470, and *Annual Digest*, 1927-1928, Case No. 10 and Note; *Walkerville Brewing Co., Ltd. v. Maynard* (1928-1929), *Ontario Law Reports*, pp. 6-12 and 573; *Westgate v. Harris* (1929), *ibid.*, p. 358; *Harwood and Cooper v. Wilkinson* (1929), *ibid.*, p. 392. And see on these cases Webber in *New York University Law Quarterly Review*, 7 (1929-1930), pp. 674-682, and Marjorie Owen in

Canadian Bar Review, 8 (1930), pp. 413-419;

(2) as equivalent to private International Law, e.g. Phillimore, iv. § 1. But see the definition of Gray J. in *Hilton v. Guyot*, 159 U.S. 113; Hudon, *Cases*, p. 987;

(3) to quote the *New English Dictionary* (Murray): 'Apparently misused for the company of nations mutually practising international comity (in some instances erroneous association with *L. comes*, "companion," is to be suspected)';

(4) as equivalent to International Law: see above in the text.

² See below, § 394.

³ See e.g. Brett L.J. in *The Parlement Belge*, L.R. 5 P.D. 197, 214, 217, who refers to the rules concerning the jurisdictional immunities of foreign ambassadors and sovereigns as being the consequence of 'international comity'; *The Luigi* (D.C.) 230 Fed. 495. In *Russian Socialist Federated Soviet Republic v. Gibrario*, 235 N.Y. 255, 139 N.E. 259, the Court said: 'Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. . . . Rules of comity are a portion of the law that they [the courts] enforce.'

present rule of International Comity will in future become one of International Law.¹

Not to be confused with the rules of comity are the rules of morality,² which ought to apply in the intercourse of States as much as in the intercourse of individuals.

IV

RELATION BETWEEN INTERNATIONAL AND MUNICIPAL LAW

Holtzendorff in *Holtzendorff*, i. pp. 49-53, 117-120--Heilborn, *Grundbegriffe des Völkerrechts* (1912), § 17--Guggenheim, pp. 19-26--Strupp, *Éléments*, § 2, B--Anzilotti, pp. 29-38--Cavaglieri, pp. 18-26--Nys, i., pp. 194-199--

¹ The matter is discussed in Stoerk, *Völkerrecht und Völkercourtoisie* (1908). See also Heilborn, *Grundbegriffe des Völkerrechts* (1912), pp. 107-110; Praag, § 24; Dimitch, *La courtoisie internationale et le droit des gens* (1930); Walz, *Das Wesen des Völkerrechts und Kritik der Völkerrechtseugner* (1930), pp. 229-237; Jordan in *Répertoire*, v. pp. 324-330; Rousseau, pp. 8-11; Lauterpacht in *Cambridge Law Journal*, 9 (1947), pp. 330-332. On some historical origins of the term see Paradisi in *Hague Review*, 78 (1951) (i.), pp. 329-377.

² On international morality see Sidgwick, *Elements of Politics*, ch. xvii., 'International Law and Morality,' and his two lectures on 'Public Morality' and the 'Morality of Strife,' reprinted in 1918 from *Practical Ethics*; Hobhouse, *Metaphysical Theory of the State* (1918); Galliard, *La morale des nations* (1920); Bosanquet, *The Philosophical Theory of the State* (4th ed., 1929), pp. 298-311; Meinecke, *Die Idee der Staatsräson* (1924, 3rd ed., 1929); McDougall, *Ethics and Some Modern World Problems* (1924), pp. 1-170; Kraus, *Gedanken über Staatsethos im internationalen Verkehr* (1925); Roemer, *The Ethical Basis of International Law* (1929); Stratton, *Social Psychology of International Conduct* (1929); Walz, *Das Wesen des Völkerrechts und Kritik der Völkerrechtseugner* (1930), pp. 220-229; Dom-

browski-Ramsy, *La morale humaine et la Société des Nations* (1930); Hocking, *The Spirit of World Politics* (1932), pp. 470-519; Laun, *Der Wandel der Ideen Staat und Volk* (1933), pp. 327-344; Beard, *The Idea of National Interest* (1934), especially pp. 358-406; Mowat, *Public or Private Morality* (1934); Folliet, *Morale internationale* (1935); Alvarez, *La psychologie des peuples et la reconstruction du droit international* (1936); Carr, *The Twenty Years' Crisis, 1919-1939* (1939), pp. 186-215; Politis, *La morale internationale* (1942); Gooch, *Studies in Diplomacy and Statecraft* (1942), pp. 311-340; Schwarzenberger, *Power Politics* (2nd ed., 1951), p. 218-231; Benoist in *Hague Review*, 1925 (iv.) pp. 131-303; Pousonby in *International Journal of Ethics*, 25 (1915), pp. 143-161; Woolf, *ibid.*, 26 (1916), pp. 11-22; Mayer in *Archiv des öffentlichen Rechts*, xxviii. Pt. 1., pp. 1-37; Bourgeois in *R.G.*, 29 (1922), pp. 5-22; Higgins in *Contemporary Review*, No. 711 (1925), pp. 314-322; Scott in *A.S. Proceedings*, 1932, pp. 10-29; Siotto-Pintor in *Rivista internazionale di filosofia del diritto*, 15 (1935), No. 6, pp. 639-648; Réglaide in *Archives de philosophie de droit*, 1936, pp. 176-197; Ginsberg in *Papers of the Aristotelian Society*, 1942. See also Ornstein, *Macht, Moral and Recht* (1946), and Keeton and Schwarzenberger, *Making International Law Work* (2nd ed., 1946), pp. 49-69.

- § 10—Hyde, i. § 5—Fenwick, ch. v. —Holland, *Studies*, pp. 176-200—Prag, §§ 17-22, 276-281—Soelle, i., pp. 27-42—Keith's *Wheaton*, pp. 23-30—Kaufmann, *Die Rechtskraft des internationalen Rechts* (1899)—Triepel, *Völkerrecht und Landesrecht* (1899) (translated by Brunet, *Droit international et droit interne* (1920)), and in *Hague Recueil*, 1923, pp. 77-121—Anzilotti, *Il Diritto internazionale nei Giudizi interni* (1905) and pp. 49-65—Oppenheim, *The Panama Canal Conflict* (1913), pp. 38-44—Picciotto, *The Relation of International Law to the Law of England and the United States* (1915)—Wenzel, *Juristische Grundprobleme* (1920), pp. 359-421, 444-459—Wright, *The Enforcement of International Law through Municipal Law in the United States* (1916), in *A.J.*, 11 (1917), pp. 1-21, and 17 (1923), pp. 234-244—Verdross, *Die völkerrechtliche Kriegshandlung und der Strafanspruch der Staaten* (1920), pp. 34-43, and in *Hague Recueil*, vol. 16 (1927) (i.), pp. 262-275, and vol. 30 (1929) (v.), pp. 301-311—Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp. 102-241, *General Theory of Law and State* (1945), pp. 363-380, in *Hague Recueil*, 1926 (iv.), pp. 231-236, in *Principles of International Law* (1952), pp. 190-196, 401-450, in *Z.o.R.*, 4 (1924), pp. 207-222, and in *R.G.*, 43 (1936), pp. 5-49—Kosters in *Bibliotheca Vissersiana*, vol. iv. (1925), pp. 261-273, and in *Bulletin de l'Institut Intermédiaire International*, (i.) (1923), pp. 1-31—Walz, *Die Abänderung völkerrechtsgemassen Landesrechts* (1927), and the same, *Völkerrecht und staatliches Recht* (1933) (a comprehensive treatise)—Strisower in *Z.o.R.*, 4 (1924), pp. 272-298—Spiropoulos, *Théorie général du droit international* (1930), pp. 71-83—Gentile in *Nuovi Studi di Diritto*, vol. II, (1929), pp. 326-352—Monaco, *L'ordinamento internazionale in rapporto all'ordinamento statale* (1932)—Masters, *International Law in National Courts* (1932) (a useful study)—Grassetti, *Diritto interno e diritto internazionale nell'ordinamento giuridico anglo-americano* (1934)—Chailley, *Le problème de la nature juridique des traités internationaux* (1932), pp. 283-327—Laun, *Der Wandel der Ideen Staat und Volk* (1933), pp. 3-62—Kohler in *Z.V.*, 2 (1908), pp. 209-230—Wilkinson in *Law Magazine and Review*, 40 (1914-1915), pp. 447-463—Potter in *A.J.*, 19 (1925), pp. 315-326—Baumgarten in *Z.o.V.*, 2 (1) (1930), pp. 305-334—Mirkine-Guetzévitch in *Hague Recueil*, vol. 38 (1931) (iv.), pp. 311-325—Blondeau in *R.I. (Paris)*, 9 (1932), pp. 579-616—Dickinson in *A.J.*, 26 (1932), pp. 239-260, and in *Hague Recueil*, 40 (1932) (ii.), pp. 328-349—Sprout in *A.J.*, 26 (1932), pp. 290-295—Redslob in *Théorie du droit* (vii.) (1932-1933), pp. 151-171—Salvioli in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 30-37—Decencière-Ferrandière in *R.G.*, 40 (1933), pp. 45-70—Svoboda in *Z.o.R.*, 14 (1934), pp. 487-531—Strupp in *Hague Recueil*, vol. 47 (1934) (i.), pp. 389-418—Kaufmann, *ibid.*, vol. 54 (1935) (iv.), pp. 430-461—Guggenheim in *Théorie du droit*, ix. (1935), pp. 90-100—Balladore Pallieri in *Rivista*, 27 (1935), pp. 24-82—Chiron, *ibid.*, 30 (1938), pp. 3-55—Lauterpacht in *Grotius Society*, 25 (1939), pp. 51-88, and in *Hague Recueil*, vol. 62 (1937) (iv.), pp. 129-148—Ténékidès in *Friedenswarte*, 41 (1941), pp. 1-23—Holdsworth in *Minnesota Law Review*, 26 (1942), pp. 141-152—McNair in *Grotius Society*, 30 (1944), pp. 11-21—Morgenstern in *B.V.*, 27 (1950), pp. 42-92—Preuss in *A.J. Proceedings*, 1951, pp. 82-100—Dickinson in *University of Pennsylvania Law Review*, 101 (1952), pp. 26-56. And see the authors cited below, § 519.

§ 20. According to what may be called the dualistic ^{Inter-}view,¹ the Law of Nations and the Municipal Law of the ^{national} several States are essentially different from each other. ^{and Muni-}They differ, first, as regards their sources. The sources of ^{cipal Law} Municipal Law are custom grown up within the boundaries ^{The} of the State concerned and statutes enacted by the law- ^{Dualist} giving authority. The sources of International Law are ^{View.} custom grown up among States and law-making treaties concluded by them.

The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of a State and the relations between the State and the individual. International Law, on the other hand, regulates relations between States.

The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between, sovereign States, and is therefore a weaker law.

If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If, according to the Municipal Law of an individual State, the Law of Nations as a body or in parts is considered to be part of the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of Nations have by adoption become at the same time rules of Municipal Law. Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International Law, because it has, *per se*, no power over municipal courts. And

¹ This view was shared emphatically by the author of this treatise. The formulation of that doctrine will be found in the works of Triepel, cited at p. 38. See also Strupp, Anzilotti (in a somewhat modified form), and

Walz, cited on the same page. For a suggestion of a 'third intermediary law' lying half-way between International and Municipal Law see Scrimale in *R.I.*, 3rd ser., vol. 20 (1939), pp. 339-410.

if it happens that a rule of Municipal Law is in indubitable conflict with a rule of the Law of Nations, municipal courts must apply the former.

The
Monistic
Doctrine.

§ 21. The above dualistic view is opposed by what may conveniently be called the monistic doctrine.¹ The latter rejects all three premises of the dualists. It denies, in the first instance, that the subjects of the two systems of law are essentially different and maintains that in both it is ultimately the conduct of the individuals which is regulated by law, the only difference being that in the international sphere the consequences of such conduct are attributed to the State. Secondly, it asserts that in both spheres law is essentially a command binding upon the subjects of the law independently of their will. Thirdly, it maintains that International Law and Municipal Law, far from being essentially different, must be regarded as manifestations of a single conception of law. This is so not only for the terminological reason that it would be improper to give the same designation of law to two fundamentally different sets of rules governing the same conduct. The main reason for the essential identity of the two spheres of law is, it is maintained, that some of the fundamental notions of International Law cannot be comprehended without the assumption of a superior legal order from which the various systems of Municipal Law are, in a sense, derived by way of delegation. It is International Law which determines the jurisdictional limits of the personal and territorial competence of States. Similarly, it is only by reference to a higher legal rule in relation to which they are all equal, that the equality and independence of a number of sovereign States can be conceived. Failing that superior legal order, the science of law would be confronted with the spectacle of some sixty sovereign States each claiming to be the absolutely highest and underived authority.² It is admitted that muni-

¹ See e.g. the writings of Kelsen, Verdross, Scelle, Bourguin, Wright, Kunz, Mirkine-Guetzévitch, and Rundstein referred to above at p. 16.

² This seems also to be the principal objection to the theory which, while

being monistic, asserts the supremacy not of International Law but of Municipal Law. See e.g. Wenzel, *Juristische Grundbegriffe* (1920) p. 387; Decencière-Ferrandière in *R.G.*, 40 (1933), pp. 45-70, and, for tren-

cipal courts may be bound by the law of their States to enforce statutes which are contrary to International Law. But this, it may be said, merely shows that, in view of the weakness of International Law and organisation, States admit and tolerate what is actually a conflict of duties within the same legal system - a phenomenon not altogether unknown in other spheres of Municipal Law.¹ In any case, from the point of view of International Law the validity of a pronouncement of a municipal court is in such cases purely provisional. It still leaves intact the international responsibility of the State. It is a well recognised rule that a State is internationally responsible for the decisions of its courts, even if given in conformity with the law of the State concerned, whenever that law happens to be contrary to International Law.²

§ 21a. In view of this wide divergence of doctrine it is necessary to inquire into the actual legal position in the principal countries in the matter of International Law and Municipal Law.

Law of Nations as part of Municipal Law.

(1) As regards Great Britain, the following points must be noted: (a) all such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country are *per se* part of the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in a striking passage,³ that the Law of Nations is part of the law of the land. It has been repeatedly acted upon by courts.⁴ Apart from isolated *obiter dicta*⁵ it has never

chant criticism, Kelsen, *Sontchundat*, pp. 151-204. See also Rousseau, pp. 55-68.

¹ See Jones in *B.Y.*, 16 (1935), p. 14.

² See below, p. 45. And see Hyde, i. §§ 5, 5a.

³ *Commentaries on the Laws of England*, iv. chap. 5, Westlake, *Collected Papers*, pp. 498-518. But see Picciotto, *op. cit.*, and Adair, *The Extritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp. 238-243.

⁴ See e.g. *Triquet and Others v. Bath*, 3 Burr. 1478; *Heathfield v. Chilton*, 4 Burr. 2015, 2016; *I'veash*

v. Becker, 3 M. & S. 284, 292, 298; *De Witz v. Hendricks*, 2 Bing. 314, 315; *Emperor of Austria v. Day*, 2 Giff. 628, 678 (a striking application of the doctrine); and many other cases enumerated by Lauterpacht in *Galus Society*, 25 (1939), pp. 52-67, 77-84. See also Lord Finlay's emphatic affirmation of that view in the *Lotus* case, P.C.J.J., Series A, No. 10, p. 54, and Judge Moore's reference, *ibid.*, ¶ 75, to 'the majestic stream of the common law, united with International Law.'

⁵ See e.g. *Mortensen v. Peters* (1906), 14 S.L.R. 227, 43 S.L.R. 872 (a Scottish case); *per Atkin L.J.* in

been denied by judges. The unshaken continuity of its observance suffered a reverse as the result of the *dicta* of some judges in *The Franconia* case in 1876,¹ but *West Rand Central Gold Mining Co. v. The King*,² decided in 1905, must be regarded as a reaffirmation of the classical doctrine.

(b) Such treaties as affect private rights and, generally, as require for their enforcement by English courts a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament.³ To that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the legislature. That departure from the traditional common law rule is largely due to the fact that, according to British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown, which would otherwise be in a position to legislate for the subject without obtaining parliamentary assent.⁴ The possible inconvenience of the

Commercial and Estates Co. of Egypt v. Board of Trade, L.R. [1925] 1 K.B. 271, at p. 295; per Lord Atkin in *Chung Chi Cheung v. The King* [1939] A.C. 160, 168; per Lord Macmillan in *The Cristina* [1938] A.C. 485, 497. In the last three cases International Law was in fact relied upon to a substantial degree.

¹ *R. v. Keyn* (1876), 2 Ex. D. 63. For comment on this aspect of that case see Lauterpacht, *Analogies*, p. 76 (n.).

² [1905] 2 K.B. 391

³ See Westlake, *op. cit.*, and in particular *McNair* in B.Y., 9 (1928), pp. 59-68. And see *The Parlement Belge* [1880] 5 P.D. 197, *Walker v. Baird* [1892] A.C. 491. See also *Porter v. Freudenberg* [1915] 1 K.B. 857. There are cases in which courts have applied the rule that, in the absence of an enabling Act of Parliament, no effect can be given to treaties affecting private rights. See *Re Arrow River Tributaries Slide & Boom Co., Ltd.*, [1932] 2 D.L.R. 250; *Annual Digest*, 1931-1932, Case No. 2; *Administrator of German Property v. Knoop*, [1933] Ch. 439; and, to some extent, *Republic of Italy v. Hambro's Bank* [1950] 1 All E.R. 430.

⁴ For an interesting example of the treaty making power being effectively used for (legislative) action which might otherwise be impossible under the Constitution see the American case of *State of Missouri v. Holland*, *United States Game Warden* (1920) 252 U.S. 416; Dickinson, *Cases*, p. 1037, *Annual Digest*, 1919-1922, Case No. 1 (with further references). And see Black in *Illinois Law Review*, 25 (1930, 1931), pp. 911-928, for a criticism of the decision. See also, to a similar effect, *R. v. Burgess, ex p. Henry*, decided in 1936 by the High Court of Australia (1936), 55 C.L.R., *Annual Digest*, 1935-1937, Case No. 19. With these judgments may be contrasted the important decision of the Judicial Committee of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326, *Annual Digest*, 1935-1937, Case No. 17. For comment thereon see a symposium in *Canadian Bar Review*, 15 (1937), pp. 393-507 see, in particular, the articles by Mackenzie, pp. 436-454, Jennings, pp. 455-463; and Jenks, pp. 464-477. See also Stewart in A.J., 32 (1938), pp. 36-62. The effect of the decision was to deny the legis-

rule rendering inoperative treaties which have not been transformed into Municipal Law is to a large extent one of theory rather than practice. This is so mainly for the reason that in practice opportunity is given, as a rule, to Parliament to approve treaties prior to their ratification and that enabling legislation is passed before the treaty is ratified.¹ Nevertheless, the uniformity of constitutional convention on the subject suggests the advisability of formalising a practice which would relieve courts of the necessity of finding that treaties internationally binding upon the United Kingdom cannot be given effect on the ground of the absence of requisite enabling legislation.

(c) English statutory law is absolutely binding upon English courts, even if in conflict with International Law, although in doubtful cases there is a presumption that an Act of Parliament did not intend to overrule International Law.² The fact that International Law is part of the law of the land and is binding directly on courts and individuals does not mean that English law recognises in all circumstances the supremacy of International Law.³

(2) In the United States the principle that International Law is part of the law of the land has been adopted even more clearly.⁴ Such customary International Law as is

lative competence of the Dominion Parliament to give effect to certain International Labour Conventions assented to and ratified by the Dominion legislature. And see below § 59a

¹ See the statements by the Government in the House of Lords on March 11, 1963 (180 House of Lords Deb., col. 1284). Thus, for instance the Treaties of Peace with Italy, Bulgaria, Finland, Hungary and Roumania were signed on February 10, 1947, enabling legislation was passed on April 29, 1947 (10 & 11 Geo. 6 c. 23); ratifications of the treaties were deposited on September 15, 1947. See McNair, *The Law of Treaties* (1938), pp. 7-37; Carter in *I.L.Q.* 3 (1950), p. 413; Preuss in *Michigan Law Review*, 51 (1953), pp. 1122-1124.

² See below, § 23. In particular, the rules of International Law are binding upon British prize courts unless they be in conflict with an Act

of Parliament. Orders in Council which are not in conformity with International Law are not binding upon British prize court unless they amount to a mitigation of the rights of the Crown in favour of the enemy or a neutral, or unless they order reprisals which are justified by the circumstances of the case and do not entail upon neutrals an unreasonable degree of inconvenience. See below, vol. II, § 434, for further details.

³ It is of importance not to confuse, as many do, the question of the supremacy of International Law and of the direct operation of its rules within the municipal sphere. It is possible to deny the former while fully affirming the latter.

⁴ See Picquatto, *op. cit.*, pp. 109-124; Holdsworth, *A History of English Law*, vol. x. (1938) p. 373; Wright, *op. cit.* and in *A.J.*, 11 (1917), pp. 1-21; Oppenheim, *The Panama Con-*

universally recognised or has at any rate received the assent of the United States, and further all international conventions ratified by the United States, are binding upon American courts, even if in conflict with previous American statutory law; for, according to the practice of the United States, customary as well as conventional International Law overrule previous Municipal Law. On the other hand, American statutory law is binding upon the courts of the United States even if in conflict with previous customary or conventional International Law; for a statute passed by Congress overrules previous International Law, although in doubtful cases there is a presumption that Congress did not intend to overrule International Law.¹

(3) Contrary to a widespread view, the incorporation of

fict (1913), pp. 40-42; Scott in *A.J.*, 1 (1907), pp. 852-866; Potter, *ibid.*, 19 (1925), pp. 315-326; Sprout, *ibid.*, 26 (1932), pp. 280-295; Wright in *A.J. Proceedings*, 1952, pp. 71-85; Dickinson, *ibid.*, pp. 239-260, and in *Hague Recueil*, vol. 40 (1932) (ii.), pp. 328-349, who—rightly, it is believed—arrives at the conclusion that the doctrine is not only fully valid, but that it has had an influence which is far-reaching and beneficent. And see below, § 89a; *The Nereide* (1815) 9 Cranch 388; *United States v. Smith* (1820) 5 Wheaton 153; *The Scotia* (1871) 14 Wallace 370; *The Paquete Habana* (1899) 175 U.S. 677; *Republica v. De Longchamps*, 1 Dall. 111. It seems to follow that the residuary power of a final and authoritative interpretation of International Law is within the jurisdiction of the supreme legislative and judicial organs of the Union as distinguished from those of the States. See also Jessup in *A.J.*, 33 (1939), pp. 740-743. It is in the application of that principle that lies to some extent the explanation of the occasional refusal of the courts of the United States to exercise jurisdiction following upon seizure or arrest contrary to International Law. See *The Mazel Tow*, reported as *Cook v. The United States* (1933) 288 U.S. 102. And see, for comment thereon, Dickinson in *A.J.*, 27 (1933), pp. 305-310, and *ibid.*, 28 (1934), pp. 231-245. As to the position in the American Republics see Moore and

Wilson in *A.S. Proceedings*, 1916, pp. 11-30.

¹ *In re Dillon*: see Wharton, i. p. 667; Moore, v. p. 78. See also *Santovincenzo v. Egan* (1931) 284 U.S. 30. For an affirmation of the rule that in the United States a subsequent statute overrides the provisions of a treaty see *U.S. v. Claus*, 63 F. Supp. 433; *Annual Digest*, 1946, Case No. 83. As to the effects of the President's proclamation of a treaty see Reiff in *A.J.*, 30 (1936), pp. 63-79. For a clear affirmation of the principle that a subsequent treaty supersedes a prior conflicting statute and that a treaty will not be deemed to have been abrogated or modified by a later statute unless the legislature clearly expressed itself to that effect see *Cook v. The United States* (1933) 288 U.S. 102; *A.J.*, 27 (1933), pp. 559-569. See also, to the same effect, *Minerva Automobiles Inc. v. United States*, decided in 1938 by the United States Court of Customs and Patent Appeals: *Annual Digest*, 1938-1940, Case No. 196. On the problems raised, in the United States, by a conflict between a treaty and the provisions of the Constitution see Cowles, *Treaties and Constitutional Law: Property Interferences and Due Process of Law* (1941). In *Steenworden v. Société des Auteurs* the Swiss Federal Court seems to have held that it would be bound by a subsequent statute inconsistent with a treaty: *Annual Digest*, 1935-1937, Case No. 4.

customary International Law as part of the law of the land, although it was first formulated in Anglo-American countries, is not confined to England and the United States. For the position has for a long time been essentially the same in many other countries, including France, Belgium, Switzerland, and, for a time, Germany.¹

(4) After the First² and the Second³ World War a number of countries have expressly adopted in their constitutions the Anglo-American doctrine of International Law being part of the law of the land. Some countries have gone

¹ See Ruth, Masters, *International Law in National Courts* (1932). This was the position in Germany even before the adoption of Article 4 of the Constitution of 1919 (see below, n. 2). Thus in the case *Hellfeld v. Russland*, decided in 1910, a high German tribunal rejected the view that International Law is applicable only in so far as it has been adopted by German customary law. The decision is printed in *A.J.*, 5 (1911), p. 514.

² See, in particular, Article 4 of the German Constitution of 1919 which provided as follows: 'The universally recognised rules of International Law are valid as binding constituent parts of German Federal Law.' See Wenzel *op. cit.*; Walz, *op. cit.*; Stier-Somlo, *Die Verfassung des deutschen Reichs* (1920), pp. 95 *et seq.* In the *Reparations Levy (Aliens in Germany)* case the German Reichsgericht held in August 1928 that, notwithstanding Article 4 of the Constitution, it was bound to act on the principle *lex posterior derogat priori* and to apply a statute which was contrary to the provisions of the Treaty of Versailles: *Annual Digest*, 1927-1928, Case No. 225. During the National-Socialist régime there was a tendency to give a restricted interpretation to that Article in the sense of making it apply to such rules only as have received the specific consent of Germany: see e.g. Walz in *Z.V.*, 18 (1934), pp. 150, 151. See also Mohr, *Die Transformation des Völkerrechts ins deutsche Reichsrecht* (1934), and Schüle in *Z.S.V.*, 6 (1936), pp. 269-285. See also, to the same effect, Article 8 of the Austrian Constitution of 1934 re-enacting Article 9 of the Constitution of 1920 (as to the

latter see Kelsen, *Die Verfassungsgesetze der Republik Österreich*, Part 5 (1920), pp. 75 *et seq.*; Verdross, *Die Einheit des rechtlichen Weltbildes* (1923), pp. 111-118; Wittmayer in *Z.V.*, 13 (1926), pp. 1-5; Métall, *ibid.*, 14 (1927), pp. 161-187; Steiner in *A.J.*, 29 (1935), pp. 125-129). As to Article 9 of the Spanish Constitution of 1931 see Strupp in *Friedensurteile*, xxxii. (1932) pp. 264, 265; Perassi in *Rivista*, 24 (1932), pp. 453-456; Morelli, *ibid.*, 25 (1933), pp. 3-23; Mirkine-Guetzévitch in *Théorie du droit*, vii. (1932-1933), pp. 115-132; Lacambra in *R.I. (Paris)*, 15 (1935), pp. 72-89.

³ See Art. 10 of the Italian Constitution of 1948 and Art. 25 of the Constitution of the German Federal Republic of 1949. The latter provides that the general rules of International Law form part of the federal law and that 'they take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory'—a striking affirmation not only of the supremacy of International Law but also of its direct operation upon individuals as subjects of International Law; see generally on the developments of the constitutional law of various countries in that direction Mirkine-Guetzévitch in *R.G.*, 52 (1948), pp. 375-386; Morgenstern in *B.Y.*, 27 (1950), pp. 86-90; Preuss in *Michigan Law Review*, 51 (1953), pp. 1117-1112. See also Paul de Visscher, 'Les tendances internationales des constitutions modernes,' *Haague Recueil*, 80 (1952) (i.), pp. 515-576 and Mangoldt in *Jahrbuch für Internationales Recht*, 3 (1954), pp. 11-25.

beyond the British practice by proclaiming expressly in their constitutions the supremacy of International Law, including that established by treaty, over conflicting Municipal Law. Thus Article 26 of the French Constitution of 1946 provides that diplomatic treaties duly ratified and published are superior in authority to French internal legislation both prior and subsequent to the treaty.¹

It follows from the foregoing survey of the practice of various States that, unless we abandon ourselves to pure dialectics,² it is impossible to accept the view that rules of International Law cannot, without express municipal adoption, operate as part of Municipal Law. The doctrine that International Law is part of the law of the land is a rule of positive law. For that reason alone, it ought not to be lightly abandoned. From a more general point of view it must be regarded as a beneficent doctrine inasmuch as it brings into prominence the fact that the obligations of International Law are, in the last resort, addressed to individual human beings. To that extent it serves as yet another explanation of the reason why the general principles of law and morality must also lie at the basis of the rules of International Law.

Rules of
Municipal
Law pre-
scribed by
Inter-
national
Law.

§ 22. In order to fulfil their international obligations States are under a duty to possess certain rules, and are

¹ See Preuss in *A.J.*, 44 (1950), pp. 641-669. See also Rousseau in *Etudes Georges Scelle* (1950), vol. ii., pp. 565-581, and Luchaire, *ibid.*, pp. 815-860. For a striking affirmation of the superiority of a treaty over municipal legislation see the decision of the Court of Appeal of Paris in *Lambert v. Jourdan*, *Annual Digest*, 1948, Case No. 111. This is also—according to Guggenheim (vol. i., p. 35)—and some other Swiss writers the position in Switzerland, the Constitution of which provides that courts shall apply statutes as well as treaties ratified by the Federal Assembly. For a detailed analysis of the position in Switzerland see Rice in *A.J.*, 46 (1952), pp. 641-666. In Holland a constitutional amendment adopted in 1953 obliges the courts to judge the validity of legislation by reference to treaties binding upon Holland. As to

Luxembourg see Pescatore in *Journal des Tribunaux*, 68 (1953), p. 645.

² Thus it may be argued that it is only by virtue of the general reception *en bloc* of International Law by Municipal Law that the former affects *per se* municipal courts and individuals. See e.g. Triepel, *Völkerrecht und Landesrecht* (1899), p. 134; Strupp in *Hague Recueil*, vol. 47 (1934) (i.), pp. 409-412. Whatever may be the dialectical value of that argument, it does not deny the fact of the direct operation of the whole body of customary International Law, unless expressly modified, upon the law of the land. On the analogy of States and individuals see Scott in *A.S. Proceedings*, 1930, pp. 15-23, and *ibid.*, 1932, pp. 10-29. See also Dickinson in *Yale Law Journal*, vol. 26, p. 564; Lauterpacht, *Analogy*, pp. 303-306.

prevented from having certain other rules, as part of their Municipal Law. Thus, for instance, on the one hand, the Municipal Law of every State is obliged to possess rules granting the necessary privileges to foreign diplomatic envoys, protecting the life and liberty of foreign citizens residing on its territory, and threatening punishment for certain acts committed on its territory in violation of a foreign State. On the other hand, the Municipal Law of every State is prevented by the Law of Nations from having rules, for instance, conflicting with the freedom of the high seas, or prohibiting the innocent passage of foreign merchantmen through its maritime belt, or refusing justice to foreign residents for injuries to their lives, liberty, and property committed on its territory by its own citizens. If a State does nevertheless possess such rules of Municipal Law as it is prohibited from having by the Law of Nations, or if it does not possess such municipal rules as it is obliged to have by the Law of Nations, it violates an international legal duty; but its courts¹ cannot by themselves alter the Municipal Law to meet the requirements of the Law of Nations.

§ 23. Even those who are inclined to adopt the so-called dualistic point of view admit a number of presumptions enabling and obliging municipal courts to apply rules of International Law which have not been expressly incorporated in the Municipal Law of the State. These presumptions will now be considered: (1) Although municipal courts must apply Municipal Law even if it conflicts with the Law of Nations, there is a presumption against the existence of such

Presumption
against
Conflicts
between
Inter-
national
and Muni-
cipal Law.

¹ This became quite apparent in the Moray Firth case (*Mortensen v. Peters*)—see below, § 102—in which the court had to apply English Municipal Law. See also *Croft v. Dunphy* (1933) 1 D.L.R. 225, [1933] A.C. 156, where the same view was expressed, *obiter*, with regard to the right of Canada to legislate outside Canadian territorial waters. In *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada* [1947] A.C. 87, there will be found an observation to the effect that the principle according to which statutes

must be interpreted so as not to conflict with International Law, did not apply to the interpretation of the Canadian War Measures Act, 1927—an Act relating to powers to be exercised at a time of war, invasion or insurrection. In *Polites v. The Commonwealth of Australia* it was held by the High Court of Australia that an Act of Parliament imposing upon aliens the obligation of military service was to be applied although its provisions were contrary to International Law: [1945] 70 C.L.R. 60; *Annual Digest*, 1943-1945, Case No. 61.

a conflict. As the Law of Nations is based upon the common consent of the different States, it is improbable that an enlightened State would intentionally enact a rule conflicting with the Law of Nations. A rule of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as to avoid such conflict.

Presumption of the Existence of certain necessary Municipal Rules.

§ 24. (2) In case of a gap in the statutes¹ of a State regarding certain rules necessitated by the Law of Nations, such rules ought to be presumed by the courts to have been tacitly adopted by such Municipal Law. It may be taken for granted that a State does not intentionally want its Municipal Law to be deficient in such rules. If, for instance, the Municipal Law of a State does not by a statute² grant the necessary privileges to diplomatic envoys, the courts ought to presume that such privileges are tacitly granted.

Presumption of the Existence of certain Municipal Rules in conformity with the Law of Nations.

§ 25. (3) 'There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can by its laws expressly renounce the whole or partial use of such rights, provided always that it is ready to fulfil such duties, if any, as are connected with those rights. However, when no such renunciation has taken place, municipal courts ought, if the interests of justice demand it, to presume that their State has tacitly consented

¹ It is hardly necessary to add that a State when charged with an international delinquency cannot validly plead as a defence that its Municipal Law is defective or contains rules in conflict with International Law; see, for instance, the *Alabama* award, *Lapradelle et Politis*, ii. (1924), at p. 891; Advisory Opinion of the Permanent Court concerning the *Jurisdiction of the Courts of Danzig*: Series B, No. 15, pp. 26, 27. For an affirmation of the superiority (apparently in the international sphere) of International Law over conflicting constitutional provisions see the decision of the French-Mexican Claims Commission in the *Georges Pinson* case of October 19, 1928: *Annual Digest*, 1927-1928, Case No. 4. See also the Advisory Opinion of the Permanent Court of International Justice of February 4, 1932, in the matter of

the *Treatment of Polish Nationals in Danzig* pointing out that a State cannot adduce against another State its own constitution in order to evade obligations incumbent upon it under International Law: Series A/B, No. 44. On the relations of international and Constitutional Law see *Mirkine Guetzévitch, Droit constitutionnel international* (1933), pp. 13-94. Useful collections of modern constitutions will be found in *Delpesch and Laferrière, Les constitutions modernes*, 6 vols. (1928-1934); *Mirkine-Guetzévitch, Les constitutions de l'Europe nouvelle* (1930); the same, *Les constitutions des nations américaines* (1932); *Pease, Constitutions of the Nations* (3 vols., 1950). See also *Constitutional Provisions Concerning Social and Economic Policy* (International Labour Office, 1944).

² Or by common or customary law.

to make use of such rights. If, for instance, the Municipal Law of a State does not by a statute extend its jurisdiction over its maritime belt, its courts ought to presume that, since by the Law of Nations the jurisdiction of a State does extend over its maritime belt, their Sovereign has tacitly consented to that wider range of its jurisdiction.

This principle was not acted upon in a remarkable case bearing on this question which occurred in England in 1876. The German vessel *Franconia*, while passing through the British maritime belt within three miles of Dover, negligently ran into the British vessel *Strathclyde*, and sank her. As a passenger on board the latter was thereby drowned, the commander of the *Franconia*, the German Keyn, was indicted at the Central Criminal Court and found guilty of manslaughter. The Court for Crown Cases Reserved, however, to which the Central Criminal Court referred the question of jurisdiction, held by a majority of one judge that, according to the law of the land, English courts had no jurisdiction over crimes committed by foreigners in the British maritime belt. Keyn's conviction, therefore, could not be sustained.¹ To provide for future cases of a like kind, Parliament passed, in 1878, the Territorial Waters Jurisdiction Act.

V

DOMINION OF THE LAW OF NATIONS

Phillimore, i. §§ 27-33 Twiss i. § 62 Taylor, §§ 60-64 - Westlake, i., p. 10
 Bluntschli, §§ 1-16 Heffter, § 7 Holtzendorff in *Holtzendorff*, i., pp. 13-18
 Nys, i. pp. 121-137 Rivier, i. § 1 Fauchille, §§ 40-44 (15) - Martens,
 i. § 41 - Fiore, *Code* §§ 43-48 Praaz §§ 4, 5 De Loutch, i., pp. 34-41
 Cruchaga, §§ 84-93 Holland *Lectures*, pp. 37-46 Schwarzenberger, pp.
 36-41 Smith, i. pp. 14-36 Sibert, pp. 21-30 Heilborn, *Grundriss der*
des Völkerrechts (1912) §§ 10-12 Deceola, *Concetti di 'Civiltà' e di*
'Nazioni Civili' nel diritto internazionale (1937) Cavaglieni in *R.G.*, 18

¹ *R. v. Keyn* (1876), 2 Ex. D. 63. See Phillimore, i. § 1086; Maine pp. 30-45; Stephen, *History of the Criminal Law of England* (1883), ii. pp. 20-42; Lauterpacht in *Grotius Society*, 25 (1939), pp. 60-62. It will be noted that the decision of the majority was due not so much to their doubts with regard to the propriety of exercising jurisdiction with-

out authority of Parliament as to the uncertain position in International Law in the matter of a State's jurisdiction in its territorial waters: see the judgment of Cockburn C.J., pp. 192, 193. See also below, § 189, where the controversy is discussed whether a littoral State has jurisdiction over foreign vessels that merely pass through its maritime belt.

(1911), pp. 259-292—Wright in *A.J.*, 20 (1926), pp. 265-268—Kunz in *Z.o.R.*, 7 (1927), pp. 86-99, and the same, *Staatenverbindungen* (1929), pp. 258-273—Kelsen in *Hague Recueil*, vol. 42 (1932) (4), pp. 178-181—Basdevant, *ibid.*, vol. 58 (1930) (iv.), pp. 484-496—Lauterpacht, *ibid.*, vol. 62 (1937) (iv.), pp. 188-206—Wilk in *A.J.*, 45 (1951), pp. 648-670.

Dominion
of Inter-
national
Law con-
troversial.

§§ 26 and 27. The modern Law of Nations is a product of Christian civilisation.¹ It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhist States. But from about the beginning of the nineteenth century matters gradually changed. Many interests which knit Christian States together, knit likewise some non-Christian and Christian States. Positive International Law no longer recognises any distinctions in the membership of the community of nations based on religious or cultural differences.

Present
Range of
Dominion
of the
Law of
Nations.

§ 28. The present range of the dominion of International Law is a product of historical development, in which epochs are distinguishable, marked by successive entrances of various States into the Family of Nations

(1) The old Christian States of Western Europe were the original members of the Family of Nations, because the Law of Nations grew up gradually between them through custom and treaties. Whenever afterwards a new Christian State made its appearance in Europe, it was received into the existing society by the old members of the Family of Nations. It is for this reason that this law was in former times frequently called 'European Law of Nations.' But this name has nowadays historical value only, as it has been changed into 'Law of Nations,' or 'International Law' pure and simple.

(2) The next group of States which entered into the Family of Nations was the body of Christian States which grew up outside Europe. All the American States which arose out of colonies of European States belong to this

¹ See Eppstein, *The Catholic Tradition of the Law of Nations* (1935). See also Wright, *Medieval Internationalism* (1920), and Bentwich, *The Religious Foundations of Internationalism* (1933),

pp. 83-158. For an exposition of International Law from the catholic point of view see Pasquazi, *Jus internationale publicum*, i. (1935).

group. Of these States the United States of America have contributed largely to the growth of the rules of International Law.¹ The two Christian Negro Republics of Liberia in West Africa and Haiti on the island of San Domingo also belong to this group.

(3) With the reception of Turkey into the Family of Nations in 1856 International Law ceased to be a law between Christian States only. This reception took place expressly through Article 7 of the Peace Treaty of Paris of 1856.² From that time until the outbreak of the First World War Turkey was invited to send delegates to every general congress which took place. But her position as a member of the Family of Nations was anomalous, because her civilisation was deemed to fall short of that of the Western States. It was for that reason that the so-called Capitulations remained in force until 1923.³

(4) Other important non-Christian members of the Family of Nations are Japan, India and Pakistan.

(5) Before the First World War the position of such States as Persia, Siam, China,⁴ Abyssinia, and the like, was to some extent doubtful. Their civilisation had not yet reached that condition which was necessary to enable their Governments and their populations in every respect to understand and to carry out, the rules of International

¹ See Westengard in *J C I*, 18 (1918), pp. 214. This is particularly true in regard to the law of neutrality.

² In which the five Great European Powers of the time, namely, France, Austria, Great Britain, Prussia, and Russia, together with Sardinia, the nucleus of the future Great Power Italy, expressly 'déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens'. But see Smith, *l. pp.* 16-18, who points out that even prior to 1856 rules of International Law were held to be applicable to Turkey. That view is supported by McKinnon Wood *l. J.*, 37 (1943), pp. 262-274, who regards Article 7 as 'an act of admission to what to day might be called a regional understanding' (at p. 274). And see on the

Islamic contribution to International Law Armanazi, *Les principes islamiques et les rapports internationaux en temps de paix et de guerre* (1929). Bentwich, *The Religious Foundations of Internationalism* (1933), pp. 159-180; Khadduri, *The Law of War and Peace in Islam* (1941); Rechid in *Hague Recueil*, vol. 60 (1937) (II.), pp. 375-502.

³ In September 1914, shortly before she became a belligerent, Turkey denounced the Capitulations (see *A J.*, 8 (1914), p. 87). The complete abolition of the Capitulations in Turkey in every respect was assented to by the other parties to the Treaty of Lausanne, 1923, Article 26, see below, § 318.

⁴ See Escarra, *La Chine et le droit international* (1931).

Law. On the other hand, international intercourse had widely arisen between these States and the States of the so-called Western civilisation. Many treaties had been concluded with them, and there was full diplomatic intercourse between them and the Western States. China, Persia and Siam had even taken part in the Hague Peace Conferences. Since the Second World War China has acquired the status of a Great Power.

(6) After the First World War the Capitulations and some other restrictions upon the territorial sovereignty of most of these States were abolished.¹ These and other non-Christian States were admitted to membership of the 'League' of Nations.² In addition to these States, other non-Christian States, such as Egypt, Iraq, Saudi Arabia, Lebanon, and Syria, participated in the San Francisco Conference of 1945 and are among the original members of the United Nations. In 1949 Israel was admitted to membership. Religion and the controversial test of degree of civilisation have ceased to be, as such, a condition of recognition of Statehood. In general, the question of the membership of the 'Family of Nations,' as distinguished from the position of a State as a subject of International Law, is now a matter of purely historical interest.

Treat-
ment of
States
outside
the
Family of
Nations.

§ 29. The Law of Nations, as a law between States based on the common consent of the members of the Family of Nations, naturally does not contain any rules concerning intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious.³ The United States of America applied, in some

¹ See below, § 318.

² As to the position of non-Christian States and peoples at different stages in the development of International Law see Westlake, i. p. 40; Phillimore, i. §§ 27-33; Bluntchli, §§ 1-16; Heffter, § 7; Gareis, § 10; Rivier, i. pp. 13-18; Fauchille, §§ 40-44 (1); Martens, § 41; Nys, i. pp. 126-137; Westlake, *Papers*, pp. 141-143; Lindley, pp. 10-47 and *passim*; Smith, i. pp. 14-33, Plantet, *Les Consuls de*

France à Alger avant la Conquête (1579-1830) (1930); Irwin, *The Diplomatic Relations of the United States with the Barbary Powers*, 1776-1816 (1931); Scott, *The Spanish Origin of International Law*. Francisco de Vitoria and his Law of Nations (1934).

³ As to the application of the laws of war to non-civilised States and savage tribes see Wright in *A.J.*, 20 (1926), pp. 266-268, and Colby, *ibid.*, 21 (1927), pp. 279-288.

respects, the rules of International Law to their relations with the Red Indians.¹

§ 29a. International Law is based on the assumption that there exists an international community embracing all independent States and constituting a legally organised society. From this assumption there necessarily follows the acknowledgment of a body of rules of a fundamental character universally binding upon all the members of that society. In view of the wide geographic, economic, and cultural differences obtaining between States, the scope of rules capable of universal application must necessarily be more limited than in the relations of individuals within the State.² These diversities between States may render necessary developments and adjustments on the basis of a regional community of interests, but such particular International Law between two or more States presupposes the existence and must be interpreted in the light of principles of International Law binding on all States.

The existence of universal rules of International Law has, on the one side, been denied by some of the adherents to the rigid positivist doctrine who see in the express will of States the only source of obligation in the sphere of International Law.³ It has, on the other side, been obscured by the exaggerated emphasis on the so-called American International Law, by the insistence on the difference between the so-called Anglo-American and Continental Schools of Inter-

¹ See Rice in *J.C.L.*, 3rd ser., 16 (1934), pp. 78-95. For a discussion of the rights of aboriginal tribes in lands inhabited by them see *In re Southern Rhodesia* [1919] A.C. 211. See also generally Snow, *The Question of Aborigines in the Law and Practice of Nations* (1921); Octavio, *Les sauvages-Américains devant le droit* in *Hague Recueil*, vol. 31 (1920) (i.), pp. 181-289. Scott, cited above, p. 50, n. 2, and the Award of the American-British Claims Arbitration Tribunal in the case of the *Cayuga Indians*, *A.J.*, 20 (1926), pp. 574-594. See also *Totus v. United States: Annual Digest*, 1941-1942, Case No. 1; *Ex parte Green*, *ibid.*, Case No. 128.

² This is so largely for the reason that the operation of the law must be

limited to matters capable of uniform regulation. See, for a somewhat different explanation, Brierly in *Nordisk T.A.*, *Acta Scandinavica*, 7 (1936), p. 9. See also Schindler in *Hague Recueil*, vol. 46 (1933) (iv.), p. 265.

³ See e.g. Bluhdorn, *Einführung in das angewandte Völkerrecht* (1934), pp. 95, 96; Anzilotti, p. 89; Strupp in *Hague Recueil*, vol. 47 (1934) (i.), pp. 317-324. See also Fedozzi, *Trattato di diritto internazionale* (2nd ed., 1933), pp. 69 *et seq.* But see Bustamante, i. pp. 33, 34; Verdross, *Verfassung*, p. 92; Scott, 'L'universalité du droit des gens,' in *Le progrès du droit des gens*, 1931, vol. i, pp. 151 *et seq.*, in *Annuaire*, 33 (1927), pp. 61, 62, and in *A.S. Proceedings* 1929, pp. 48-54.

national Law, and by the various nationalist conceptions of the Law of Nations. These will now be considered in turn.

So-called
American
Inter-
national
Law.

§ 296. The historical circumstances accompanying the rise of the various American Republics as independent States caused them to stress certain principles like those of self-determination, the right to independence, freedom from intervention on the part of European States, freedom of expatriation and migration, and so on. Some of these doctrines were subsequently taken over by European nations and played a prominent part in the history of Europe; others, like freedom of immigration, have now been abandoned, at least temporarily, by most of the American States. In addition, the States of the American Continent, with the exception of Canada, have created a permanent organ of non-political co-operation in the form of the Pan-American Union and periodical Pan-American Conferences.¹ They have also adopted, subject to numerous reservations, a series of general conventions codifying *inter se* various topics of public and private International Law.² The principles underlying these conventions do not, in so far as they have secured the general consent of all American States, differ in substance from those binding on States in other parts of the world. It is possible that the special problems of the American Continent may necessitate in the future a clear departure from some of the rules and principles obtaining elsewhere. However, up till now, American International Law, although looming large in discussions of writers, does not seem to have developed any distinctive peculiarities of its own.³ Geographical propinquity may usefully serve as a basis for more developed forms of international co-operation and mutual political assistance in the preservation of peace than is possible between all States at large; it may also necessitate the adoption of special rules of International Law with regard to particular interests and situations. But the controversy surrounding the question of the existence

¹ See below, p. 185, n. 1.

² See below, p. 63, n. 2.

³ Many writers refer to the doctrine *uti possidetis* (see below, § 201) as an

example of American International Law, but this is often the only example given. See e.g. Urutia, *Le Continent Américain et le droit international* (1928), p. 199.

of an American International Law shows that it is of importance not to magnify either the extent or the significance of such regional peculiarities.¹ In the *Asylum* case between Colombia and Peru the International Court of Justice showed no disposition to attach decisive importance to some of the apparent consequences of the institution of asylum which, because of the relative frequency of internal commotions, acquired a certain prominence among Latin-American countries. It preferred to base its Judgment upon general principles of International Law including that of prohibition of intervention which, it held, required a restrictive

¹ The author of this treatise expressed the view that 'it ought not to be maintained that there is—in contradistinction to the European—American International Law' (§ 28). The existence of an American International Law has been asserted in particular by Alvarez in a series of able writings beginning with his *Le droit international américain* (1909); in *A.J.*, 3 (1909), pp. 269-353, and in *R.G.*, 20 (1913), pp. 48-52, 'Preface to Strupp, *Éléments du droit international public, universel, européen et américain* (1927); *La reconstruction du droit international et sa codification en Amérique* (1928), and the works referred to above, p. 4, n. 2. However, it appears that Alvarez, far from denying the existence of universal rules of International Law, stresses 'the existence of particular rules relating to special American problems with regard to matters which have not yet been regulated by general international law': Institut Américain de Droit International, *Historique, Notes, Opinions* (1916), p. 111.

The term 'American International Law' was adopted in the Draft Code of American International Law which was presented by the Pan American Union to the Governments of all the American States. In Project 2 of this Code (*A.J.*, 20 (1926), Suppl. 2, p. 302), American International Law was defined as 'all of the institutions, principles, rules, doctrines, conventions, customs, and practices which, in the domain of international relations, are proper to the Republics of the New

World,' thus giving a very wide significance to the term law, and comprising apparently principles of policy such as the Monroe Doctrine, which is not a rule of law (see below, §§ 139, 140). This Project was not amongst those adopted by the International Commission of American Jurists at Rio de Janeiro in April-May 1927 (see Scott in *A.J.*, 21 (1927), at p. 437).

See also, in support of the thesis that there exists an American International Law, Urrutia, *Le Continent américain et le droit international* (1928); Yepes, *La contribution de l'Amérique latine au développement du droit international public et privé* (1931), and in *Hague Recueil*, vol. 32 (1930) (II.), pp. 697-792, and *ibid.*, vol. 47 (1934) (I.), pp. 5-137; Baak in *R.I.*, 3rd. ser., 13 (1912), pp. 367-397. See, on the other hand, Vianna, *De la non-existence d'un droit international américain* (1912); Leger, *La codification du droit des gens et les conférences des juristes américains* (1929), pp. 88 et seq.; Guerrero, *La codification du droit international* (1930), p. 12. See also Lamas, *La crise de la codification et la doctrine argentine du droit international* (1931), and Fauchille, §§ 44 (2)-44 (12). See also Ceretti, *Panamericanismo e diritto internazionale* (1939), Savelberg, *Le problème du droit international américain* (1946), and Yepes, *Philosophie du Panaméricanisme et organisation de la paix* (1945). And see below, § 36, n., on the numerous attempts at regional codification of parts of International Law on the American Continent, and §§ 140, 167-168 on American regionalism.

interpretation of the right of a State to shelter, in its legations, fugitives from justice in the receiving country.¹

The so-called Anglo-American and Continental schools of International Law.

§ 29c. The differences in the notions and methods of various systems of Municipal Law have equally given rise to an attitude questioning, in a different sphere, the universal character of International Law. Thus it has been maintained that there exist fundamental differences on essential questions of International Law between the so-called Anglo-American and Continental Schools.² However, there are in fact at present no such divergencies, either in the law of peace or of war.³ With regard to supposed differences in basic notions and methods of approach resulting from divergencies in municipal systems, international practice has, in the few relevant cases, resulted in an assimilation and mutual approximation of apparently opposed conceptions. This is shown, for instance, in the manner in which the practice of the Permanent Court of International Justice and its successor have combined formal disregard of the doctrine of judicial precedent with constant and fruitful regard for their previous decisions.⁴ Moreover, a comparative study of the principal systems of private law tends to show that the differences between them lie often in the domain of terminology, language, and procedure rather than of substantive law. In so far as substantive differences exist they affect rules of conduct lying specifically within the field of Municipal Law and are not, therefore, of a nature likely to render impossible or difficult a uniform development and administration of International Law.⁵

¹ See above, § 17, and below, § 390b.

² See e.g. Keith's *Wheaton*, i. p. 34; Fischer Williams, *Charters*, p. 58; Pearce Higgins, *International Law and Relations* (1928), pp. 30, 31; Lord Hailsham, then Lord Chancellor, in the House of Lords on May 1, 1929: *House of Lords*, 74, cols. 303, 304. With regard to *travaux préparatoires* see below, § 554a.

³ With regard to the law of war, the undoubted divergence between the Anglo-American and Continental views as to the subjects of the relation of war (see vol. II, § 57) has probably

been rendered obsolete by the changes in the character and scope of modern warfare. See Lauterpacht in *B.Y.*, 12 (1931), pp. 31-62, for a discussion of the whole question.

⁴ See the same, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 3-12. There is no pronouncement of the International Court referring to any difference between the two schools of thought in International Law.

⁵ There has probably been in recent years a weakening of the tendency to assume the existence of differences

§ 29d. Finally, the universality of the Law of Nations has been assailed by some national conceptions of International Law developed in the abnormal period following the First World War. Thus writers in Soviet Russia denied for a time the possibility of a permanent and general International Law¹; they spoke of an International Law of transition, based on particular as distinguished from general agreements, pending the extension of the Russian system to other countries. Similarly, with the advent of the new political régime in Germany in 1933, German writers stressed the idea of an 'inter-corporative international law of co-ordination' of States built on the principle of racial consanguinity² and, animated by the desire to assist in the termination of the régime of political subjection of Germany as the result of the Treaty of Versailles, they elevated the notion of equality

National
Conceptions
of Inter-
national
Law.

between the Anglo-American and Continental schools as a ready explanation of difficulties. On the contribution of Great Britain and the United States to International Law see Dickinson in *Hag. Recueil*, vol. 40 (1932) (II), pp. 309-393, but it is probably not inconsistent with the view of the learned author to point out that that contribution is not in most matters there referred to exclusively confined to Anglo-American countries and that it is not connected with the peculiarities of the Common Law as distinguished from Continental law.

¹ See KOROVIN, *Das Völkerrecht des Übergangszeit* (transl. from Russian 1929), pp. 7, 24. And see generally, on the relation of Soviet Russia to International Law, Hrabar in *Z I*, 14 (1927-1928), pp. 188-211; Mirkin Guetzkévitch in *RI (Paris)*, 2 (1928), pp. 1012-1049; Alexeev and Zaitzeff in *Z I*, 16 (1931-1932), pp. 72-99; Hazard in *I J*, 32 (1938), pp. 244-252; Florin in *Revue internationale de la théorie du droit* 12 (1938), pp. 97-115. See also Taracourio, *The Soviet Union and International Law* (1935), and in *AS Proceedings*, 1934, pp. 105-120, the same, *War and Peace in Soviet Diplomacy* (1940); Stoupitzky, *Statut international de l'U.R.S.S. État com-*

merçant (1936), Liperna, *Conceptions soviétiques de droit international public* (1931). As to the conduct of foreign relations see below, p. 178, n. 5.

² The following selection from the literature on the German National Socialist conception of International Law may be of historical interest: Guerke, *Volk und Völkerrecht* (1935); Wolgast in *Z V*, 18 (1934), pp. 129-132, and the same, *Völkerrecht* (1934) § 545; Ruhland in *Z V*, 18 (1934) pp. 133-144; Walz, *ibid.*, pp. 145-154; Lorok, *ibid.*, pp. 249-254; Preuss in *R G*, 11 (1931), pp. 661-674, *ibid.* 42 (1935), pp. 668-677; *American Political Science Review*, 29 (1935), pp. 596-609, and in *J C L*, 3rd ser., 16 (1934) pp. 268-280; Tartarin, *L'union soviétique en Archéologie des Sciences et de la Philosophie* 29 (1936) pp. 295-319; Gottin in *I J*, 32 (1938) pp. 704-718; Brister, *Die Völkerrechtslehre des Nationalsozialismus* (1938); Fourrier, *La conception national-socialiste du droit des gens* (1939); Bonnard, *Le droit et l'État dans la doctrine national-socialiste* 2nd ed. (1939); Schmitt, *Völkerrechtliche Grossraumordnung* (1939); Janssens, *Le droit des gens l'après le national-socialisme* (1940); Walz in *Z I*, 23 (1939) pp. 129-161. As to Fascism see Baak in *Zö R*, 9 (1929), pp. 1-31, and Sereni, *The Italian Conception of International Law* (1943), pp. 269-278.

of States to the authority of the basic principle of International Law.¹ These and similar intrusions of national policies into the sphere of International Law are essentially transient.² On the other hand, in so far as the internal and international practice of such States is based on notions radically opposed to conceptions prevailing in the large majority of States, a situation is unavoidably created in which the society of States is deprived of that community of political, juridical, and ethical outlook which is the necessary condition of both the normal functioning and the full development of International Law. However, while in such periods the growth of International Law is necessarily impeded, its principal function of regularising intercourse and maintaining and enforcing peace continues to be capable of fulfilment and gains in practical importance.

VI

CODIFICATION OF THE LAW OF NATIONS

Holtzendorff in *Holtzendorff* 1, pp. 136-151 Fauchille, §§ 153 (5) 153 (22) Nys, i, pp. 174-193--Rivier, 1 § 2 Fiore, 1 §§ 124-127 Cavaglieri, pp. 74-81--Guggenheim, pp. 152-159 Holland, *Studies* pp. 79-95 Scelle, ii., pp. 526-543--Rousseau, pp. 862-885 Rustamante, pp. 81-113 *Répertoire*, ii, pp. 520-561--Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877), pp. 44-77 Bulmerincq, *Praxis, The und Codification des Völkerrechts* (1874), pp. 167-192 Alvarez, *La codification du droit international* (1912), *Méthodes de la codification du droit international public* (1947), and in *Rev.* 20 (1913), pp. 24-32, 725-74

¹ See Bruns, *Deutschlands Gleichberechtigung als Rechtsproblem* (1934), and in *Z.S.V.*, 5 (1935), pp. 326 et seq.; Keller in *Z.V.*, 17 (1933), pp. 342-372; Bülfinger in *Z.o.V.*, 4 (1934), p. 485. Walz, *op. cit.*, p. 153, insisted that the duty of courts to interpret Municipal Law in accordance with International Law did not apply to the provisions of the Treaty of Versailles imposed upon Germany in derogation of her equality among States.

* ² As to the change of the Russian attitude in connection with her entry into the League see Männren, *Sovietunion und Völkerrecht* (1932); Davis, *The Soviet Union and the League of Nations* (*General Special Studies*, 5,

No. 1, 1934); Kleist, *Die völkerrechtliche Anerkennung Sowjetrusslands* (1934); Miliokov, *La politique extérieure des Soviets* (1936); Hartlieb, *Das politische Vertragssystem der Sowjetunion, 1920-1935* (1936); Makarov in *Z.o.V.*, 5 (1935), pp. 34-60 (with a bibliography), and 6 (1936), pp. 479-495, Maurach in *Z.V.*, 21 (1937), pp. 19-45; and Beckhoff, *Völkerrecht gegen Bolschewismus* (1937). See also Prince in *A.J.*, 36 (1942), pp. 425-445 (on the participation of Soviet Russia in international organization), *ibid.*, 39 (1945), pp. 450-485, Hazard in *Yale Law Journal*, 55 (1946), pp. 1016-1035, and Krylov in *Hague Recueil*, 70 (1947) (i.), pp. 407-474.

Politis, *Les nouvelles tendances du droit international* (1927), pp. 193-229—
 Maresh, *La codification du droit international* (1932) Cavalcanti in *R.G.*,
 21 (1914), pp. 183-204—*A.S. Proceedings*, 4 (1910), pp. 208-227; 5 (1911),
 pp. 256-337; 10 (1916), pp. 149-167; 1923, pp. 55-61; 1926, pp. 27-57,
 108-121—Nys in *A.J.*, 5 (1911), pp. 871-900—Crocker in *A.J.*, 18 (1924),
 pp. 38-55—Scott, *ibid.*, pp. 260-280—Baker in *B.Y.*, 5 (1924), pp. 38-65—
 de Visser in *Hague Recueil*, 1925 (i.), pp. 329-452—Garner, *Developments*,
 pp. 708-774, and in *A.J.*, 19 (1925), pp. 327-333—Root, *ibid.*, pp. 675-
 684—Hudson, *ibid.*, 20 (1926), pp. 655-669—Bellot in *J.C.L.*, 3rd ser., 8
 (1926), pp. 137-141—Niemeyer in *Z.J.*, 37 (1926), pp. 1-10—Alvarez in
Annuaire, 35 (i) (1929) pp. 1-113, and (the same article) in *R.I. (Paris)*,
 4 (1929), pp. 179-263, and 8 (1931), pp. 7-85—Saavedra Lamas, *ibid.*, 7
 (1931), pp. 26-106—Brierly in *B.Y.*, 12 (1931), pp. 1-12—Garner in *Hague*
Recueil, vol. 35 (1931) (i.), pp. 676-693—Cavalcanti in *R.G.*, 42 (1935),
 pp. 411-430—Hurst in *Int'lus Society*, 32 (1946), pp. 135-153—Jennings
 in *B.Y.*, 24 (1947), pp. 301-329—Liang in *A.J.*, 42 (1948), pp. 66-97 and
 in *Hague Recueil*, 73 (1948) (ii.), pp. 411-527—*International Law Association*
Report, 47 (1950), pp. 64-121. And see below, p. 63, n. 2, on the Codification
 Conference of 1930.

§ 30. The lack of precision which is natural to a large number of the rules of the Law of Nations on account of its slow growth has created a movement for its codification.¹ That movement has been strengthened by the desire to put at the disposal of international tribunals a body of ascertained and agreed rules and thus to stimulate the willingness of States to submit disputes to judicial determination.

The idea of a codification of the Law of Nations in its totality arose at the end of the eighteenth century. It was Bentham who first suggested such a codification.² A similar project was due to the French Convention which resolved in 1792 to proclaim a Declaration of the Rights of Nations as a pendant to the Declaration of the Rights of Mankind

¹ 'Codification' has at least two distinct meanings: (1) the process of translating into statutes or conventions customary law and the rules arising from the decisions of tribunals with little or no alteration of the law; this is what the English lawyer means when he says that the Sale of Goods Act, 1893, codified the law as to sale of goods; (2) the process of securing, by means of general conventions, agreement among the States upon certain topics of International Law, these conventions being based upon existing International

Law, both customary and conventional, but modified so as to reconcile conflicting views and render agreement possible. See Brierly in *B.Y.*, 12 (1931), pp. 1-6, and Politis, *Les nouvelles tendances du droit international* (English transl., 1928), p. 70.

² See Bentham's *Works*, ed. by Bowring, viii, p. 537; Nys in *L.Q.R.*, 1 (1885) pp. 226-231. See also Schwarzenberger in *Jeremy Bentham and the Law* (1948), pp. 152-184 (a valuable assessment of Bentham's contribution to International Law).

of 1879. For this purpose the Abbé Grégoire was charged with the drafting of such a declaration. In 1795 he produced a draft of twenty-one articles, which, however, was rejected by the Convention, and the matter was dropped.¹

Work of
the First
Hague
Peace
Confer-
ence.

§ 31. At the end of the nineteenth century, in 1899, the so-called Peace Conference at The Hague, convened on the personal initiative of the Emperor Nicholas II. of Russia,

¹ See Rivier, i. p. 40, where the full text of these twenty-one articles is given. They do not contain a real code, but certain principles only. See also Redlob, *Völkerrechtliche Ideen der französischen Revolution* (1916).

It was not until 1861 that a real attempt was made to show the possibility of a codification. This was done by an Austrian jurist, Alfons von Domin-Petruschévez, who published in that year at Leipzig a *Précis d'un code de droit international*. In 1863 Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the United States published during the Civil War for the guidance of her army (see below, vol. ii. § 68 (4); and see Scott in *R.I. (Paris)*, 4 (1929), pp. 393-408). In 1868 Bluntschli, the celebrated Swiss writer, published *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*. This draft code has been translated into the French, Greek, Spanish, and Russian languages. In 1872 the great Italian politician and jurist Mancini raised his voice in favour of codification of the Law of Nations in his able essay, *Vocazione del nostro secolo per la riforma e codificazione del diritto delle genti*. Likewise in 1872 appeared at New York David Dudley Field's *Draft Outline of an International Code*. In 1873 the Institute of International Law was founded at Ghent in Belgium. This association of jurists of all nations meets periodically, and has produced a number of drafts concerning various parts of International Law. In 1873 was founded the Association for the Reform and Codification of the Law of Nations, which also meets periodically and which now styles itself the International Law

Association. In 1874 the Emperor Alexander II. of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare. At this conference jurists, diplomats, and military men assembled as delegates of the invited States, and they agreed upon a body of sixty Articles under the name of the Declaration of Brussels. But these Articles have never been ratified. In 1880 the Institute of International Law published its *Manuel des lois de la guerre sur terre*. In 1887 Leone Levi published his *International Law with Materials for a Code of International Law*. In 1890 the Italian jurist Fazio published his *Il diritto internazionale codificato e la sua sanzione guardica*, of which a fifth edition appeared in 1915. An English translation of the fifth edition appeared in 1916. In 1906 E. Duplessix published his *La loi des nations: projet d'institution d'une autorité nationale, législative, administrative, judiciaire: projet de code de droit international public*. In 1911 Jerome Intermescia published his *New Code of International Law* in English, French, and Italian. In the same year Epitacio Pessoa published his *Projeto de código de direito internacional publico* (see Alvarez, *La codificación del droit international* (1912), p. 276 (n.)). In 1913 the Institute of International Law published its *Manuel de la guerre maritime*. See also Alvarez, *Exposé de motifs et Déclaration des grands principes du Droit international moderne* (1930), and for comment thereon Redlob, *Les principes du droit des gens moderne* (1937), *passim*, and Le Fur in *Hague Recueil*, vol. 54 (1935) (iv.), pp. 132, 133.

showed that parts of the Law of Nations might be codified.¹ In addition to three declarations of minor value, and the convention concerning the adaptation of the Geneva Convention to naval warfare, this conference succeeded in producing two important conventions which may well be called codes—namely, first, the ‘Convention for the Pacific Settlement of International Disputes,’ and, secondly, the ‘Convention with respect to the Laws and Customs of War on Land.’ The first-named convention is of great practical importance, as the various tribunals acting as the Permanent Court of Arbitration have given awards in a number of cases. Nor can the great practical value of the second-named convention be denied. Although the latter contains many gaps, even in the amended form given to it by the second Hague Peace Conference of 1907, it represents a model the very existence of which teaches that codification of parts of the Law of Nations is practicable. The first Hague Peace Conference therefore marked an epoch in the history of International Law.²

§ 32. The second Hague Peace Conference of 1907³ produced no less than thirteen conventions,⁴ some of which are codifications of parts of maritime law. Three of the thirteen conventions, namely, that for the pacific settlement of international disputes, that concerning the laws and customs of war on land, and that concerning the adaptation of the principles of the Geneva Convention to maritime war, took the place of three corresponding conventions of the first Hague Peace Conference. But the other ten conventions were entirely new. Apart from the conventions on the

Work of the Second Hague Peace Conference.

¹ Upon the initiative of the Dutch Government six conferences have already been held at The Hague for the purpose of codifying various topics of private International Law, namely in 1893, 1894, 1900, 1904, 1925, 1928.

² For a general account of the work of the Hague Conferences see Wehberg in *Hague Recueil*, vol. 37 (1931) (iii.), pp. 533-664.

³ Shortly after the Hague Peace Conference of 1899, the United States of America took a step with regard to sea warfare similar to that taken by

her in 1863 with regard to land warfare. She published on June 27, 1900, a body of rules for the use of her navy under the title, *The Laws and Usages of War at Sea*—the so-called *United States Naval War Code*—which was drafted by Captain Charles H. Stockton, of the United States Navy. Although, on February 4, 1901, this code was by authority of the President of the United States withdrawn, it provided the starting-point of a movement for codification of maritime International Law.

⁴ For an enumeration of these Conventions see below, vol. ii. § 68.

limitation of the employment of force for the recovery of contract debts¹ and the opening of hostilities,² they were devoted to the regulation of rules of warfare and neutrality in war on land and sea.³

Codifica-
tion in the
period
after the
First
World
War.

§ 33. In the domain of the law of war the period after the First World War produced in 1929 general conventions on the treatment of prisoners of war⁴ and sick and wounded⁵ and, in 1925, on the use of poisonous and asphyxiating gases.⁶ In the field of the law of peace that period produced important pieces of partial codification through general instruments like the Covenant of the League of Nations, the Statute of the Permanent Court of International Justice,⁷ the General Act for the Pacific Settlement of International Disputes of 1928,⁸ the General Treaty for the Renunciation of War,⁹ conventions concerning air navigation¹⁰ and inland¹¹ and maritime navigation,¹² and a great number of conventions of a scientific, economic, and humanitarian¹³ character, including the imposing series of conventions concluded under the aegis of the International Labour Organisation.¹⁴ But these conventions were concerned with specific matters and could only metaphorically be described as constituting codification. It was left to the League of Nations to approach in a systematic manner the problem of codification properly so called.

Codifica-
tion under
the
auspices
of the
League of
Nations

§ 34. To stress what they believed to be the close connection between the judicial settlement of international disputes and codification, the Committee of Jurists, who in 1920 drafted the Statute of the Permanent Court of International Justice, adopted a resolution urging the calling of an international conference charged with reconciling divergent views on particular topics of International Law and the considera-

¹ See below, § 135.

² See vol. II, § 94.

³ See vol. II, § 68.

⁴ See vol. II, §§ 126-132.

⁵ See vol. II, §§ 119-124a.

⁶ See vol. II, § 113.

⁷ See vol. II, § 25ac.

⁸ See vol. II, § 25aj.

⁹ See vol. II, § 52s.

¹⁰ See below, § 197c.

¹¹ See below, § 178b.

¹² See below, § 265.

¹³ See below, Appendix. And see generally, on the part played by so-called law-making conventions, Hudson, *Legislation*, I, (1931), pp. xvii. and xviii.; and V, (1936), pp. viii.-x.; and the same in *A.J.*, 22 (1928), pp. 330-349, and *ibid.*, Suppl., pp. 90-108; Rühlmann, *System der völkerrechtlichen Kollektivverträge als Beitrag zur Kodifikation des Völkerrechts* (1929). See also above, § 18.

¹⁴ See below, § 340ff.

tion of those which were not adequately regulated.¹ In 1924 the Council of the League of Nations appointed a committee of sixteen jurists to report on the codification of International Law. The Committee was not instructed to prepare codes, but to report to the Council on the questions which it regarded as ripe for codification, and also as to how their codification could best be achieved. The Committee then considered a number of reports prepared by its sub-committees on various topics, it examined the replies of the Governments on these reports, and in April 1927 reported to the Council that the following seven topics were ripe for codification: (i) Nationality; (ii) Territorial Waters; (iii) Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners; (iv) Diplomatic Privileges and Immunities; (v) Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties; (vi) Piracy; (vii) Exploitation of the Products of the Sea.²

In 1927 the Assembly took into consideration the Committee's Report to the Council and the Council's observations thereon and decided that a conference should be held at The Hague for the purpose of codifying the subjects mentioned under (i), (ii), and (iii). The Council then instructed a preparatory committee to consider and recom-

¹ *Procès-Verbaux* of the Meetings of the Committee, p. 747.

² For the Report of the Committee see Doc. C. 196. M. 70 1927. V. As to topics (v) and (vii) the Committee recommended a procedure more technical than an international conference. In June 1928 the Committee reported two more topics as being ripe for codification, namely, the Legal Position and Functions of Consuls and the Competence of Courts in regard to Foreign States.

The Committee, after examining reports upon (i) Nationality of Commercial Corporations and their Diplomatic Protection, and (ii) the Recognition of the Legal Personality of Foreign Commercial Corporations, reported to the Council that these topics were ripe for regulation by international agreement, and might

usefully be left to a Conference upon Private International Law.

The Committee examined and reported as not being ripe for international regulation the following topics: (i) Criminal Competence of States in respect of Offences committed outside their territory; (ii) Extradition; (iii) Interpretation of the Most-Favoured-Nation Clause. (The Committee also studied, and considered to be ripe for international regulation, the Legal Status of Government Ships Employed in Commerce; but, in view of the conferences which had already been held under the direction of the International Maritime Committee and the Convention prepared by that body (see below, § 451a), recommended the Council to take no further action at that time.)

ment to the Council what action it should take in execution of the Assembly's Resolution. The Committee examined the replies made by the Governments to the various questions covering the principal topics of the three proposed subjects of codification and drew up bases of discussion for the use of the Conference. (The replies of the Governments, the bases of discussion and the Committee's final report are printed in three separate volumes which are an authoritative and invaluable source of information.¹)

The
Hague
Codifica-
tion Con-
ference of
1930.

§ 35. The first Conference on the Progressive Codification of International Law was held at The Hague from March 13 to April 12, 1930. It resolved itself into three Committees for each of the three topics for the consideration of which the Conference had been convened. As the result of the work of the First Committee the Conference adopted: (a) a Convention concerning Certain Questions relating to the Conflict of Nationality Laws; (b) a Protocol relating to Military Obligations in certain cases of Double Nationality; (c) a Protocol relating to a Certain Case of Statelessness; and (d) a Special Protocol concerning Statelessness.² These Conventions, although falling short of a comprehensive codification of international aspects of nationality, covered important questions and have subsequently been ratified by a number of States, including Great Britain.³ With regard to Territorial Waters, the Conference was unable to adopt a convention as no agreement could be reached on the question of the extent of territorial waters and the problem of a 'contiguous zone' adjacent thereto. There was, however,

¹ They are: Vol. I. Nationality: C. 73. M. 38. 1929. V.; Vol. II. Territorial Waters: C. 74. M. 39. 1929. V.; Vol. III. Responsibility of States, etc.: C. 75. M. 69. 1929. V. For an account of the preparatory work of the Conference up to 1930 see Hudson in *A.J.*, 20 (1926), pp. 656-669; Wickersham in *A.S. Proceedings*, 1926, pp. 121-135; Reeves in *A.J.*, 21 (1927), pp. 659-667, and 24 (1930), pp. 52-57; McNair in *Grotius Society*, 13 (1928), pp. 120-140. Reference may also be made here to a series of valuable publications in the form of draft conventions

stimulated by the proposed codification of International Law and prepared under the auspices of the Harvard Law School. The comment accompanying these draft conventions is based on comprehensive and painstaking research. These publications are enumerated above in the List of Abbreviations.

² As to all these see below, §§ 299, 310a and 313.

³ The Convention and the three Protocols came into force in 1937 following upon the receipt of the tenth ratification.

some measure of agreement on such questions as the legal status of territorial waters, including the right of innocent passage, and the base line for measuring the territorial waters. The views of the Conference on these matters were embodied in a Report submitted by the Second Committee of the Conference.¹ With regard to State responsibility, the Conference disclosed complete disagreement on the question, *inter alia*, of responsibility for the treatment of aliens in cases in which there is no discrimination against the aliens as compared with the nationals of the State.²

¹ See *A.J.*, 24 (1930), Suppl., p. 234.

² See below, § 155*d*. On the various aspects of the Hague Codification Conference of 1930, see Alvarez, *Les résultats de la Ière Conférence de codification de droit international* (1931); Reeves in *A.J.*, 24 (1930), pp. 52-57, 486-499; Hudson, *ibid.*, pp. 447-463; Flournoy, *ibid.*, pp. 467-485; Hackworth, *ibid.*, pp. 500-516; Borchard, *ibid.*, pp. 517-540; Hunter Miller, *ibid.*, pp. 674-693; Guerrero in *R.I. (Paris)*, 5 (1930), pp. 478-491; Niemeyer in *Z.I.*, 42 (1930), pp. 1-26; Rohu in *R.I.*, 3rd ser., 11 (1930), pp. 581-599; Hunter Miller in *A.S. Proceedings*, 1930, pp. 213-221; Borchard, *ibid.*, pp. 221-229; Hudson, *ibid.*, pp. 229-234; Rauchberg in *Z.o.R.* 10 (1931), pp. 481-522. For the texts of the Final Act, the Convention on Nationality, the three Protocols adopted by the Conference and the Reports of the Committees on Nationality and Territorial Waters see *A.J.*, 24 (1930), Suppl., pp. 169-258. See also Hudson, *Legislation*, vol. v, pp. 359-394, *League Doc. A 19 1931. V., C 351 M. 145. 1930. V.* (the Final Act).

A variety of partial codification is regional codification, for instance, on the American continent. As long ago as the Panama Congress of 1826 the movement for the codification of International Law among the States of the New World became prominent. In 1906 the Pan-American Conference at Rio de Janeiro (at which the United States of America were represented) decided to establish a commission of jurists for the purpose of preparing codes both of public and of private International Law for sub-

mission to a future conference. After the interruption caused by the First World War the task was actively resumed, with the close co-operation of the new American Institute of International Law founded in 1912, and in 1925 this Institute transmitted to the Pan American Union the texts of thirty projects of conventions for a code of public International Law (printed in *A.J.*, Special Suppl., October 1926). These projects were considered at a meeting of an International Commission of American Jurists in Rio de Janeiro in April and May 1927, and twelve of them were adopted and recommended for consideration by a Sixth Pan-American Conference, which was held in January and February 1928. For the twelve projects referred to see *A.J.*, 22 (1928), Special Suppl. of January 1928. The Conference adopted, on February 20, 1928, the following seven codifying conventions: (1) On the Status of Aliens; (2) On Treaties; (3) On Diplomatic Officers; (4) On Consular Agents; (5) On Maritime Neutrality; (6) On Asylum; (7) On Duties and Rights of States in the Event of Civil Strife. For the texts of these conventions see *A.J.*, 22 (1928), Suppl., pp. 124 *et seq.*; Hudson, *Legislation*, iv, pp. 2374-2419. The Seventh Pan-American Conference adopted on December 26, 1933 the following conventions: (1) On the Nationality of Women; (2) On Nationality; (3) On Tradition; (4) On Political Asylum; (5) On Rights and Duties of States. For the texts of these conventions see *A.J.*, 28 (1934), Suppl., pp. 61 *et seq.* The Conference also passed a resolution on methods

The
Limits
and
Prospects
of the
Codifica-
tion of
Inter-
national
Law.

§ 36. Those participating in the Hague Conference of 1930 apparently assumed that it was to be the first of a series of conferences for pursuing the work of codification under the auspices of the League. For the Conference adopted detailed recommendations concerning the methods of preparation and of summoning of future conferences.¹ In 1930, the Eleventh Assembly reaffirmed the great interest of the League in the work of codification and invited the observations of member-States concerning the recommendations of the Conference.² These observations were on the whole not unfavourable³ to continuing the task of codification, but the Twelfth Assembly, while deciding in principle to continue that work, laid down elaborate details governing the future procedure in the matter.⁴ Their main effect was to transfer the formal initiative from the League and its organs to the

of codification to be pursued in the future (*ibid.*, p. 55). The resolution proposed, *inter alia*, (a) the establishment of a permanent commission whose members were to serve both as experts and as official representatives of their Governments with full powers to sign conventions, and (b) the elimination of codification from the agenda of future Pan-American conferences. For comment on the resolution see Reeves in *A.J.*, 28 (1934), pp. 310-321. See also Borchart in *A.J.*, 31 (1937), pp. 471-473, and the same, *ibid.*, 33 (1939), pp. 268-282, on the work of the Committee of experts created by the resolution of 1933. For the various conventions codifying to some extent the previous conventions as to pacific settlement and adopted by that Conference see *International Conciliation* (Pamphlet No. 238), March 1937. See Alvarez, *La Codification du droit international* (1912, a work which was considered in some detail by the Codification Commission of American Jurists in that year), *La codificación del derecho internacional en América* (1923), *Le nouveau droit international et sa codification en Amérique* (1924), and in *R.G.* (1913), pp. 24-52 and 725-747; Rauchhaupt, *Völkerrechtliche Eigentümlichkeiten Amerikas* (1924); Scott in *A.S. Proceedings*, 1925, pp. 14-48, in *A.J.*, 19 (1925),

pp. 333-337, *ibid.*, 20 (1926), Suppl. No. 2, pp. 284-295, and *ibid.*, 21 (1927), pp. 417-450, *Revue de Droit International*, March 1925, special number; Briefly in *B.Y.*, 7 (1926), pp. 14-23. On American efforts to codify International Law see Léger, *La codification du droit des gens et les conférences des juristes américains* (1929), Urrutia in *Hague Recueil*, vol. 22 (1928) (n.), pp. 85-230. The Conference of American States at Lima adopted, on December 21, 1938, a Resolution concerning the methods for the gradual and progressive codification of International Law through a number of agencies. *I.J.* 31 (1940), Suppl. p. 194, *The International Conferences of American States First Supplement*, 1933-1940 (1940) p. 246. See also literature cited above p. 56, and § 296 above, on 'American International Law.'

¹ See the Final Act of the Conference: Doc. G. 351. M. 145. 1930. V. p. 138; *A.J.*, 24 (1930), Suppl., p. 257.

² *Off. J.*, Special Suppl. No. 83, p. 9.

³ See Docs. A. 12. 1931. V., A. 12 (a). 1931. V., and A. 12 (b). 1931. V.

⁴ *Off. J.*, Special Suppl., No. 92, p. 9. For comment see Hudson in *A.J.*, 26 (1932), pp. 137-143. And see Briefly in *B.Y.*, 12 (1931), pp. 1-12.

members of the League and thus to lessen the chances of codification in the near future.

In any case the experience and results of the Hague Conference of 1930 made it possible to assess the desirability and the prospects of codification. In the first instance, that Conference revealed clearly the difference between codification conceived as a systematisation and unification of agreed principles and codification regarded as agreement on hitherto divergent views and practices. Its progress and results showed that different methods may be required for the achievement of these two different purposes, and that, in particular, the securing of agreement on existing differences is primarily a matter of policy and cannot well be settled by conferences of legal experts. Secondly, in view of the fact that international conferences are governed by the rule of unanimity, there is a danger that attempts to reach agreement in the form of codified rules may result in reducing the value of the rules eventually agreed upon for the reason that the issue may be unduly determined by the most persistent or least progressive State or States. The product of codification may thus retard instead of advancing the progress of International Law¹ Thirdly, there is the danger that, given the cautious attitude of Governments, attempts at codification may in many cases reveal and emphasise differences in cases where agreement was hitherto supposed to exist. Fourthly, it appears that, in so far as codification implies uniform regulation, its scope must necessarily be limited for the reason that in many cases the diversity of interests and conditions render uniformity difficult or undesirable. Fifthly, the Conference showed that even with regard to generally non controversial matters the work of codification requires lengthy preparation and discussion which cannot always usefully take place in the hurried atmosphere of an international conference. Thus the programme of the Hague Conference in 1930 was probably too ambitious inasmuch as it attempted within the space of one month

¹ Even before the Conference met, the Preparatory Committee which drafted the Bases of Discussion

uttered a warning to that effect. See Doc. C. 73 M. 38. 1929. V

to codify three important branches of International Law.

On the other hand, it would be a mistake to regard these obstacles as a sufficient reason for abandoning the task of introducing, through general conventions, uniformity and certainty in those branches of International Law which are sufficiently developed for that purpose. It is true that the absence of codified rules has not seriously impeded the work of the International Court of Justice or of other tribunals, and that, on the contrary, their work has shown that International Law may be developed indirectly and given a degree of certainty through decisions of international tribunals.¹ But there is no doubt that the codification of suitable portions of International Law may add both to its clarity and authority and, to a smaller extent, to the willingness of States to submit disputes to obligatory judicial or arbitral settlement. The danger of failure, or even of retrogression, in consequence of the operation of the unanimity rule, may be circumvented by the adoption of conventions by the majority of the States represented at the Conference. The scope of conventions thus adopted is likely to become enlarged as the result of subsequent accessions. The very fact of their continued validity among large groups of States cannot fail to exercise considerable influence. While therefore the mere re-statement by authoritative official or private bodies—a course occasionally urged on account of the dangers and drawbacks of formal codification—would be of considerable usefulness, formal codification incorporating its results as part of positive International Law must be regarded as a proper and legitimate object of endeavour on the part of the organised international community. It is probably in this sense that the Charter of the United Nations lays down, in Article 13, that the General Assembly shall initiate studies and make recommendations for the purpose, *inter alia*, 'of encouraging the progressive development of International Law and its codification.'² The Second General Assembly decided, in 1947,

¹ See above, § 19a.

² See Jessup in *A.J.*, 39 (1945), pp. 755-757. For the recommendations of the Inter-American Juridical

Committee of October 1944 on the reorganisation of agencies engaged in the codification of International Law see *A.J.*, 39 (1945), Suppl., pp. 231-245.

to set up an International Law Commission charged with the task of codifying and developing International Law.¹ At the same time the Assembly adopted a statute of the Commission, defining its functions and regulating the periodic election of its members by the General Assembly. The Statute provides that the Commission shall consist of fifteen members who shall be persons of recognised competence in International Law. It also lays down that there shall be assured in the Commission as a whole the 'representation of the main forms of civilisation and of the principal legal systems.' The Commission, which was first elected in 1948 for three years, meets yearly for short periods. It possesses no permanent organs of its own. It is apparent that the active promotion, on the part of the members of the United Nations, of the purpose of that important aspect of Article 13 of the Charter, must depend upon their being able to reduce their preoccupation with the more urgent task of preserving the peace of the world.²

¹ The decision was adopted in pursuance of the recommendations of a committee composed of representatives of Governments, which sat in June 1947. See Finch in *A J*, 41 (1947) pp. 611-616. See also the Resolutions of the International Law Association of 1947 based on the Report of a Committee of the Association under the chairmanship of Judge McNair, and emphasising the importance of a restatement not amounting to official codification in the form of conventions—of selected portions of International Law (Report of the Session of the International Law Association held in Prague in 1947). For a useful survey prepared by the Division of Development and Codification of International Law of the United Nations, of the development and codification of International Law by international conferences see *I J* 41 (1947), Supplement, pp. 29-147.

² At its first session held in 1949 the Commission drew up a provisional list of the following fourteen topics selected for codification: (1) Recognition of States and Governments, (2) Succession of States and Governments, (3) Jurisdictional Immunities of States and their Property, (4)

Jurisdiction with regard to crimes committed outside national territory, (5) Regime of the high seas, (6) Regime of territorial waters, (7) Nationality including statelessness, (8) Treatment of aliens, (9) Right of asylum, (10) Law of treaties, (11) Diplomatic intercourse and immunities, (12) Consular intercourse and immunities, (13) State responsibility, (14) Arbitral procedure. In 1953 the Commission produced a draft on certain aspects of the latter subject as well as draft conventions on elimination and reduction of statelessness (see below § 313a). It also embarked upon a consideration of the law of treaties and of the regime of territorial waters and the high seas. With regard to the latter it has produced draft articles on the continental shelf (see below § 287d) and fisheries (see below § 155a). It also submitted drafts and reports on specific topics such as formulation of the Nuremberg principles and a code of offences against the peace and security of mankind (see vol. II., § 582), of a declaration of rights and duties of States (see below, § 112) the denunciation of aggression, reservations to multilateral conventions (see below

Codification and Development of International Law.

‘§ 37. The distinction between codification and development of International Law has been adopted both in the Charter of the United Nations and in the Statute of the International Law Commission. In the latter the expression ‘progressive development of International Law’ is used for convenience—for ‘the formulation of draft conventions on subjects which have not yet been regulated by International Law or in regard to which the law has not yet been sufficiently developed in the practice of States.’ The expression ‘codification of International Law’ is used—similarly

§ 517a) and the question of international criminal jurisdiction (see below vol. II., § 257b)

It appears that neither the terms of its Statute relating to its composition, nor the resources at its disposal, nor the machinery available to Governments for considering the drafts proposed by the Commission, have been such as to enable it to pursue in a systematic manner, the task of codification and development of International Law. In the first seven years of its existence the Commission has not been in the position to bring about a formulation, by way of codification or development (see below, § 37), of any major topic of International Law in such a manner as to achieve positive action thereon by the United Nations either by formal adoption by the General Assembly or otherwise with the view to adoption of a Convention by Governments. The Statute of the Commission provides that with regard to the final drafts proposed by it in the matter of codification (and, apparently also of development) the Commission may recommend to the General Assembly (a) to take no action, the report having already been published; (b) to take note of or adopt the report by resolution; (c) to recommend the draft to Members with a view to the conclusion of a convention; (d) to convolve a conference for the purpose of concluding a convention (Article 23). It is also laid down that whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting. The effective fulfilment of these important

and intricate tasks by the General Assembly must depend upon the existence within or in conjunction with the General Assembly—of organs of a competence and permanence enabling them to cope with the legislative output of an International Law Commission functioning on a scale commensurate with the tasks entrusted to it by the Charter. Similarly any expansion of the work of the Commission in conformity with the object of the Charter must depend to a large extent upon the development within the Governments and Foreign Offices of the members of the United Nations of requisite machinery for a detailed examination of the drafts of the Commission. The work of the Commission is surveyed in the annual reports of the Commission submitted to the General Assembly. See also the following publications of the Secretariat of the United Nations: *Preparatory Study concerning a Draft Declaration on the Rights and Duties of States* (1948), *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (1949), *Ways and Means of Making the Evidence of Customary International Law more readily available* (1949), *Historical Survey of the Question of International Criminal Jurisdiction* (1949), *The Charter and Judgment of the Nuremberg Tribunal* (1949). On some aspects of the work of the Commission see Marx in *Archiv des Völkerrechts*, 1 (1948 1949), pp. 279 et seq.; Parry in *BY*, 26 (1949) pp. 308-328; Chergin in *Current Legal Problems* 5 (1952) pp. 251-273; Hertz in *Friedenswart*, 52 (1953), pp. 19-47.

'for convenience'—as meaning 'the more precise formulation and systematization of International Law in fields where there already has been extensive State practice, precedent and doctrine.'¹ It is probable that such usefulness as can be attributed to that distinction depends upon the realisation that its theoretical value is limited and its practical application insignificant. The Statute of the Commission provides for different procedures for these two kinds of activity, but such differentiation of procedure has proved unworkable and has been altogether disregarded in practice. Subjects such as the limit of territorial waters²

—on which there is 'extensive State practice,' precedent and doctrine' are often so controversial that nothing but a legislative innovation, by way of a formulation of new rules, can meet the exigencies of the case. Moreover, it may happen that with regard to the subjects, which are of some rarity, where there is full agreement in existing practice and doctrine, the requirements of international progress may call for a modification of the existing rule. Conversely, principles relating to topics of distinct novelty such as the régime of the continental shelf³ can be formulated by way of 'development' only by taking into account, and to that extent 'codifying,' an established principle of International Law. Thus the régime of the continental shelf, as formulated by the Commission, is based on the full recognition and preservation, subject to reasonable modifications, of the principle of the freedom of the seas.⁴ In fact, the usefulness and justification of the entire process of codification, in its wider sense, must, as a rule, depend upon the combination, in relation to the same subject, of the processes of restatement of existing principles with the formulation of new principles. It is desirable that in each case the codifying agency should leave no doubt as to the proportion in which rules formulated by it amount to a statement of the existing law or a change thereof.

§ 37a. The primary object of codification and development of International Law as envisaged in Article 13 of the Charter is to give clear expression to those branches of Inter-

International
Legislation
and the
Revision
of International
Law.

¹ Article 15. ² See below, § 186. ³ See below, § 287d. ⁴ See below, § 287d.

national Law with regard to which there is already either a common measure of agreement or a sufficient amount of practice to warrant attempts at improvement. From the codification and development of International Law thus conceived there must be distinguished the deliberate revision and change of territorial settlements and analogous situations—such as those relating to the sovereignty over the air or the exclusive competence of States to regulate tariffs or migration—with a view to adapting them to changed conditions and removing causes of international friction. There is at present no machinery of international legislation¹ for effecting changes of this nature against the dissent of a minority of interested States.² The establishment of such machinery would amount, to a substantial degree, to setting up an international legislature.³ That development, while possible in itself and while fully consistent with the nature and objects of International Law, is not one which Governments are at present prepared to accept. Its realisation must be a matter of gradual transition from the existing principle of unanimity to a process of international legislation which, in turn, is conditioned by the adoption of far-reaching changes in the matter of equality of voting and representation. Article 19 of the Covenant, which authorised the Assembly to recommend the consideration of treaties and international situations in accordance with changed conditions, could well have provided the starting-point for a development of that nature.⁴ Although no corresponding provision has been adopted in the Charter of the United Nations, the wide powers of discussion and recommendation which Article 11 of the Charter confers upon the General Assembly may properly be used for the same purpose

¹ On the metaphorical use of that term see above, p. 27, n. 4.

² On the existing and possible substitutes for international legislation see Lauterpacht, *The Function of Law*, pp. 245-347.

³ This is not always realised by those who speak of the necessity of providing effective institutions of peaceful change as a condition of pro-

gress in other fields of international organisation.

⁴ See § 167o below, and the literature there cited. See also Kuns in *A.J.*, 33 (1939), pp. 33-66; Bourquin, *Dynamism and the Machinery of International Institutions* (1940); Gihl, *International Legislation* (1937); Brierly, *The Outlook for International Law* (1944), pp. 98-108.

⁵ See below, § 168i.

CHAPTER II

DEVELOPMENT AND SCIENCE OF THE LAW OF NATIONS

I

DEVELOPMENT OF THE LAW OF NATIONS BEFORE GROTIUS

Walker *History* i pp. 30-137 Fenwick pp. 3-18 Holtzendorff in *Holtzendorff* i pp. 159-186 De Louter i pp. 77-95 Nis i pp. 1-22—Martens, i. §§ 9-20—Fiore, i. §§ 3-31 Calvo, i. pp. 1-32—Fauchille, §§ 71-86—Despagnet, §§ 1-19 Merignhac, i. pp. 38-43—Laurent, *Histoire du droit des gens*, etc., 14 vols. (2nd ed., 1861-1868)—Ward, *Enquiry into the Foundation and History of the Law of Nations* 2 vols. (1795) Müller-Jochims, *Geschichte des Völkerrechts im Alterthum* (1848) Hosack, *Rise and Growth of the Law of Nations* (1882) pp. 1-226 Nis *Le droit de la guerre et les précurseurs de Grotius* (1892) and *Les origines du droit international* (1894) Hill *History of Diplomacy in the International Development of Europe*, vol. i (1905) and vol. ii (1906) Cybuchowski, *Das antike Völkerrecht* (1907) Philippon *The International Law and Custom of Ancient Greece and Rome* 2 vols. (1910) Raeder *L'arbitrage international chez les Hellènes* (1912) Redlob *Das Problem des Völkerrechts* (1917) and *Histoire des grands principes du droit des gens* (1923) Lange, *Histoire de l'internationalisme*, vol. i. (1919)—Vinogradoff in *Bibliotheca Visseriana*, i. (1923) pp. 13-15 Koster *ibid.*, iv. (1925), pp. 7-63—Butler and Maccohy, *The Development of International Law* (1928) Schnurcr, *Die Anfänge der abendländischen Völkergemeinschaft* (1932) Bentwich, *The Religious Foundations of Internationalism* (1933)—Wegner, *Die Geschichte des Völkerrechts* (1936), pp. 1-164 Van Vollenhoven, *The Law of Peace* (transl. from Dutch 1936), pp. 6-80 Scott, *Law, the State, and the International Community* vol. i. (1930) Pearce Higgins in *Cambridge History of the British Empire* vol. i (1929), ch. vi Reuz Moreno *El Derecho Internacional Público antes de la Era Cristiana* (1946) Nussbaum *A Concise History of the Law of Nations* (1950) Van der Heide *Die Geburtsstunde des souveränen Staates* (1952)—Hershey in *A.J.*, 5 (1911), pp. 901-933—Audinet in *R.G.*, 21 (1914) pp. 29-63 Boak in *4 J.*, 15 (1921), pp. 375-383 Korff *ibid.*, 18 (1925) pp. 246-259, and (the same article) in *Hague Recueil*, 1923, pp. 5-23 Goyau *ibid.*, 1925 (i.), pp. 125-198—Roegner, *ibid.*, 1925 (i.), pp. 245-324 Lange, *ibid.*, vol. 13 (1926) (iii.), pp. 175-248—Le Fur *ibid.*, vol. 41 (1932) (iii.), pp. 505-601—Trelles, *ibid.*, vol. 17 (1927) (ii.), pp. 113-337, and vol. 43 (1933) (i.),

- * pp. 389-551—Zimmermann, *ibid.*, vol. 44 (1933) (ii.), pp. 319-437—Kosters in *R.J.*, 3rd ser., 14 (1933), pp. 31-61, 282-317, 634-676—Hrabar in *R.J.* (*Paris*), 18 (1936), pp. 2-39, 373-439—van Kan in *Hague Recueil* vol. 66 (1938) (iv.), pp. 318-558—Moreau-Reibel, *ibid.*, 77 (1950) (ii.) pp. 485-590.

Law of
Nations in
Antiquity.

§ 37b. International Law as a law between sovereign and equal States based on the common consent of those States is a product of modern Christian civilisation, and may be said to be about four hundred years old. However, the roots of this law go very far back into history. Such roots are to be found in the rules and usages which were observed by the different nations of antiquity with regard to their external relations. But it is well known that the conception of a Family of Nations did not arise in the mental horizon of the ancient world. Each nation had its own religion and gods, its own language, law, and morality. International interests of sufficient vigour to realize a degree of solidarity among States, bring them nearer to each other and knit them together into a community of nations, did not spring up in antiquity. On the other hand, however, no nation could avoid coming into contact with other nations. War was waged and peace concluded. Treaties were agreed upon. Occasionally ambassadors were sent and received. International arbitration was resorted to. International trade sprang up. Political partisans whose cause was lost often fled their country and took refuge in another. And, just as in modern times, criminals often fled their country for the purpose of escaping punishment.

Such more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly consistent rules and usages to be observed with regard to external relations. These rules and usages were considered to be under the protection of the gods; their violation called for religious expiation. It will be of interest to take a glance at the respective rules and usages of the Jews, Greeks, and Romans.¹

¹ As to India see Viswanatha, *International Law in Ancient India* (1925), which reveals some interesting anticipations of rules and institutions commonly regarded as exclusively

European. See also Bentwich, *The Religious Foundations of Internationalism* (1933), pp. 159-180. As to ancient Egypt see Roy in *R.G.*, 48 (1) (1941-1945), pp. 35-52.

§ 38. Although they were monotheists and although the standard of their ethics was much higher than that of their heathen neighbours, the Jews did not in fact raise the standard of the international relations of their time except in so far as they afforded foreigners living on Jewish territory equality before the law. Proud of their monotheism and despising all other nations on account of their polytheism, they found it totally impossible to recognise other nations as equals. If we compare the different parts of the Bible concerning the relations of the Jews with other nations, we are struck by the fact that the Jews were sworn enemies of some foreign nations, such as the Amalekites, for example, with whom they declined to have any relations whatever in peace. When they went to war with those nations, their practice was extremely cruel. They killed not only the warriors on the battlefield, but also the aged, the women, and the children in their homes.¹ With those nations, however, of which they were not sworn enemies the Jews used to have international relations. Ambassadors were considered sacrosanct, and treaties were faithfully observed. And when they went to war with those nations, their practice was in no way exceptionally cruel, if looked upon from the standpoint of their time and surroundings.² Comparatively mild also were the Jewish rules regarding their foreign slaves. Such slaves were not without legal protection. The master who killed a slave was punished (Exodus xxi. 11); if the master struck his slave so severely that he lost an eye or a tooth, the slave became a free man (Exodus xxi. 26 and 27). The Jews, further, allowed foreigners to live among them under the full protection of their laws. 'Love . . . the stranger: for ye were strangers in the land of Egypt,' says Deuteronomy x. 19, and in Leviticus xxiv. 22 there is the command 'Ye shall have one manner of law, as well for the stranger, as for one of your own country.'³

Of the greatest importance, however, for the International

¹ See e.g. 1 Samuel xv. 3.

² See also Joshua ix. 4 (heralds);

³ 2 Samuel x. 4 (ambassadors); 1 Kings xx. 34 (capitulations)

⁴ See e.g. Deut. xx. 10-14.

Law of the future, are the Messianic ideals and hopes of the Jews, as these Messianic ideals and hopes are not national only, but fully *international*.¹ Thus we see that the Jews, at least at the time of Isaiah, had a presentiment of a future when all the nations of the world should be united in peace. The Jews have given this ideal to the Christian world. Although the Jewish State did practically nothing to realise that ideal, yet it sprang up among the Jews and has never disappeared.²

The
Greeks.

§ 39. Totally different from this Jewish contribution to a future International Law is that of the Greeks.³ The broad and deep gulf between their civilisation and that of their neighbours necessarily made them look down upon those neighbours as barbarians, and thus prevented them from raising the standard of their relations with neighbouring nations above the average level of antiquity. But the Greeks before the Macedonian conquest were never united into one powerful national State. They lived in numerous more or less small city States, which were totally independent of one another. It is this very fact which, as time went on, called into existence a kind of International Law between these independent States. They could never forget that their inhabitants were of the same race. The same blood, the same religion, and the same civilisation of their citizens united these independent and—as we should say nowadays—sovereign States into a community of States which in time of peace and war held themselves bound to observe certain rules as regards the relations between one another. The consequence was that international arbitration⁴ was frequently resorted to, and that the practice of the Greeks in

¹ See Isaiah (ii. 2-4), where the prophet foretells the state of mankind when the Messiah shall have appeared:

(v. 4) 'And he shall judge among the nations, and shall rebuke many people: and they shall beat their swords into plowshares, and their spears into pruning-hooks: nation shall not lift up sword against nation, neither shall they learn war any more.'

² Mention should also be made of

the contribution of Judaism to the conception of the Law of Nature: see Isaacs in *The Legacy of Israel* (Oxford, 1927) and Bentwich, *The Religious Foundations of Internationalism* (1933), pp. 59-82. Golden published in 1640 his *De Jure Naturæ et Gentium juxta Disciplinam Ebraeorum*.

³ See Tod, *op. cit.*, and Bosk in *A.J.*, 15 (1921), pp. 376-383.

⁴ See Raeder, *op. cit.* See also Ténékidès in *R.G.*, vol. 38 (1931), pp. 5-20.

their wars among themselves was relatively mild. It was a rule that war should never be commenced without a declaration of war. Heralds were inviolable. Warriors who died on the battlefield were entitled to burial. If a city was captured, the lives of all those who took refuge in a temple had to be spared. Prisoners of war could be exchanged or ransomed; their lot was, at worst, slavery. Certain places, as, for example, the temple of the god Apollo at Delphi, were permanently inviolable. Even certain persons in the armies of the belligerents were considered inviolable, as, for instance, the priests, who carried the holy fire, and the seers.

Thus the Greeks left to history the example that independent and sovereign States can live, and are in reality compelled to live, in a community which provides a law for the international relations of the member-States, provided that there exist some common interests and aims which bind these States together. It is often maintained that this kind of International Law of the Greek States could in no way be compared with our modern International Law, as the Greeks did not consider their international rules as legally, but only as religiously, binding. We must not forget, however, that the Greeks never made the same distinction between law, religion, and morality which the modern world makes. The fact remains that the Greek States set an example to the future that independent States can live in a community in which their international relations are governed by certain rules and customs based on the common consent of the members of that community.¹

§ 40. Totally different again from the Greek contribution to a future International Law is that of the Romans. As far back as their history goes, the Romans had a special set of twenty priests, the so-called *fetiales*, for the management of functions regarding their relations with foreign nations. In fulfilling their functions the *fetiales* did not apply a purely secular, but a divine and holy law, a *jus sacrum*, the so-called *jus fetiale*. The *fetiales* were employed when war was declared or peace was made, when treaties of friendship or

¹ See Kahrstedt, *Staatsrecht und Staatsangehörige in Athen* (1934).

of alliance were concluded, when the Romans had an international claim against a foreign State, or *vice versa*.

According to Roman Law the relations of the Romans with a foreign State depended upon whether or not there existed a treaty of friendship between Rome and that State. Where no such treaty existed, persons or goods coming from the foreign land into the land of the Romans, and likewise persons and goods going from the land of the Romans into the foreign land, enjoyed no legal protection whatever. Such persons could be made slaves, and such goods could be seized, and became the property of the captor. Should such an enslaved person ever come back to his country, he was at once considered a free man again according to the so-called *jus postliminii*.¹ An exception was made as regards ambassadors. They were always considered inviolable, and whoever violated them was handed over to the home State of those ambassadors to be punished according to discretion.

Different were the relations when a treaty of friendship existed. Persons and goods coming from one country into the other stood then under legal protection. So many foreigners came in the process of time to Rome that a whole system of law sprang up regarding these foreigners and their relations with Roman citizens, the so-called *jus gentium*² in contradistinction to the *jus civile*. And a special magistrate, the *praetor peregrinus*, was nominated for the administration of that law. Of such treaties with foreign nations there were three different kinds, namely, of friendship (*amicitia*), of hospitality (*hospitium*), or of alliance (*foedus*). These treaties often contained a provision according to which future controversies could be settled by arbitration of the so-called *recuperatores*.

Precise legal rules existed as regards war and peace. Roman law considered war a legal institution. There were four different just reasons for war, namely: (1) violation of the Roman dominions; (2) violation of ambassadors;

¹ See below, vol. ii. § 279.

² Upon the connection of this term with the *jus inter gentes* or

Law of Nations see Westlake, i. pp. 11-13.

(3) violation of treaties ; (4) support given during war to an opponent by a hitherto friendly State. But even in such cases war was only justified if satisfaction was not given by the foreign State. Four *fetiales* used to be sent as ambassadors to the foreign State from which satisfaction was asked. If such satisfaction was refused, war was formally declared by one of the *fetiales* throwing a lance from the Roman frontier into the foreign land. For warfare itself no legal rules existed, but discretion only, and there are examples enough of great cruelty on the part of the Romans. Legal rules existed, however, for the ending of war. War could be ended, first, through a treaty of peace, which was then always a treaty of friendship. War could, secondly, be ended by surrender (*deditio*). Such surrender spared the enemy their lives and property. War could, thirdly and lastly, be ended through conquest of the enemy's country (*occupatio*). It was in this case that the Romans could act according to discretion with the lives and the property of the enemy.

It thus appears that the Romans gave to the future the example of a State with *legal*¹ rules for its foreign relations. As the legal people *par excellence*, the Romans could not leave their international relations without legal treatment. And though this legal treatment can in no way be compared to modern International Law, yet it constitutes a contribution to the Law of Nations of the future, in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations.

§ 41. The Roman Empire gradually absorbed nearly the whole civilised ancient world, so far as it was known to the Romans. They hardly knew of any independent civilised States outside the borders of their Empire. There was, therefore, neither room nor need for an International Law as long as this Empire existed. It is true that at the borders of this World Empire there were always wars, but these wars gave opportunity for the practice of a few rules and

Law
of Nations
during the
Middle
Ages.

¹ But essentially municipal rather than international.

usages only. And matters did not change when under Constantine the Great (306-337) the Christian faith became the religion of the Empire and Byzantium its capital instead of Rome, and, further, when in 395 the Roman Empire was divided into the Eastern and the Western Empires.¹ The Western Empire disappeared in 476, when Romulus Augustulus, the last emperor, was deposed by Odoacer, the leader of the Germanic soldiers, who made himself ruler in Italy. The land of the extinct Western Roman Empire came into the hands of different peoples, chiefly of Germanic extraction. In Gallia the kingdom of the Franks sprang up in 486 under Chlodovech the Merovingian. In Italy the kingdom of the Ostrogoths under Theodoric the Great, who defeated Odoacer, rose in 493. In Spain the kingdom of the Visigoths appeared in 456. The Vandals had, as early as 429, erected a kingdom in Africa, with Carthage as its capital. The Saxons had already gained a footing in Britannia in 449.

All these peoples were barbarians in the strict sense of the term. Although they had adopted Christianity, it took hundreds of years to raise them to the standard of a more advanced civilisation. And, likewise, hundreds of years passed before different nations emerged out of the amalgamation of the various peoples that had conquered the old Roman Empire with the residuum of the population of that Empire. It was in the eighth century that matters became more settled. Charlemagne built up his vast Frankish Empire and, in 800, was crowned Roman Emperor by Pope Leo III. Again the whole world seemed to be one empire, headed by the Emperor as its temporal and by the Pope as its spiritual master, and for an International Law there was therefore no room and no need. But the Frankish Empire did not last long. According to the Treaty of Verdun it was, in 843, divided into three parts, and with that division the process of development

¹ On some aspects of the law of nations of that period as expressed in the writings of St. Augustine see De Briere in *Revue de philosophie*, xxx. (1930) pp. 566 *et seq.*; Koster in

R.I., 3rd ser., 14 (1933), pp. 31-61, 282-317, 634-676. See also Hrabar in *R.I. (Paris)*, 18 (1936), pp. 2-39, 373-439, and Wright, *Medieval Internationalism* (1930).

set in, which led gradually to the rise of the several States of Europe.

In theory, the Emperor of the Germans remained for hundreds of years to come the master of the world ; but in practice he was not even master at home, as the German Princes, step by step, succeeded in establishing their independence. And although, theoretically, the world was well looked after by the Emperor as its temporal and the Pope as its spiritual head, there were constantly treachery, quarrelling, and fighting going on. The practice in war was the most cruel possible. It is true that the Pope and the Bishops succeeded on occasions in mitigating such practice, but as a rule there was no influence of the Christian teaching visible.

§ 42. The necessity for a Law of Nations did not arise until a multitude of States absolutely independent of one another had successfully established themselves. That process of development, starting from the Treaty of Verdun of 843, reached its climax with the reign of Frederic III., Emperor of the Germans from 1440 to 1493. He was the last of the Emperors crowned in Rome by the hands of the Popes. At that time Europe was, in fact, divided up into a great number of independent States, and thenceforth a law was needed to deal with the international relations of these sovereign States. Seven factors of importance prepared the ground for the growth of principles of a future International Law.

The
Fifteenth
and Six-
teenth
Centuries.

(1) There were, first, the Civilians and the Canonists. Roman Law was, in the beginning of the twelfth century, brought back to the West through Irnerius, who taught this law at Bologna. He and the other *glossatores* and *post-glossatores* considered Roman Law the *ratio scripta*, the law *par excellence*. These Civilians maintained that Roman Law was the law of the civilised world *ipso facto* through the Emperors of the Germans being the successors of the Emperors of Rome. Their commentaries on the *Corpus Juris (civilis)* touch upon many questions of the future International Law, which they discuss from the basis of Roman Law.

The Canonists, on the other hand, whose influence was unshaken till the time of the Reformation, treated from a

moral and ecclesiastical point of view many questions of the future International Law concerning war.¹

(2) There were, secondly, collections of maritime law of great importance which made their appearance in connection with international trade. From the eighth century world trade, which had totally disappeared in consequence of the downfall of the Roman Empire and the destruction of the old civilisation during the period of the migration of the peoples, began slowly to develop again. The sea trade specially flourished, and fostered the growth of rules and customs of maritime law, which were collected into codes, and gained some kind of international recognition. The more important of these collections are the following: The *Consolato del Mare*, a private collection made at Barcelona in Spain in the middle of the fourteenth century²; the *Laws of Oléron*, a collection, made in the twelfth century, of decisions given by the maritime court of Oléron in France; the *Rhodian Laws*, a very old collection of maritime laws which probably was compiled between the seventh and the ninth centuries³; the *Tabula Amalfitana*, the maritime laws of the town of Amalfi in Italy, which date at latest from the tenth century; the *Leges Wisbyenses*, a collection of maritime laws of Wisby on the island of Gothland, in Sweden, dating from the fourteenth century.

The growth of international trade caused also the rise of the controversy regarding the freedom of the high seas (see below, § 248), which indirectly influenced the growth of International Law (see below, §§ 248-250).

(3) A third factor was the numerous leagues of trading towns for the protection of their trade and trading citizens. The most celebrated of these leagues was the Hansatic, formed in the thirteenth century. These leagues stipulated for arbitration on controversies between their member-towns. They acquired trading privileges in foreign States.

¹ See Holland, *Studies*, pp. 40-58; Walker, *History*, i. pp. 204-212. Vanderpol, *La doctrine scolastique du droit de guerre* (1919), and Delos in *R.G.*, 34 (1927), pp. 505-519. And see below, § 52, for the various apprecia-

tions of the forerunners of Grotius.

² See Nys, *Le droit des gens et les anciens juristes espagnols* (1914), pp. 125-138.

³ See Ashburner, *The Rhodian Sea Law* (1909), Introduction, p. cxii.

They even waged war, when necessary, for the protection of their interests.¹

(4) A fourth factor was the growing custom on the part of the States of sending and receiving permanent legations. In the Middle Ages the Pope alone had a permanent legation at the court of the Frankish kings. Later, the Italian Republics, Venice and Florence for instance, were the first States to send out ambassadors, who took up their residence for several years in the capitals of the States to which they were sent. At last, from the end of the fifteenth century, it became a universal custom for the kings of the different States to keep permanent legations at one another's capitals. The consequence was that an uninterrupted opportunity was given for discussing and deliberating upon common international interests. Since the position of ambassadors in foreign countries had to be taken into consideration, international rules concerning inviolability and extraterritoriality of foreign envoys gradually grew up.

(5) A fifth factor was the custom of the great States of keeping standing armies, a custom which also dates from the fifteenth century. The uniform and stern discipline in these armies favoured the rise of more universal rules and practices of warfare.

(6) A sixth factor was the Renaissance and the Reformation.² The Renaissance of science and art in the fifteenth century, together with the resurrection of the knowledge of antiquity, revived the philosophical and aesthetical ideals of Greek life and transferred them to modern life. Through their influence the spirit of the Christian religion took precedence of its letter. The conviction arose that the principles of Christianity ought to unite the Christian world more than they had done hitherto, and that these principles ought to be observed in matters international as much as in matters national. The Reformation, on the other hand, put an end to the spiritual mastership of the Pope over the civilised world. Protestant States could not recognise the claim of the Pope to arbitrate as of right in

¹ See Christoph, *Die Hansestädte und die Habsburgische Ostseepolitik im 30-jährigen Kriege* (1935).

² See Boegner, *op. cit.* at p. 67.

their conflicts either between one another or between themselves and Catholic States.

(7) A seventh factor made its appearance in connection with the schemes for the establishment of eternal peace which arose from the beginning of the fourteenth century. Although these schemes were utopian, they nevertheless must have had great influence by impressing upon the princes and the nations of Christendom the necessity for some kind of organisation of the numerous independent States into a community. The first of these schemes was that of the French lawyer, Pierre Dubois, who, as early as 1305, in *De Recuperatione Terre Sancte*, proposed an alliance between all Christian Powers for the purpose of the maintenance of peace and the establishment of a permanent court of arbitration for the settlement of differences between the members of the alliance.¹ Another project arose in 1461, when Podiebrad, King of Bohemia from 1420 to 1471, adopted the scheme of his Chancellor, Antoine Marini, and negotiated with foreign courts the foundation of a Federal State to consist of all the existing Christian States with a permanent Congress, seated at Basle, of ambassadors of all the member-States as the highest organ of the Federation.² A third plan was that of Sully, adopted by Henry IV. of France, which proposed, in 1603, the division of Europe into fifteen States and the linking together of these into a Federation with a General Council as its highest organ consisting of Commissioners deputed by the member-States.³ A fourth project was that of Émeric Crucé, who, in 1623, proposed the establishment of a Union consisting not only of the Christian States, but of all States then existing in

¹ See Meyer, *Die staats- und völkerrechtlichen Ideen von Pierre Dubois* (1908); Schücking, *Die Organisation der Welt* (1909), pp. 28-30; Vesnitch, *Deux précurseurs français du pacifisme*, etc. (1911), pp. 1-29; Zerk, *Der Publizist Pierre Dubois* (1911); Knight in *Grotius Society*, 9 (1924), pp. 1-16 (with bibliography).

² See Schwitzky, *Der europäische Fürstenbund Georgs von Podiebrad* (1907); Schücking, *Die Organisation der Welt* (1909), pp. 32-36; and Darby

in *Grotius Society*, 4 (1919), pp. 160-108. See also Bagliat, *La Querela Pacis d'Erasmé*, 1517 (1924).

³ See Kükelhahn, *Der Ursprung des Planes vom ewigen Frieden in den Memoiren des Herzogs von Sully* (1893); Nys, *Études de droit international et de droit politique* (1896), pp. 301-306; Darby, *International Tribunals* (4th ed., 1904), pp. 10-21; Butler, *Studies in Statelcraft* (1920), pp. 65-90.

the whole of the world, with a General Council as its highest organ, seated at Venice, and consisting of ambassadors of all the member-States of the Union.¹

II

DEVELOPMENT OF THE LAW OF NATIONS
AFTER GROTIUS

Lawrence, §§ 22-23, and *Essays*, pp. 147-190—Walker, *History*, i. pp. 138-202—Fenwick, pp. 12-26—Nys, i. pp. 23-50—Martens, i. §§ 21-33—Fiore, i. §§ 32-52—Calvo, i. pp. 32-101—Fauchille, §§ 87-146 (10)—Despagnet §§ 20-

¹ See Balch, *Le Nouveau Cygne de Émeric Crucé* (1909); Darby, *International Tribunals* (4th ed., 1904), pp. 22-33; Vesnitch, *Deux précurseurs français du pacifisme*, etc. (1911), pp. 29-54; Butler, *op. cit.*, pp. 91-104.

The schemes enumerated in the text are those which were advanced before the appearance of Grotius' work, *De Jure Belli ac Pacis* (1625). The numerous plans which made their appearance afterwards—that of the Landgrave of Hesse-Rheinfels, 1666; of Charles, Duke of Lorraine, 1688; of William Penn, 1693; of John Bellers, 1710; of the Abbé de Saint-Pierre (1658-1743); of Kant, 1795; and of others—are for the most part discussed in Schucking, *Die Organisation der Welt* (1909); in Darby, *International Tribunals* (4th ed., 1904); in Lorimer, ii. pp. 216-239, who himself develops a scheme (pp. 240-299); in Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung*, vol. i., 1300-1800 (1917), vol. ii. (i.) (1789-1870) (1929), and vol. ii. (ii.) (1940); by Lange in *Hague Recueil*, 1926 (iii.), pp. 176-411; Hemleben, *Plans for World Peace through Six Centuries* (1943); Wohberg in *Études Georges Nelle* (1950), vol. ii., pp. 633-652. See also Kuo Lou, *Conception d'une Fédération Mondiale* (1930), and Alvarez, *L'organisation internationale* (1931). See on the scheme of Cardinal Alberoni (1736), Vesnitch, *Le Cardinal Alberoni Pacifiste* (1912), and in *A.J.*, 7 (1913), pp. 51-107, and Darby in *Grotius Society*, 5 (1920), pp. 71-81; see on the scheme of the Abbé de Saint-Pierre, Soroux d'Agin-

court, *Exposé des projets de paix perpétuelle de l'Abbé de Saint-Pierre et Bentham et Kant*, etc. (1905); Borner, *Über das Weltstaatsprojekt des Abbe de Saint-Pierre* (1913); Dupuis in *R.I. (Paris)*, 2 (1928), pp. 989-1011; Post, *ibid.*, 11 (1933), pp. 218-234. As to Guillaume Aubert, a precursor of Crucé, see Lejeune-Dehousse in *R.I. (Paris)*, 15 (1935), pp. 104-119. See also Bourgeois, *La théorie du droit international chez Proudhon* (1927). As to Kant see Moog, *Kant's Ansichten über Krieg und Frieden* (1917); Vorländer, *Kant und der Gedanke des Völkerfriedens* (1919); Kraus, *Das Problem internationaler Ordnung bei Kant* (1931); Hoor in *Nordisk T.A., Acta Scandinavica*, 5 (1934), pp. 82-89. See also Gargaz, *A Project of Universal and Perpetual Peace*, 1782, edited in New York, 1922. See also Ladd, *An Essay on a Congress of Nations* (1840) (reprinted in 1916 with an Introduction by Scott). For Lord Beauvalé's project in 1840 for a 'League' to preserve peace see Rodkey in *American Historical Review*, 35 (1929-1930), pp. 308-316. The Grotius Society published in 1927 the following texts containing reprints of peace projects with notes: No. 4, *Quakers and Peace*; No. 5, the Abbé de Saint-Pierre's *Abbrégé du Projet de Paix Perpétuelle*; No. 6, Bentham's *Plea for an Universal and Perpetual Peace*; No. 7, Kant's *Perpetual Peace*. The outbreak of the First World War in 1914 caused the appearance of numerous further plans for the establishment of eternal peace (see below, § 167a). As to the literature in the course of and after the Second World War see below, § 168.

- * 27—Mérignhac, i. pp. 43-79—Ullmann, §§ 15-17—Liszt, §§ 3 (ii.), 4—De Louter, i. pp. 96-159—Laurent, *Histoire du droit des gens*, etc., 18 vols. (2nd ed. 1861-1868)—Wheaton, *Histoire des progrès du droit des gens en Europe* (1841)—Pierantoni, *Storia del Diritto internazionale nel Secolo xix.* (1876)—Hosack, *Rise and Growth of the Law of Nations* (1882), pp. 227-319—Brie, *Die Fortschritte des Völkerrechts seit dem Wiener Congress* (1890)—Gareis, *Die Fortschritte des internationalen Rechts im letzten Menschenalter* (1905)—Dupuis, *Le principe d'équilibre et le concert européen de la Paix de Westphalie à l'Acte d'Algésiras* (1909)—Strupp, *Urkunden zur Geschichte des Völkerrechts*, 2 vols. (1911)—Conner, *The Development of Belligerent Occupation* (1912)—Hill, *History of Diplomacy in the International Development of Europe*, vol. iii. (1914)—Muir, *Nationalism and Internationalism* (1916)—Phillimore, *Three Centuries of Treaties of Peace and their Teaching* (1917), pp. 13-111—Dupuis, *Le droit des gens et les rapports des Grandes Puissances avec les autres états avant le pacte de la Société des Nations* (1920)—Nippold in *Hague Recueil*, 1924 (i.), pp. 5-121—Reeves, *ibid.*, (ii.), pp. 19-42—Lange, *ibid.*, 1926 (iii.), pp. 249-411—Vinogradoff in *Bibliotheca Visseriana*, i. (1923), pp. 46-70—Kosters, *ibid.*, iv. (1925) pp. 65-251—Redslob, works cited above in § 37—Goldscheid in *Strupp, Wort.*, iii. pp. 484-496—Butler and Maccohy, *The Development of International Law* (1928), pp. 193-502—Ter Meulen, cited above at p. 83, n. 1—Dickinson, *The International Anarchy*, 1904-1914 (1926)—Mirkin-Guetzévitch, *Les traités internationaux de l'Europe orientale* (1929)—the same in *Hague Recueil*, vol. 22 (1928) (ii.), pp. 299-457 (on the influence of the French Revolution)—Headlam-Morley, *Studies in Diplomatic History* (1930)—Mowat, *The Concert of Europe* (1930)—Simons, *The Evolution of International Public Law in Europe since Grotius* (1931)—Schaefer, *Die dritte Koalition und die heilige Allianz* (1934)—Van Vollenhoven, *The Law of Peace* (transl. from the Dutch, 1936), pp. 81-112—Wegner, *Die Geschichte des Völkerrechts* (1936), pp. 266-300—Nussbaum, *A Concise History of the Law of Nations* (1950)—Hershey in *A.J.*, 6 (1912), pp. 30-67—Pearce Higgins in *Cambridge History of the British Empire*, vol. i. (1929) ch. vi.—Le Fur in *Hague Recueil*, vol. 41 (1932) (iii.), pp. 505-601—van Kan, *ibid.*, vol. 66 (1938) (iv.), pp. 558-597—Lauterpacht in *B.Y.*, 23 (1946), pp. 1-53.

The
Time of
Grotius.

§§ 43-50. The seventeenth century found a multitude of independent States established and crowded on the comparatively small continent of Europe. Many interests and aims knitted these States together into a community of States. International lawlessness was henceforth an impossibility. This was the reason for the fact that Grotius's work, *De Jure Belli ac Pacis, libri iii.*, which appeared in 1625, won the ear of the different States, their rulers, and their writers on matters international. Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied

a legal basis to most of those international relations which were at the time considered as lacking such a basis, the book of Grotius obtained such a world-wide influence that he is correctly styled the 'Father of the Law of Nations.' It would be very misleading, and in no way consistent with the facts of history, to believe that Grotius' doctrines were as a body at once universally accepted. No such thing happened, or could have happened. What did soon take place was that, whenever an international question of legal importance arose, Grotius's book was consulted, and its authority was so overwhelming that in many cases its rules were considered right. How those rules of Grotius, which have more or less quickly been recognised by the common consent of the writers on International Law, have gradually received similar acceptance at the hands of the Family of Nations, is a process of development which in each single phase cannot be ascertained. It can only be stated that by the end of the seventeenth century the civilised States considered themselves bound by a Law of Nations, the rules of which were to a great extent the rules of Grotius. This does not mean that these rules have from the end of that century never been broken. On the contrary, they have frequently been broken. Although the several Governments recognised the Law of Nations when its rules suited their interests, consciously or unconsciously they violated it in many cases, when they thought that a rule was opposed to their interests. But whenever this occurred, the Governments concerned maintained either that they did not intend to break these rules, or that their acts were in harmony with them, or that they were justified by just causes and circumstances in breaking them. The development of the Law of Nations did not come to a standstill with the reception of the bulk of the rules of Grotius. More and more rules were gradually required, and therefore gradually grew up. All the historically important events and facts of international life from the time of Grotius down to our own have, on the one hand, given occasion for the manifestation of the existence of a Law of Nations, and, on the other hand, in their turn made the Law of Nations constantly and gradually

develop into a more perfect and more complete system of legal rules.¹

Lessons
of the
History
of the
Law of
Nations.

§ 51. In particular, there are certain lessons which may be derived from a study of that period.²

(1) The first moral is that the progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government,

¹ In §§ 44-50c of the first four editions of this treatise there followed a survey of the principal historical events from 1648 to 1928. For various reasons, including reasons of space, these sections have now been omitted. But it has been useful to retain and to bring up to date the bibliography relating to the development of International Law during that period. As to the period up to the First World War see the bibliography on p. 83. As to the period during and since the First World War see: Garner, *International Law and the World War*, 2 vols. (1920) (cited as 'Garner'), *Recent Developments in International Law* (1925) (cited as 'Garner, Developments'), and *Prize Law during the World War* (1927); Fauchille, §§ 146-146 (10); Mérignhac et Lémonon, *Le droit des gens et la guerre de 1914-1918*, 2 vols. (1921); Liszt, § 4, B-F; Schücking, *Die völkerrechtliche Lehre des Weltkrieges* (1917); *Völkerrecht im Weltkrieg*, 4 vols. (1919-1928), by the Investigation Committee of the German Reichstag; Nippold in *Hague Recueil*, 1923, pp. 78-117; Strupp, *Wort.*, iii, pp. 36-148, 204-211, 227-292, 544-635. As to the impulse given to the restatement of International Law see above, § 1, p. 4. As to the Peace Conference and the resettlement of the world after the First World War see Temperley, *History of the Peace Conference*, 6 vols. (1920-1924) (cited as 'Temperley'); *La Documentation Internationale. La Paix de Versailles*, 12 vols. (1930); Toynbee's annual *Survey of International Affairs* from 1920 onwards (cited as 'Toynbee, Survey') and Toynbee, *The World after the Peace Conference* (1925); Hershey, §§ 86c-86f; Mowat, *A History of European Diplomacy, 1914-1925* (1927). For literature upon the causes of the war see below, vol. ii. § 62 (n.), and Osoch,

Recent Revelations of European Diplomacy (1927) (a survey of post-war literature). The following are bibliographies: Prothero, *Select Analytical List of Books concerning the Great War* (1923); Hall, *British Archives and the Sources for the History of the World War* (1925); Wegerer, *Bibliographie zur Vorgeschichte des Weltkrieges* (1934). See also Gathorne Hardy, *A Short History of International Affairs, 1920-1934* (1934); Wegner, *Die Geschichte des Völkerrechts* (1936), pp. 301-353; Van Vollenhoven, *The Law of Peace* (translated from Dutch), 1936, pp. 160-221; Rappard, *The Quest for Peace* (1940).

² No change has been made by the present editor in the wording of this section except that certain passages have been omitted, namely, those relating to dynastic wars and to the balance of power. As to the latter see Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), pp. 40-50. On the balance of power see Donnadieu, *Essai sur la théorie de l'équilibre* (1900); Kaeber, *Der Idee des europäischen Gleichgewichts* (1907); Dupuis, works cited above, § 43; Tardieu, *La France et les alliances; la lutte pour l'équilibre* (1909); Hoijer, *La théorie de l'équilibre et le droit des gens* (1917); Ter Meulen, *Der Gedanke der internationalen Organisation* (1917), pp. 38-60; Vestal, *The Maintenance of Peace* (1920); Scott, *The Development of Modern Diplomacy* (1921); Wright, *The Causes of War and Conditions of Peace* (1935), pp. 49-72, and the same, *A Study of War* (1942), pp. 743-766; Schwarzenberger, *Power Politics* (2nd ed., 1951), pp. 178-185. See also Triepel, *Die Hegemonie, Ein Buch von führenden Staaten* (1938); Spencer in *A.J.*, 9 (1915), pp. 45-71; Wistrand, *ibid.*, 15 (1921), pp. 523-529; Gross in *A.J.*, 42 (1948), p. 27.

or, what is the same thing, of democracy over autocracy. Autocratic government, not being responsible to the nation it dominates, has a tendency to base the external policy of the State, just as much as its internal policy, on brute force and intrigue; whereas constitutional government cannot help basing both its external and its internal policy ultimately on the consent of the governed. And although it is not at all to be taken for granted that democracy will always and everywhere stand for international right and justice, so much is certain, that it excludes a policy of personal aggrandisement and insatiable territorial expansion, which in the past has been the cause of many wars.

(2) The second moral is that the principle of nationality¹ is of such force that it is fruitless to try to stop its victory. Wherever a community of many millions of individuals, who are bound together by the same blood, language, and interests, become so powerful that they think it necessary to have a State of their own, in which they can live according to their own ideals, and can build up a national civilisation, they will certainly get that State sooner or later. What international politics can, and should, do is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority.² States embracing a population of several nationalities can exist and will always exist, as many examples show.

(3) The third moral is that the progress of International Law depends to a great extent upon whether the legal school of international jurists prevails over the diplomatic school.³ The legal school desires International Law to

¹ See Le Fur in *R.I.*, 3rd ser., ii. (1921), pp. 193-224, 385-414. And see Holland Rose, *Nationality in Modern History* (1916); Haver, *Essays on Nationalism* (1926), and *The Historical Evolution of Modern Nationalism* (1931); Quincy Wright, *A Study of War* (1942), vol. ii, pp. 986-1011. *Nationalism. A Report by a Study Group of the Royal Institute of International Affairs* (1940); Friedmann *The Crisis of the National State* (1943); Kohn, *The Idea of Nationalism* (1944);

Hertz, *Nationalism in History and Politics* (1944); Carr, *Nationalism and After* (1945); Cobban, *National Self-Determination* (1945).

² See below, §§ 340b-340d.

³ These schools are here referred to as 'diplomatic' and 'legal' for want of a better denomination. They must, however, not be confounded with the three schools of the 'Naturalists,' 'Positivists,' and 'Grotians,' details concerning which will be given below, §§ 55-57.

develop more or less on the lines of Municipal Law, aiming at the codification of firm, decisive, and unequivocal rules of International Law, and working for the establishment of international courts for the purpose of the administration of international justice. The diplomatic school, on the other hand, considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm and precise rules. The diplomatic school opposes the establishment of international courts because it considers diplomatic settlement of international disputes, and, failing this, arbitration, preferable to international administration of justice by international courts composed of permanently appointed judges. There is, however, no doubt that international courts are urgently needed, and that the rules of International Law require now an authoritative interpretation and administration such as only an international court can supply.

(4) The fourth, and last, moral, is that the progressive development of International Law depends chiefly upon the standard of public morality on the one hand, and, on the other, upon economic interests. The higher the standard of public morality rises, the more will International Law progress. And the more important international economic interests grow, the more International Law will grow. For, looked upon from a certain standpoint, International Law is, just like Municipal Law, a product of moral and of economic factors and at the same time the basis for a favourable development of moral and economic interests. This being an indisputable fact, it may, therefore, fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour.

III

THE SCIENCE OF THE LAW OF NATIONS

Phillimore, i. Preface to the first edition. Lawrence, §§ 22-29. Walker, *History*, i. pp. 203-337, and *The Science of International Law* (1893), *passim*. - Wheaton, §§ 4-13. - Fenwick, ch. iii. - Rivier in *Holtzendorff*, i. pp. 395-523. - Nys, i. pp. 224-351. - Martens, i. §§ 34-38. - Fiore, i. §§ 53-88, 164-185, 240.

272—Anzilotti, pp. 1-40 Brierly, pp. 9-33 Calvo, i. pp. 27-34, 45-46, 51-55, 61-63, 70-73, 101-137—Fauchille, §§ 35-37, 147-153 (2) —Despagnet, §§ 28-35—Ullmann, § 18—Liszt, §§ 5, 6 —Kohler, §§ 1, 21 —Cruchaga, i. §§ 122-127 —Kaltenborn, *Die Vorläufer des Hugo Grotius* (1848)—Holland, *Studies*, pp. 1-58, 167-175 Westlake, *Papers*, pp. 23-77 Ward, *Enquiry into the Foundation and History of the Law of Nations*, 2 vols. (1795)—Reddie *Enquiries in International Law*, 2nd ed. (1851), pp. 27-108—Bulmerincq, *Die Systematik des Völkerrechts* (1858)—Nys, *Le droit de la guerre et les précurseurs de Grotius* (1882), *Notes pour servir à l'histoire . . . du droit international en Angleterre* (1888), *Les origines du droit international* (1894), *Le droit des gens et les anciens jurisconsultes espagnols* (1914), and in *A.J.*, 6 (1912), pp. 1-29, 279-315—Wheaton, *Histoire des progrès du droit des gens en Europe* (1841) —Figgis, *From Gerson to Grotius* (1907)—Vanderpol, *Le droit de guerre d'après les théologiens et les canonistes du moyen âge* (1911) and *La doctrine scolastique du droit de guerre* (1919)—Focherini, *La dottrina canonica del diritto della guerra da S. Agostino a Balthazar d'Ayala* (1912) Schilling, *Das Völkerrecht nach Thomas von Aquin* (1919)—Mier-Somlo in *Strupp*, *Wort.*, iii. pp. 212-227—Knubben, *ibid.*, pp. 227-292 (with a full bibliography) —Holdsworth, *History of English Law*, vol. v. (1924), pp. 25-60—Wright, *Research in International Law since the War* (1930) —Scott, *The Spanish Origin of International Law. Francisco de Vitoria and his Law of Nations* (1934), and the same, *The Catholic Conception of International Law* (1934) —Eppstein, *The Catholic Tradition of the Law of Nations* (1935) —Oppenheim in *A.J.*, 1 (1908), pp. 313-356—Pollock in *The Cambridge Modern History*, xii. (1910), pp. 703-729—Nys in *R.I.*, 2nd ser., 14 (1912), pp. 360, 494, 614, and 16 (1914), pp. 215-286 Serille in *R.G.*, 30 (1923), pp. 116-142—Brierly in *B.Y.*, 5 (1924), pp. 4-16—Lauterpacht, *ibid.*, 8 (1927), pp. 89-107—Wehberg in *Friedenswarte*, xix. (1929), pp. 163-172—Vitta in *Rivista*, 21 (1929), pp. 501-525—Kunz in *Z.d.R.*, 14 (1931), pp. 318-335 (as to the United States)—Akzin in *Iowa Law Review*, 20 (1935), pp. 774-784—Castberg in *Hague Recueil*, vol. 43 (1933) (i.), pp. 313-381—Catellani, *ibid.*, 46 (1933) (iv.), pp. 709-825—Pearce Higgins, *ibid.*, 40 (1932) (ii.), pp. 5-57—Lunstedt in *New York University Law Quarterly Review*, 10 (1932-1933), pp. 326-340—Brierly in *L.Q.R.*, 51 (1935), pp. 24-35—Moore in *H.L.R.*, 60 (1937), pp. 395-448—Kelsen in *O.Z.o.R.*, 1 (1946), pp. 20-83—Schwarzenberger in *H.L.R.*, 60 (1947), pp. 539-570—See also A. de La Pradelle, *Maîtres et Doctrines du droit des gens* (2nd ed., 1950) and the bibliographies enumerated below in § 61, and literature in n. 2 on p. 4 and n. 7 on p. 107.

§ 52. The science of the modern Law of Nations commenced from Grotius's work, *De Jure Belli ac Pacis, libri iii.* because in it a fairly complete system¹ of International Law was for the first time built up as an independent branch of the science of law. But there were many writers before Grotius who wrote on special parts of the Law of

¹ For an analysis of the work of Grotius see Walker, *History*, pp. 284-329. See also Lauterpacht in *B.Y.*, 23 (1946), pp. 1-53. See also Otten-

waldner, *Zur Naturrechtslehre des Hugo Grotius* (1950) and Van Deynse, *Hugo Grotius* (1952).

Nations. They are therefore commonly called 'forerunners of Grotius.' The most important of these forerunners are the following: (1) Legnano, Professor of Law in the University of Bologna, who wrote in 1360 his book, *De Bello, de Represaliis, et de Duello*, which was, however, not printed until 1477¹; (2) Belli (1502-1575), an Italian jurist and statesman, who published in 1563 his book, *De Re militari et de Bello*²; (3) Brunus (1491-1563), a German jurist, who published in 1548 his book, *De Legationibus*; (4) Vitoria (1480-1546), professor in the University of Salamanca, whose *Relectiones theologicæ*,³ which partly deal with the Law of War, were published after his death, in 1557; (5) Ayala (1548-1584), of Spanish descent but born in Antwerp, a military judge in the army of Alexandro Farnese, the Prince of Parma. He published in 1582 his book, *De Jure et Officiis bellicis et Disciplina militari*⁴; (6) Suarez⁵ (1548-1617), a Spanish Jesuit and professor at Coimbra, who published in 1612 his *Tractatus de Legibus ac Deo legislatore*, in which (ii. c. 19, n. 8) for the first time an attempt is made to found a law between the States on the fact that they form a community of States; (7) Gentilis (1552-1608), an Italian jurist, who became Professor of Civil Law at Oxford. He

¹ Edited in Scott's *Classics of International Law*, by Holland, with an English translation by Brierly (1917).

² Edited in Scott's *Classics of International Law*, with an English translation by Nutting (1937).

³ See details in Holland, *Studies*, pp. 51-52; the analysis in Walker, *History*, pp. 215-229; Trelles, *Francisco de Vitoria* (1928), and in *Hague Recueil*, vol. 17 (1927) (ii.), pp. 113-337; Scott, Wright, and others in *Addresses in Commemoration of the Fourth Centenary of De Indis et De Jure Belli* (Washington, 1933); Regada, 'El derecho de gentes según Vitoria,' in *Anuario de la Asociación F. de Vitoria*, vi. (1933) pp. 37-41; and, in particular, Scott, *The Spanish Origin of International Law*. Francisco de Vitoria and his Law of Nations (1934); the same, *The Catholic Conception of International Law* (1934); Heydte in *Z.ä.R.*, 13 (1933), pp. 239-

268 (with a bibliography); Gasa in *Revista de derecho internacional*, 36 (1939), pp. 77-116, 145-169. The parts dealing with the Law of War, namely, *De Indis et de Jure Belli Relectiones*, were re-edited in 1917 by Nys in Scott's *Classics of International Law*, with an English translation by Bate. See also Henkert, *The Thomistic Conception of International Society* (1942); Muñoz in *The Thomist*, January 1947; Brierly in *Dublin Review*, July 1947.

⁴ Edited in Scott's *Classics of International Law*, by Westlake, with an English translation by Bate (1912). On Ayala see Nys in *R.I.*, 2nd ser., 15 (1913), pp. 225-239, and Knight in *J.C.L.*, 3rd ser., vol. 3 (1921), pp. 220-227.

⁵ See Sherwood in *Grotius Society*, 12 (1927), pp. 19-28; Schuster in *Z.ä.R.*, 16 (1936), pp. 487-495; Trelles in *Hague Recueil*, vol. 43 (1933) (i.), pp. 389-546; and Scott, *op. cit.* above, n. 2.

published in 1585 his work, *De Legationibus*,¹ in 1588 and 1589 his *Commentationes de Jure Belli*, and in 1598 an enlarged work on the same matter under the title, *De Jure Belli, libri tres*.² His *Advocatio Hispanica* was edited, after his death, in 1613 by his brother Scipio. Gentilis' book, *De Jure Belli*, supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotius's *De Jure Belli ac Pacis*. 'The first step'—Holland rightly says—'towards making International Law what it is was taken, not by Grotius, but by Gentilis.'

§ 53. Although Grotius owes much to Gentilis, he is Grotius. nevertheless the greater of the two, and bears by right the title of 'Father of the Law of Nations.' Hugo Grotius³ was born at Delft in Holland in 1583. He was from his earliest childhood known as a 'wondrous child' on account of his marvellous intellectual gifts and talents. He began to study law at Leyden when only eleven years old, and at the age of fifteen he took the degree of Doctor of Laws at Orleans in France. He acquired a reputation, not only as a jurist, but also as a Latin poet and a philologist. He first practised as a lawyer, but afterwards took to politics and became involved in political and religious quarrels

¹ Edited in Scott's *Classics of International Law*, with an introduction by Nys and a translation by Laing (1924).

² Re-edited in 1877 by Holland, and in Scott's *Classics of International Law*, with a translation by Rolfe and an introduction by Phillipson (1933). On Gentilis see Holland, *Studies*, pp. 1-39; Westlake, *Papers*, pp. 33-36; Walker, *History*, i. pp. 249-277; Thanum, *Albericus Gentilis und seine Bedeutung für das Völkerrecht* (1896); Baraj, *Alberico Gentili* (1935); Phillipson in *J.C.L.*, New Ser., 12 (1912), pp. 52-80; Balch in *A.J.*, 5 (1911), pp. 665-679; Abbot in *A.J.*, 10 (1916), pp. 737-748.

³ See Vreeland, *Hugo Grotius* (1917); and in *A.J.*, 11 (1917), pp. 580-606. The tercentenary in 1925 of the publication of Grotius's great work was responsible for the output of a mass of new literature of which the following may be mentioned: Knight, *The Life and Works of Hugo*

Grotius (1925); van Vollenhoven in *Bibliotheca Vissersiana*, vi. (1926) pp. 5-44, and in *A.J.*, 19 (1925), pp. 1-11; Lysen, *Hugo Grotius, opinions sur sa vie et ses œuvres* (1926); Ter Meulen, *Concise Bibliography of Hugo Grotius* (1925); Higgins, *The Work of Grotius in Cambridge Legal Essays* (1926); Scott in *A.J.*, 19 (1925), pp. 461-468; Roscoe Pound, *ibid.*, pp. 685-688; van Eysinga in *R.I.*, 3rd ser., 6 (1925), pp. 269-279; Scott, *ibid.*, pp. 481-527; Hrabar, *ibid.*, pp. 537-555; Bourquin, *ibid.*, 7 (1926), pp. 86-125; van der Vlugt in *Hague Recueil*, 1925 (n.), pp. 397-506; Geyl in *Grotius Society*, 12 (1927), pp. 81-96; Balogh in *New York University Law Quarterly Review*, 7 (1929-1930), pp. 261-292. And see Lee in *Proceedings of the British Academy*, 16 (1930), pp. 218-279, n. *L.Q.R.*, 62 (1946), pp. 53-57, and in *Grotius Society*, 31 (1946), pp. 193-215; Sandifer in *A.J.*, 34 (1940), pp. 459-472; Lauterpacht in *B.Y.*, 23 (1946), pp. 1-53.

which led to his arrest in 1618 and condemnation to prison for life. In 1621, however, he succeeded in escaping from prison, and went to live for ten years in France. In 1634 he entered the service of Sweden and became Swedish Minister in Paris. He died in 1645 at Rostock in Germany on his way home from Sweden, whither he had gone to tender his resignation.

Even before he had the intention of writing a book on the Law of Nations, Grotius took an interest in matters international. For in 1609, when only twenty-four years old, he published—anonymously at first—a short treatise under the title *Mare liberum*, in which he contended that the open sea could not be the property of any State, whereas the contrary opinion was generally prevalent.¹ But it was not until fourteen years later that Grotius began, during his exile in France, to write his *De Jure Belli ac Pacis, libri iii.*,² which was published, after a further two years, in 1625, and of which it has rightly been maintained that no other book, with the single exception of the Bible, has ever exercised a similar influence upon human minds and matters.

Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of a Law of Nations as were eternal, unchangeable, and independent of the special consent of the single States. Long before Grotius, the opinion was generally prevalent that above the positive law, which had grown up by custom or by legislation of a State, there was in existence another law which had its roots in human reason, and which could therefore be discovered without any knowledge of positive law. This law of reason was called Law of Nature or Natural Law. But the system of the Law of Nature which Grotius

¹ See, for details with regard to the controversy concerning the freedom of the open sea, below, §§ 248-250. Grotius's treatise, *Mare liberum*, is—as we know now—the twelfth chapter of the work *De Jure Prædæ*, written in 1604 but never published by Grotius; it was not printed till 1808: see below, § 250. A new edition by J. B. Scott, with an English transla-

tion by Magoffin, appeared in New York (1917). *De Jure Prædæ Commentarius* was published in 1949 by the Carnegie Endowment, with a translation by Williams.

² Edited in Scott's *Classics of International Law*, with a translation by Kelsey and an introduction by Scott (1925).

built up, and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence, so that Grotius appeared to posterity as the Father of the Law of Nature as well as the Father of the Law of Nations.¹

Whatever may have been the changing fortunes of the doctrine of the Law of Nature, the fact remains that, for more than two hundred years after Grotius, jurists, philosophers and theologians firmly believed in it. But for the systems of the Law of Nature and the doctrines of its prophets, modern Constitutional Law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern Law of Nations in particular owes its very existence to the theory of the Law of Nature. Grotius took the decisive step of secularising the law of nature and emancipating it from purely theological doctrine. He did not deny that there already existed in his time a good many customary rules for the international conduct of the States, but he expressly kept them apart from those rules which he considered the outcome of the Law of Nature. He distinguishes, therefore, between the *Jus Gentium*, the customary Law of Nations—he calls it *Jus voluntarium*, voluntary Law—and the *Jus Naturae*, concerning the international relations of the States, afterwards called the *natural* Law of Nations. The bulk of Grotius's interest is concentrated upon the natural Law of Nations, since he considered the voluntary of minor importance. But, nevertheless, he does not altogether neglect the voluntary Law of Nations. Although he mainly and chiefly lays down the rules of the natural Law of Nations, he always mentions also voluntary rules concerning the different matters.

¹ See Pollock, *The History of the Law of Nature*, in *J.C.L.*, New Ser., 2 (1900), pp. 418-433, and 3 (1901), pp. 204-213 (reprinted in Pollock, *Essays in the Law* (1922)). The 'new' Law of Nature—see Charmant, *La renaissance du droit naturel* (1910)—

is something quite different from the Law of Nature taught by Grotius and his followers. See below, § 59, p. 107, n. 7. And see Stapleton, *Justice and World Society* (1943), and Lauterpacht, *An International Bill of the Rights of Man* (1945), pp. 26-53.

'Grotius's influence was soon enormous, and reached over the whole of Europe. His book¹ went through more than forty-five editions, and many translations have been published.

Zouche.

§ 54. But the modern Law of Nations has another, though minor, founder besides Grotius, and this is an Englishman, Richard Zouche² (1590-1660), Professor of Civil Law at Oxford and a Judge of the Admiralty Court. A prolific writer, the book through which he acquired the title of 'Second founder of the Law of Nations' appeared in 1650, and bears the title: *Juris et Judicii fecialis, sive Juris inter Gentes, et Quaestionum de eodem Explicatio, qua, quae ad Pacem et Bellum inter diversos Principes aut Populos spectant, ex Praecipuis historico Jure peritis exhibentur*.³ This little book has rightly been called the first manual of the *positive* Law of Nations. The standpoint of Zouche is totally different from that of Grotius in so far as, according to him, the customary Law of Nations is the most important part of that law, although, as a child of his time, he does not at all deny the existence of a natural Law of Nations. It must be specially mentioned that Zouche was the first who used the term *Jus inter Gentes* for that new branch of law. Grotius knew very well, and says, that the Law of Nations is a law *between* the States, but he called it *Jus Gentium*, and it is due to his influence that until Bentham nobody called the Law of Nations *International Law*.

The distinction between the natural Law of Nations, chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche,⁴ gave rise in

¹ See Rivier in *Holtendorff*, i. p. 412. An English translation was published in 1854 by William Whewell. See Reeves in *AJ*, 19 (1925), pp. 251-262, for a bibliographical account, and Ter Meulen and Diermanse, *Bibliographie des écrits imprimés de Hugo Grotius* (1930) (an encyclopaedic work).

² See Phillipson in *J.C.L.*, New Ser., 9 (1908), pp. 281-304.

³ Edited, in Scott's *Classics of International Law*, by Holland, with an English translation by Brierly (1911).

⁴ It should be mentioned that, even before Zouche, another Englishman, John Selden, in his *De Jure naturali et Gentium secundum Disciplinam Ebraeorum* (1640), recognised the importance of the positive Law of Nations. The successor of Zouche as a Judge of the Admiralty Court, Sir Leoline Jenkins (1625-1684), ought also to be mentioned. His opinions concerning questions of maritime law, and in particular prize law, were of the greatest importance for the development of maritime International Law.

the seventeenth and eighteenth centuries to three different schools¹ of writers on the Law of Nations—namely, the ‘Naturalists,’ the ‘Positivists,’ and the ‘Grotians.’

§ 55. ‘Naturalists,’ or ‘Deniers of the Law of Nations,’^{The Naturalists.} is the appellation of those writers who deny that there is any positive Law of Nations whatever as the outcome of custom or treaties, and who maintain that all Law of Nations is only a part of the Law of Nature. The leader of the Naturalists is Samuel Pufendorf² (1632-1694), who occupied the first chair which was founded for the Law of Nature and Nations at a university—namely, that at Heidelberg. Among the many books written by Pufendorf, three are of importance for the science of International Law: (1) *Elementa Jurisprudentiae universalis*, 1666³; (2) *De Jure Naturae et Gentium*, 1672⁴; (3) *De Officio Hominis et Civis juxta Legem naturalem*, 1673.⁵ Starting from the assertion of Hobbes, *De Cive*, xiv. 4, that natural law is to be divided into natural law of individuals and of States, and that the latter is the Law of Nations, Pufendorf⁶ adds that outside this natural Law of Nations no voluntary or positive Law of Nations exists which has the force of real law (*quod quidem legis propriae dictae vim habeat, quae gentes tamquam a superiore profecta stringat*).

The most celebrated follower of Pufendorf was the German philosopher Christian Thomasius (1655-1728), who published in 1688 his *Institutiones Jurisprudentiae*, and in 1705 his *Fundamenta Juris Naturae et Gentium*. Of English Natur-

See Wynne, *Life of Sir Leslie Jenkins*, 2 vols (1740), and Llewelyn Davies in *Grotius Society*, 21 (1935), pp. 149-160.

¹ These three schools of writers must not be confused with the division of the present international jurists into the diplomatic and legal schools: see above, § 51.

² See Phillipson in *J.C.I.*, New Ser., 12 (1912), pp. 233-265.

³ Edited in Scott's *Classics of International Law*, with a translation by Zeydel and an introduction by Wohberg (1931).

⁴ Edited in Scott's *Classics of International Law*, with a translation by

C. H. Oldfather and W. A. Oldfather and an introduction by Simons (1934).

⁵ Edited in Scott's *Classics of International Law*, with a translation by F. G. Moore and an introduction by Schucking (1927).

⁶ *De Jure Naturae et Gentium*, ii. c. 3, § 22. On Leibnitz as an international lawyer see Walter Jones in *B.Y.*, 22 (1945), pp. 1-10. For a comparison of the teaching of Hobbes and Spinoza in relation to international law see Lange in *Acta Scandinavica*, 7 (1936), pp. 83-106. As to Spinoza see Lauterpacht in *B.Y.*, 8 (1927), pp. 89-107.

alists may be mentioned Francis Hutcheson (*System of Moral Philosophy*, 1755), and Thomas Rutherford (*Institutes of Natural Law*, being the Substance of a Course of Lectures on Grotius read in St. John's College, Cambridge, 2 vols. 1754-1756). Jean Barbeyrac (1674-1744), the learned French translator and commentator on the works of Grotius, Pufendorf and others, and, further, Jean Jacques Burlamaqui (1694-1748), a native of Geneva, who wrote *Principes du droit de la nature et des gens*, ought likewise to be mentioned.

The Positivists.

§ 56. The 'Positivists' are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The positivist writers had not much influence in the seventeenth century, during which the Naturalists and the Grotians carried the day, but their time came in the eighteenth century.

Of seventeenth-century writers, the Germans Rachel and Textor must be mentioned. Rachel published in 1676 his two dissertations, *De Jure Naturae et Gentium*,¹ in which he defines the Law of Nations as the law to which a plurality of free States are subjected, and which comes into existence through tacit or express consent of these States.² Textor published in 1680 his *Synopsis Juris Gentium*.³ According to him, the Law of Nations is founded on custom and express agreements.

In the eighteenth century the leading Positivists, Bynkershoek, Moser and Martens, gained an enormous influence.

Cornelius van Bynkershoek⁴ (1673-1743), a celebrated Dutch jurist, never wrote a treatise on the Law of Nations, but gained fame through three books dealing with different

¹ Edited in Scott's *Classics of International Law*, by von Bar, with an English translation by Bato (1916); see Rühlmann in *Z.I.*, vol. 34 (1925), pp. 1-112.

pressum aut tacite initum, quo utilitatis gratia sibi invicem obligantur.

² Edited, in Scott's *Classics of International Law*, by von Bar, with a translation by Bato (1916).

³ *Dissertatio altera, § xvi., Jus utrum gentium est jus plurium liberarum gentium pacto sive placito ex-*

⁴ See Phillipsen in *J.C.L.*, New Ser., 9 (1908), pp. 27-49, and Reibstein in *Archiv des Völkerrechts*, 4 (1953), pp. 1-29.

parts of this law. He published in 1702 *De Dominio Maris*,¹ in 1721 *De Foro Legatorum*, in 1737 *Quaestionum Juris publici, libri ii.*² According to Bynkershoek the basis of the Law of Nations is the common consent of the nations which finds its expression either in international custom or in international treaties.

Johann Jakob Moser (1701-1785),³ a German Professor of Law, published many books concerning the Law of Nations, of which three must be mentioned: (1) *Grundsätze des jetzt üblichen Völkerrechts in Friedenszeiten*, 1750; (2) *Grundsätze des jetzt üblichen Völkerrechts in Kriegszeiten*, 1752; (3) *Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegszeiten*, 1777-1780. Moser's books are a store-house of an enormous number of facts which are of the greatest value for the positive Law of Nations.

Georg Friedrich von Martens (1756-1821), Professor of Law in the University of Göttingen, also published many books concerning the Law of Nations. The most important is his *Précis du droit des gens moderne de l'Europe*, published in 1789, of which William Cobbett published in 1795 at Philadelphia an English translation, and of which as late as 1864 there appeared a new edition at Paris with notes by Charles Vergé. Martens began the celebrated collection of treaties published under the title *Martens, Recueil de traités*.⁴ The influence of Martens was considerable. He is not an exclusive Positivist, since he does not deny the existence of the natural Law of Nations and since he some times refers to the latter where he finds a gap in the positive Law of Nations. But his interest is in the positive Law of Nations, which he builds up historically on international custom and treaties.⁵

¹ Edited by Scott in Scott's *Classics of International Law*, with a translation by Magoffin (1923).

² Edited in Scott's *Classics of International Law*, with a translation by Frank and an introduction by de Louter (1930).

³ For an appreciation of Moser see Verdross in *Z.d.R.*, 3 (1923), pp. 96-102.

⁴ Georg Friedrich von Martens is not to be confused with his nephew Charles de Martens, the author of the *Causés célèbres du droit des gens* and of the *Guide diplomatique*. There was also F. de Martens, Professor of the University of St. Petersburg.

⁵ As to Spanish writers in the 18th century see Herrero in *Hague Recueil*, 81 (1952) (ii), pp. 313-446.

The
Grotians

§ 57. The 'Grotians' stand midway between the Naturalists and the Positivists. They keep up Grotius's distinction between the natural and the voluntary Law of Nations, but, in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, their interest to both alike. Grotius's influence was so enormous that the majority of the authors of the seventeenth and eighteenth centuries were Grotians, but only two of them have acquired a European reputation—namely, Wolff and Vattel.

Christian Wolff (1679-1754), a German philosopher who was first Professor of Mathematics and Philosophy in the Universities of Halle and Marburg and afterwards returned to Halle as Professor of the Law of Nature and Nations, was seventy years of age when, in 1749, he published his *Jus Gentium Methodo scientifica pertractatum*.¹ In 1750 followed his *Institutiones Juris Naturae et Gentium*. Wolff's conception of the Law of Nations is influenced by his conception of the *Civitas Gentium maxima*. The fact that there is a Family of Nations in existence is strained by Wolff into the doctrine that the totality of the States form a world-State above the component member-States, the so-called *Civitas Gentium maxima*.

Emerich de Vattel (1714-1767), a Swiss from Neuchâtel, who entered the service of Saxony and became her Minister at Berne, did not in the main intend any original work, but undertook the task of introducing Wolff's teachings concerning the Law of Nations into the courts of Europe and to the diplomatists. He published in 1758 his work *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*.² But it must be specially mentioned that Vattel expressly rejects Wolff's conception of the *Civitas Gentium maxima* in the preface to his book. Numerous editions of Vattel's book have appeared, and as late as 1863 Pradier-

¹ Edited in Scott's *Classics of International Law*, with a translation by J. H. Drake and an introduction by Nippold (1934).

² Edited, in Scott's *Classics of International Law*, by Lapradelle, together

with a translation by Fenwick (1916); see Staub, *Die völkerrechtlichen Lehren Vattels im Lichte der naturrechtlichen Doktrin* (1922). See also de Montmorency in *J.C.L.*, New Ser., 10 (1909), pp. 17-39.

Fodéré re-edited it at Paris. An English translation by Chitty appeared in 1834 and went through several editions. His influence was very great.

§ 58. Some details concerning the three schools of the Naturalists, Positivists, and Grotians were necessary in view of the influence which they exercised in the development of the science of International Law. The following list of treatises comprises the more important ones only.

Treatises
of the
Nine-
teenth
and Twen-
tieth Cen-
turies.

(1) BRITISH TREATISES

William Oke Manning : Commentaries on the Law of Nations, 1839 ; new ed. by Sheldon Amos, 1875.

Archer Polson : Principles of the Law of Nations, 1848 ; 2nd ed., 1853.

Richard Wildman : Institutes of International Law, 2 vols., 1849-1850.

Sir Robert Phillimore : Commentaries upon International Law, 4 vols., 1854-1861 ; 3rd ed., 1879-1889.

Sir Travers Twiss : The Law of Nations, etc., 2 vols., 1861-1863 ; 2nd ed., vol. i. (Peace) 1884, vol. ii. (War) 1875 ; French translation, 1887-1889.

Sheldon Amos : Lectures on International Law, 1874.

Sir Edward Shepherd Creasy : First Platform of International Law, 1876.

William Edward Hall : A Treatise on International Law, 1880 ; 8th ed., 1924 (by Pearce Higgins).

Sir Henry Sumner Maine : International Law, 1833 ; 2nd ed., 1891 (Whewell lectures, not a treatise).

James Lorimer : The Institutes of the Law of Nations, 2 vols., 1883-1884 ; French translation by Nys, 1885.

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- L. Oppenheim* : International Law, vol. i. (Peace) 1905, vol. ii. (War) 1906 ; 2nd ed., vols. i. and ii., 1912 ; 3rd ed., 1920-1921 (by Roxburgh) ; 4th ed., 1926-1928 (by McNair) ; 5th ed., 1935-1937 (by Lauterpacht) ; 6th ed., 1940-1946 (by Lauterpacht), 7th ed., vol. i. (1948), vol. ii. (1952).
- Baty* : The Canons of International Law, 1930.
- H. A. Smith* : Great Britain and the Law of Nations, a Selection of Documents, vol. i. (1932), vol. ii. (1935).
- J. L. Brierly* : The Law of Nations, 1928 ; 4th ed., 1949.
- Schwarzenberger* . International Law, vol. i. International Law as Applied by International Courts and Tribunals, 2nd ed., 1949.
- Schwarzenberger* : A Manual of International Law, 3rd ed., 1952.
- Starke* : An Introduction to International Law, 2nd ed., 1950.

(2) NORTH AMERICAN TREATISES

- James Kent* : Commentary on International Law, 1826 ; English ed. by Abdy, 1878.
- Henry Wheaton* : Elements of International Law, 1836 , 8th American ed. by Dana, 1866 (reprinted in 1936 in Scott's Classics of International Law, with an Introduction by George Grafton Wilson) ; 3rd English ed. by Boyd, 1889 ; 4th English ed. by Atlay, 1904 ; 5th English ed. by Coleman Phillipson, 1916 ; 6th English ed. by Berriedale Keith, 2 vols., 1929 ; 7th ed., by Berriedale Keith, vol. ii. (1914).
- Theodore D. Woolsey* : Introduction to the Study of International Law, 1860 ; 6th ed. by Th. S. Woolsey, 1891.
- Henry W. Halleck* : International Law, 2 vols., 1861 ; 4th English ed. by Sir Sherston Baker, 1908.
- Francis Wharton* : A Digest of the International Law of the United States, 3 vols., 1886.
- John N. Pomeroy* : Lectures on International Law in Time of Peace, 1886.
- George B. Davis* : The Elements of International Law, 1887 ; 4th ed. by Sherman, 1916.
- Hannis Taylor* : A Treatise on International Public Law, 1901.
- George Grafton Wilson* and *George Fox Tucker* : International Law, 1901 ; 9th ed., 1935.
- Edwin Macey* : International Law, with illustrative cases, 1906.
- John Bassett Moore* : A Digest of International Law, 8 vols., 1906.
- George Grafton Wilson* : Handbook of International Law, 1910 ; 2nd ed., 1927 ; 3rd ed., 1939.
- Charles H. Stockton* : A Manual of International Law, 1911 ; also Outlines of International Law, 1914.

Amos S. Hershey : The Essentials of International Public Law and Organisation, 1912 ; 2nd ed., 1927.

Roland R. Foulke : International Law, 1920.

C. C. Hyde : International Law, chiefly as interpreted and applied by the United States, 2 vols., 1922 ; 2nd ed., 3 vols., 1945.

C. G. Fenwick : International Law, 1924 ; 3rd ed., 1948.

Ellery C. Stowell : International Law, a Restatement of Principles in Conformity with Actual Practice, 1931.

Hackworth : Digest of International Law, 7 vols., 1940-1943.

Kelsen : Principles of International Law, 1952.

(3) FRENCH TREATISES

Funck-Brentano et Albert Sorel : Précis du droit des gens, 1877 ; 2nd ed., 1894.

P. Pradier-Fodéré : Traité de droit international public, 8 vols., 1885-1906.

Alfred Chrétien : Principes de droit international public, 1893.

Henry Bonfils : Manuel de droit international public, 1894 ; 8th ed. by Fauchille, 1922-1926 (referred to in this volume as 'Fauchille').

Frantz Despuget : Cours de droit international public, 1894 ; 4th ed. by De Boeck, 1910.

Robert Prédelle : Précis de droit international public, 2 vols., 1883-1895.

A. Mérignhac : Traité de droit public international, Part I, 1905 ; Part II., 1907 ; Part III., vol. 1., 1912.

Scelle : Précis de droit des gens. Principes et systématique, vol. 1., 1932, vol. 2., 1934.

Scelle : Manuel élémentaire de droit international public, 1943.

Deraux : Traité élémentaire de droit international public, 1935.

Le Fur : Précis de droit international public, 3rd ed., 1936.

Rousseau : Principes généraux du droit international public, vol. 1 1944

Redslob : Traité de droit des gens, 1950.

Cavarié : Le droit international public positif, 2 vols., 1951.

Sibert : Traité de droit international public, 2 vols., 1952.

Rousseau : Droit international public, 1953.

(4) GERMAN TREATISES

Theodor Schmalz : Europäisches Völkerrecht, 1817.

Julius Schmalz : Systematischer Grundriss des praktischen europäischen Völkerrechts, 3 vols., 1818-1820. Also Lehrbuch des europäischen Völkerrechts, 1821.

Johann Ludwig Klüber : *Droit des Gens moderne*, 1819 ; German ed. under the title of *Europäisches Völkerrecht* in 1821 ; last German ed. by Morstadt in 1851, and last French ed. by Ott in 1874.

Karl Heinrich Ludwig Poeltz : *Practisches (europäisches) Völkerrecht*, 1823 ; 2nd ed., 1828.

Friedrich Saalfeld : *Handbuch des positiven Völkerrechts*, 1833.

August Wilhelm Heffter : *Das europäische Völkerrecht der Gegenwart*, 1844 ; 8th ed. by Geffcken, 1888 ; French translations by Bergson in 1851 and Geffcken in 1883.

Heinrich Bernhard Oppenheim : *System des Völkerrechts*, 1845 ; 2nd ed., 1866.

Johann Caspar Bluntschli : *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, 1868 ; 3rd ed., 1878 ; French translation by Lardy, 5th ed., 1895.

Adolph Hartmann : *Institutionen des praktischen Völkerrechts in Friedenszeiten*, 1874 ; 2nd ed., 1878.

Franz von Holtzendorff : *Handbuch des Völkerrechts*, 4 vols., 1885-1889. Holtzendorff is the editor and a contributor, but there are many other contributors

August von Bulmerincq : *Das Völkerrecht*, 1887 ; 2nd ed., 1889.

Karl Gareis : *Institutionen des Völkerrechts*, 1888 ; 2nd ed., 1901.

E. Ullmann : *Völkerrecht*, 1898 ; 2nd ed., 1908.

Franz von Liszt : *Das Völkerrecht*, 1898 ; 12th ed. by Fleischmann, 1925.

Kohler : *Grundlagen des Völkerrechts*, 1918.

Niemeyer : *Völkerrecht*, 1923.

Hatschek : *Das Völkerrecht als System rechtlich bedeutsamer Staatsakte*, 1923 ; English translation by Manning, 1930.

Isay : *Das Völkerrecht*, 1924.

Strupp : *Grundzüge des positiven Völkerrechts*, 1921 ; 5th ed., 1932.

Theorie und Praxis des Völkerrechts, 1925. French edition in 1927 entitled : *Éléments du droit international public universel, européen et américain* ; 2nd ed., 3 vols., 1930.

Wörterbuch des Völkerrechts und der Diplomatie (an encyclopaedia) begun by Hatschek and continued by Strupp, 3 vols., 1924-1929.

Vanselow : *Völkerrecht*, 1931.

Wolgast : *Völkerrecht*, 1934.

Sauer : *Grundlehre des Völkerrechts*, 2nd ed., 1948.

(5) ITALIAN TREATISES

Ludovico Casanova : *Lezioni del diritto internazionale*, published after the death of the author by Cabella, 1853 ; 3rd ed., 2 vols., by Brusa, 1876.

- Pasquale Fiore* : Trattato di diritto internazionale pubblico, 1865 ; 4th ed. in 3 vols., 1904 ; French translation of the 2nd ed. by Antoine, 1885.
- Giuseppe Carnazza-Amari* : Trattato sul diritto internazionale di pace, 2 vols., 1867-1875 ; French translation by Montanari-Revest, 1880-1882. Also Elementi di diritto internazionale, 2 vols., 1866-1874.
- Antonio del Bon* : Istituzioni del diritto pubblico internazionale, 1868.
- Giuseppe Sandona* : Trattato di diritto internazionale moderno, 2 vols., 1870.
- Gian Battista Pertile* : Elementi di diritto internazionale moderno, 2 vols., 1877.
- Augusto Pierantoni* : Trattato di diritto internazionale, vol. i., 1881. (No further volume has appeared.)
- Giovanni Lomonaco* : Trattato di diritto internazionale pubblico, 1905.
- Giulio Diena* : Principi di diritto internazionale, Parte Prima, Diritto internazionale pubblico, 1908 ; 2nd ed., vol. i., 1914, vol. ii., 1917 ; 3rd ed., 1930.
- Dionisio Anzilotti* : Corso di diritto internazionale, vol. i., 1912 ; 3rd ed., 1928 ; French translation by Gidel, 1929 ; vol. iii., part i., 1915. Vol. ii. and part ii. of vol. iii. have not yet appeared.
- G. Cavarretta* : Diritto interstatuale, vol. i., 1914.
- Marino* : Corso di diritto internazionale pubblico, 1917.
- Gemma* : Appunti di diritto internazionale, 1923.
- Perassi* : Lezioni di diritto internazionale, 1922 ; 2 vols., 1934.
- Cavaglieri* : Lezioni di diritto internazionale (general part), 1925 ; Corso di diritto internazionale, 3rd ed., 1934.
- Fedozzi* : Trattato di diritto internazionale, 2nd ed., 1933.
- Romano* : Corso di diritto internazionale, 3rd ed., 1933.
- Olini* : Diritto internazionale pubblico, 3rd ed., 1933.
- Balladore Pallieri* : Diritto internazionale pubblico, 4th ed., 1948.
- Morelli* : Nozioni di diritto internazionale, 3rd ed., 1951.

(6) SPANISH AND SOUTH AMERICAN TREATISES

- Andrés Bello* : Principios de Derecho de Gentes (internacional), 1832 ; last ed. in 2 vols. by Silva, 1883 (Chilean).
- José Maria de Pando* : Elementos del Derecho internacional, published after the death of the author, 1843-1844 ; 2nd ed., 1852 (Peruvian).
- Antonio Riquelme* : Elementos de Derecho público internacional, etc. ; 2 vols., 1849.
- Carlos Calvo* : Le droit international, etc. (first edition in Spanish,

following editions in French), 1868; 5th ed. in 6 vols., 1896 (Argentinian).

M. M. Madieto: Tratado de Derecho de Gentes, 1874 (Colombian).

Amancio Alcorta: Curso de Derecho internacional público, vol. i., 1887; French translation by Lehr, 1887 (Argentinian).

Marquis de Olivart: Tratado y Notas de Derecho internacional público, 2 vols., 1887; 4th ed. in 4 vols., 1903-1904; 5th ed. (abridged), 1 vol., 1906.

Luis Gestoso y Acosta: Curso de Derecho internacional público, 1894; 2nd ed., 1898.

H. Fekner: Manual de Derecho internacional, 2 vols., 1894.

Miguel Cruchaga Torornal: Nociones de Derecho internacional, 1899; 3rd ed., 1923-1925.

Manuel Torres Campos: Elementos de Derecho internacional público; 3rd ed., 1912.

Clovis Bevilacqua: Direito público internacional, 2 vols., 1911 (Brazilian).

S. Planas Suarez: Tratado de Derecho internacional público, 2 vols., 1916 (Venezuelan, although published in Madrid).

Antokoletz: Tratado de Derecho internacional público en tiempo de paz, 3 vols., 1924-1928.

Olivart: El derecho internacional público, 2 vols., 1927.

Ulloa: Derecho internacional público, 2 vols., 1929.

González-Hontoria y Fernández-Landreda: Tratado de derecho internacional público, 4 vols., 1928, 1930.

Accioly: Tratado de Direito internacional público, 3 vols., 1933-1935; French translation by Goulé, vol. i. (1940), vol. ii. (1942), vol. iii. (1942); Spanish translation, 3 vols. (1945-1946)

Moreno: Lecciones de Derecho internacional público, 2 vols., 1934.

Bustamante: Derecho internacional público, vol. i., 1933 (French translation, 1934); vol. ii., 1934 (French translation, 1931); vol. iii., 1936 (French translation, 1936); vol. iv. (1937), vol. v. (1938).

Podesta Costa: Manual de derecho internacional público, 2nd ed., 1947.

Moreno Quintana and Bollini Shaw: Derecho internacional publico, 1950.

• (7) TREATISES OF AUTHORS OF OTHER NATIONALITIES

Frederick Kristian Bornemann: Forelaesninger over den positive Folkeret, 1866 (Danish).

Friedrich de Martens: Völkerrecht, 2 vols., 1883-1886; a German

translation by Bergbohm of the Russian original. A French translation by Léo in 3 vols. appeared 1883-1887. The Russian original went through its 5th ed. in 1905.

Jan Helenus Ferguson : Manual of International Law, etc., 2 vols., 1884. The author is Dutch, but the work is written in English.

Alphonse Rivier : Lehrbuch des Völkerrechts, 1894 ; 2nd ed., 1899, and a larger work in two vols. under the title, *Principes du droit des gens*, 1896. The author of these two excellent books was a French Swiss who taught International Law at the University of Brussels.

H. Matzen : Forelaesninger over den positive Folkeret, 1900 (Danish).

Ernest Nys : Le droit international, 3 vols., 1901-1906 ; new edition, 1912. The author of this exhaustive treatise was a Belgian jurist whose researches in the history of the science of the Law of Nations gained him a far-reaching reputation.

J. De Louter : Het Stellig Volkenrecht, 2 vols., 1910 (Dutch) ; French translation, 1920.

Ulanickij : Myeshdonarodnaye Pravo, 1911 (Russian).

Cybichowski : Prawo narodów, System prawa międzynarodowego, 1915 (Polish).

Vastberg : Folkerett, 1937 (Norwegian).

Boye : Handboog i Folkerett, 1918 (Norwegian).

Séfériales : Principles of International Law, 1920 ; 2nd ed., 1925 (in Greek).

Waldkirch : Völkerrecht, 1926 (Swiss).

Ehrlich : Prawo narodów, 1927 (Polish) ; 2nd ed., 1932.

François : Handboek van het Volkenrecht, vol. i., 1911 ; vol. ii., 1933 (Dutch).

Möller : International Law in Peace and War, 2 vols. in Danish ; 1st ed., 1928 ; 2nd ed., 1933 and 1934 ; English translation, vol. i., 1931 ; vol. ii., 1935.

Hold-Ferneck : Lehrbuch des Völkerrechts, vol. i., 1930 ; vol. ii., 1932 (Austrian).

Hobza : Uvod do mezinárodního práva mírového, 1933 (Czech).

Spiropoulos : Traité théorique et pratique du droit international public, 1933 (Greek).

Verdross : Völkerrecht, 2nd ed., 1950 (Austrian).

Guggenheim : Lehrbuch des Völkerrechts, vol. i., 1948 ; vol. ii., 1951. (The first volume of a revised and enlarged French version appeared in 1953 ; the second in 1954.)

Ross : A Textbook of International Law, 1948 (translation from the Danish).

The
Science of
the Law
of Nations
in the
Nine-
teenth
and Twen-
tieth Cen-
turies

§ 59. The science of the Law of Nations, as left by the French Revolution, developed progressively during the nineteenth century under the influence of three factors. The first factor was the endeavour, on the whole sincere, of the Powers after the Congress of Vienna to submit to the rules of the Law of Nations. The second factor was the many law-making treaties which arose during this century. And the last, but not indeed the least factor, was the rising predominance of positivism over the theory of the Law of Nature. When the nineteenth century opens, the three schools of the Naturalists, the Positivists and the Grotians are still in the field, but Positivism gains slowly and gradually the upper hand, until at the end it may be said to be victorious, without, however, being omnipotent.¹ Writers like Martens, Klüber, Heffter, Phillimore, Calvo, Fiore, Bluntschli, Twiss, Maine, and Westlake, while basing themselves largely on the practice of States, recognised in some form or other a natural Law of Nations. But, on the whole, positivism was victorious at the end of the nineteenth century and the beginning of the twentieth. In denying the validity of sources of International Law other than the will of States it constituted yet another manifestation of the extreme doctrine of State sovereignty which, at that time, was typical of the science of law and of politics. So uncompromising was the positivist attitude that it denied the character of science to any other than the purely positive Law of Nations.²

In the period between the First and Second World Wars, and since, the science of International Law, in keeping both with the trend of legal philosophy³ and with the developments in conventional International Law and arbitral practice, abandoned to a large extent the rigid adherence to the positivist view. The great majority of writers now recognise that the triumph of positivism was not accomplished without

¹ That the triumph of Positivism has not been accomplished without the loss of certain factors making for the development of International Law is shown by Brierly in *B.Y.*, 1924, pp. 4-16.

² This was also the view of the author of this book, and in § 59 of the former editions there will be found

a survey of the treatises of the nineteenth century from the point of view of whether they are 'positivist' or not. See also Oppenheim in *A.J.*, 2 (1908), pp. 313-356.

³ For a survey of that literature see Lauterpacht, *The Function of Law*, p. 61.

the loss of certain important factors making for the development of International Law. It is now generally admitted that, in the absence of rules of law based on the practice of States, International Law may be fittingly supplemented and fertilised by recourse to rules of justice and to general principles of law, it being immaterial whether these rules are defined as a Law of Nature in the sense used by Grotius, or a modern Law of Nature with a variable content, or as flowing from the 'initial hypothesis' of International Law,¹ or from the fundamental assumption of the social nature of States as members of the international community,² or, in short, from reason.³ In fact, recourse to such rules is a frequent feature of the practice of States, especially as evidenced in arbitration conventions, and of judicial and arbitral decisions.⁴ In adopting Article 38 of the Statute of the Permanent Court of International Justice the signatory States sanctioned that practice.⁵ Whatever may have been its merits in the past history of International Law, rigid positivism can no longer be regarded as being in accordance with existing International Law. Probably what has been described above as the Grotian⁶ school comes nearest to expressing correctly the present legal position.⁷

¹ See above, p. 15, n. 1

² See Hall, § 7.

³ Westlake, i pp. 14, 15.

⁴ See above, § 19

⁵ *Ibid.*

⁶ See above, § 57

⁷ See on this point Nelson, *Die Rechtswissenschaft ohne Recht* (1917), pp. 211-224; Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923), pp. 120-125; the same, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), pp. 28-33, and in Strupp, *Wort.*, iii, pp. 292-294; Politis, *The New Aspects of International Law* (English translation, 1928), pp. 14-16, who adopts the 'juridical consciousness of peoples' as the primary source of International Law; Haines, *The Revival of Natural Law Concepts* (1930); Keller, *Droit naturel et droit positif en droit international public* (1931); Drucker, *Die Rechtfertigung des Völkerrechts aus dem Staatswillen*

(1932); Morgenthau, *La réalité des normes* (1934), in *Mélanges Allamira* (1936) and in *A.J.* 71 (1940), pp. 260-284; Lauterpacht, *Colloques*, §§ 20-29 and in Grotius *so ety*, 29 (1943), pp. 1-33; Tahsin, *No Man's Land du droit des gens* (1936); Brierly in *B.Y.*, 5 (1924), pp. 4-16; Koster in *Bibliotheca Visserriana*, iv, (1925) pp. 200-227; Le Fur in *Hague Recueil*, vol. 18 (1927) (iii), pp. 263-441; Bruns in *Z.o.V.*, 1 (1929), pp. 1-56; Ballardore Pallieri in *Annali dell' istituto di scienze giuridiche della Università di Messina*, vi, (1931-1932); Knubben in Strupp, *Wort.*, iii, pp. 227-292; Birkás in *Z.V.*, 17 (1933), pp. 13-25; Scelle in *Mélanges Génin* in (1934); Djurava in *Hague Rec.*, vol. 64 (1938) (ii), pp. 485-616; Truhol in *R.G.*, 54 (1950), pp. 369-416; 55 (1951), pp. 23-40, 199-236; Rousseau, pp. 15-35; Kelsen, *General Theory of Law and State* (1945), pp. 391-418; Keeton and

In so far as the revival of the authority of natural law, in its modern connotation, has tended to undermine the rigid positivism of the nineteenth century, that development received an accession of strength as the result of the experience preceding the Second World War. The rise of the German and other totalitarian dictatorships, trampling upon the rights of man and universally accepted notions of law, once more tended to bring into prominence the importance and the vitality of legal standards which, though they may not be enforceable before municipal courts, are of an enduring validity transcending the positive law of any one sovereign State.¹

§ 60. COLLECTIONS OF TREATIES²

(1) GENERAL COLLECTIONS

Leibnitz : Codex Iuris Gentium diplomaticus (1693), Mantissa Codicis Iuris Gentium diplomatici (1700).

Bernard : Recueil des traités, etc., 4 vols. 1700.

Rymer : Foedera, etc., inter Reges Angliae et alios quosvis Imperatores . . . ab Anno 1101 ad nostra usque Tempora habita aut tractata, 20 vols. 1704-1718 (contains documents from 1101-1654).

Dumont : Corps universel diplomatique, etc., 8 vols., 1726-1731.

Rousset : Supplément au corps universel diplomatique de Dumont, 5 vols. 1739.

Schmauss : Corpus Iuris Gentium academicum (1730).

Wenck : Codex Iuris Gentium recentissimi, 3 vols. 1781, 1786, 1795.

Martens : Recueil de Traités d'Alliance, etc., 8 vols. 1791-1801 ;
Nouveau recueil de Traités d'Alliance, etc., 16 vols. 1817-1842 ;
Nouveaux suppléments au recueil de traités et d'autres actes

Schwarzenberger, *Making International Law Work* (2nd ed., 1946), pp. 133-150 ; Corbett, *Law and Society in International Relations* (1951), pp. 17-35. See the answers given by a number of international lawyers in reply to the inquiry as to whether and how far the Natural Law conception of International Law as taught by Grotius is valid to-day : *Z.I.*, 34 (1925), pp. 113-189 ; Le Fur's reply in *B.J.*, 3rd ser., 6 (1925),

pp. 59-79 ; Bourquin, *ibid.*, 7 (1926), pp. 106-110. See also above, § 1, p. 4, § 15 (Sources of International Law), § 19 (General Principles of Law), and below, § 70 (Sovereignty)

¹ See Lauterpacht, *An International Bill of the Rights of Man* (1945), pp. 3-53. And see below, § 340g.

² See a valuable bibliography by Myers, *Manual of Collections of Treaties and of Collections relating to Treaties* (1922).

- remarquables, etc., 3 vols. 1839-1842; Nouveau recueil général de traités, conventions et autres actes remarquables, etc., 20 vols. 1843-1875; Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international; Deuxième Série, 35 vols. 1876-1908; Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international, Troisième Série, vol. i. 1909, continued up to date.¹
- Ghillany*: *Diplomatisches Handbuch*, 3 vols. 1855-1868.
- Martens et Cussy*: *Recueil manuel*, etc., 7 vols. 1846-1857; continuation by Geffcken, 3 vols. 1885-1888.
- British and Foreign State Papers (Hertslet): vol. i. 1841; continued up to date.
- Das Staatsarchiv: Sammlung der officiellen Actenstücke zur Geschichte der Gegenwart, vol. i. 1861, continued up to date.
- Archives diplomatiques: Recueil mensuel de diplomatie, d'histoire et de droit international, First and Second Series, 1861-1900, Third Series from 1901 continued up to date.
- Recueil international des traités du XIX^{me} Siècle: Edited by Descamps, Renault, and Baslevaut, vol. i. 1915. *
- Recueil international des traités du XX^{me} Siècle: Edited by Descamps and Renault since 1902.
- Strupp*: *Urkunden zur Geschichte des Völkerrechts*, 2 vols. 1911.
- Documents pour servir à l'histoire du droit des gens, 5 vols. 1923 (the second enlarged edition of the preceding work).
- Albin*: *Les grands traités politiques depuis 1815 jusqu'à nos jours*, 2nd ed. 1912.
- Giannini*: *Collezione dei trattati di pace*, 6 vols. 1922-1924.
- League of Nations Treaty Series: Publication of Treaties and International Engagements registered with the Secretariat of the League in English, French, and any other language in which they may be drawn up.
- United Nations Treaty Series (replacing the preceding Series).
- Répertoire général des traités et autres actes diplomatiques; Part I. by Tétot, covering the period 1493-1866; Part II. by Ribier, covering the period 1867-1894; and Part III. by the Institut Intermédiaire International, covering the period 1895-1920, continued in the Bulletin of the Institut. (Not collections of treaties but indexical volumes.)
- Hudson*: *International Legislation*. Washington, Carnegie Endowment for International Peace. . vols. covering the years 1919-1945.

¹ For a history and appreciation of Martens's *Recueils* see Martitz in *Archiv für öffentliches Recht*, vol. 40 (1.) (1921), pp. 22-72.

Le Fur et Chklaver : Recueil de textes de droit international public ; 2nd ed., 1934.

Strupp, Wörterbuch, ii. pp. 663-672, contains a list of Collections of Treaties.

(2) COLLECTIONS OF TREATIES OF PARTICULAR STATES ¹

CHINA

Treaties and Agreements with and concerning China (1891-1919), ed. by Macmurray, 2 vols. 1921.

FRANCE

De Clercq : Recueil des traités, etc., conclus par la France avec les puissances étrangères depuis 1713 jusqu'à 1904.

Basdevant : Traités et conventions en vigueur entre la France et les puissances étrangères, 4 vols. 1918-1922. (Published by the French Foreign Office.)

GERMANY

Handelsverträge des Deutschen Reiches (edited by the Ministry for Internal Affairs) 1906, Supplement 1915.

GREAT BRITAIN

Jenkinson : Collection of all the Treaties, etc., between Great Britain and other Powers from 1648 to 1783, 3 vols. 1785.

Chalmers : A Collection of Maritime Treaties of Great Britain and other Powers, 2 vols. 1790.

Hertslet : Collection of Treaties and Conventions between Great Britain and other Powers, so far as they relate to Commerce and Navigation, etc. (vol. 1. 1820, continued to date).

Treaty Series : vol. i. 1892, and a volume every year (referred to in this volume as 'Treaty Series').

Handbook of Commercial Treaties with Foreign Powers. 4th ed., 1931.

ITALY

Trattati e convenzione fra il Regno d' Italia e gli Altri Stati. Published since 1861 under the auspices of the Ministry of Foreign Affairs. 42 volumes till 1936.

¹ This list includes the collections of treaties published in the principal countries only. Most countries now

publish official or unofficial collections of their treaties.

JAPAN

Treaties and Conventions between the Empire of Japan and other Powers: compiled by the Foreign Office, Yokohama, 1871; 5th ed., 1908.

Traité et conventions entre l'empire du Japon et les puissances étrangères: Ministère des affaires étrangères, Tokyo, 2 vols. 1908-1912.

RUSSIA

Recueil des traités et conventions conclus par la Russie avec les puissances étrangères, publié d'ordre du Ministère des affaires étrangères: ed. by F. de Martens, 15 vols. 1874-1909.

Freund: *Russland's Friedens- und Handelsverträge*, 1918-1923 (1924).

Collection of Treaties, Agreements, and Conventions now in force with Foreign States, published in Russian by the People's Commissariat for Foreign Affairs (1924-1925).¹

SPAIN

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¹ See also collections of recent Russian Treaties mentioned in Kelmann and Freund, *Die juristische Literatur Sowjetrusslands* (1928), pp.

99-101; and see Taracouzio, *The Soviet Union and International Law* (1935), pp. 450-480 (an exhaustive list of treaties).

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¹ A detailed list of digests and collections of judicial decisions, national and international, will be found in Hudson, *Cases*, pp. xxii-xxv. Of the digests and collections of decisions the most important are: *Annual Digest and Reports of Public International Law Cases*: 1919-1948 (see above, List of Abbreviations); *Fontes Juris Gentium* (ed. by Bruns): Series A, Part I., vols. 1 and 3, Digest of the Decisions of the Permanent Court of International Justice, 1922-1930 (1931) and 1931-1934 (1935); Series A, Part I., vol. 2, Digest of the Decisions of the Permanent Court of Arbitration, 1902-1928 (1931); Series A, Part II., vol. 1, Decisions of the German Supreme Court relating to International Law, 1879-1929 (1931); Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 6 vols (1898), and *International Adjudications, Ancient and Modern*, vols. 1 and 2, Saint Croix River Arbitration (1929, 1930); vol. 3, Recovery of Pre-War Debts: Mixed Commission under Article 6 of the Treaty of 1794 (1931); vol. 4, Neutral Rights and Neutral Duties: Mixed Commission under Article 7 of the Treaty of 1794 (1931); vol. 5, I. Spanish Spoliations, 1795; II. French Indemnity, 1803; III. French Indemnity, 1831 (1933); vol. 6, Title to Islands in Passamaquoddy Bay and the Bay of Fundy: Mixed Commission under Article 4 of the Treaty of 1814 (1933); Permanent Court of International Justice, Series A, Nos. 1-24, Judgments (1923-1930); Series B, Nos. 1-18, Advisory Opinions (1922-1930); Series A/B, Nos. 40 et seq.: Judgments,

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Zeitschrift für internationales Recht

Annuaire de l'Institut de Droit International.

Rivista di Diritto internazionale

Zeitschrift für Völkerrecht

American Journal of International Law.

Proceedings of the American Society of International Law.

Journal du droit international ¹ Mainly devoted to Private International Law.

Grotius Society's Transactions London.

Revista de Derecho Internacional, the organ of the American Institute of International Law.

British Year Book of International Law.

Revista Argentina de Derecho Internacional.

Revista Peruana de Derecho Internacional.

Académie de Droit International, Recueil des Cours; lectures delivered at the Hague Academy of International Law.¹

¹ On the Hague Academy of International Law see Mazel in *Répertoire*, t. pp. 93-102.

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Revue internationale française du droit des gens.

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Die Friedenswarte.

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International Law Quarterly.

International Organization.

Jahrbuch für internationales und ausländisches öffentliches Recht.

Jahrbuch für Internationales Recht.

Archiv des Völkerrechts.

Inter-American Juridical Yearbook.

Revue Hellénique de droit international.

The United Nations Bulletin and the Bulletin of the United States Department of State —both official publications— contain useful and up-to-date material.

Japanese Journal of International Law and Diplomacy.

Revue Egyptienne de droit international.

Revista Española de derecho internacional.

Netherlands International Law Review.

Revue de droit international pour le Moyen Orient.

PART I

THE SUBJECTS OF THE LAW OF NATIONS

CHAPTER I

INTERNATIONAL PERSONS

I

SOVEREIGN STATES AS INTERNATIONAL PERSONS

Vattel, i. §§ 1-12—Hall, § 1—Lawrence, §§ 37-43—Phillimore, i. §§ 61-68—Twiss, i. §§ 1-11—Taylor, § 117—Walker, § 1—Westlake, i. pp. 1-5, 20-22—Brierly, pp. 86-90—Wheaton, §§ 16-21—Hershey, §§ 87-95—Liszt, §§ 7 (i. iii.), 8—Fauchille, §§ 160-164, 175-175(1)—Pradier-Fodéré, i. §§ 43-81—Nys, i. pp. 352-383—Rivier i. § 3—Calvo, i. §§ 39-41—Fiore, i. §§ 305-309 and *Code*, §§ 56-82—Martens, i. §§ 53-54—Merrignac, i. pp. 114-232, and ii. pp. 5-154-221—Moore, i. § 3—Cruchaga, i. pp. 128-130—Keith's Wheaton, pp. 32-12—Stowell, pp. 49-52—Baty, pp. 6-19—Hold-Ferneck, i. pp. 27-77—Anzilotti, pp. 120-131—Seelle, i. pp. 74-83—Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp. 1-85—Verdross, § 28—Dickinson, *The Equality of States in International Law* (1920)—Sukienicki, *La souveraineté des états en droit international moderne* (1927)—Knubben, *Die Subjekte des Völkerrechts* (1928), pp. 127-190—Kunz, *Die Staatserbindungen* (1929), pp. 1-61—Wright, *Mandates under the League of Nations* (1930), pp. 267-309—Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit und Handlungsfähigkeit der Staaten* (1934), pp. 28-55, 135-186—Kelsen *Principles of International Law* (1952), pp. 100-114—Von der Heydt, *Der Geburtsstunde des souveränen Staates* (1952)—Gunst, *Der Begriff der Souveränität im modernen Völkerrecht* (1953)—Brierly in *Hague Recueil*, vol. 23 (1928) (iii), pp. 503-545—Irons in *Z.o.R.*, 1 (1929), pp. 31-40—Dupuis in *Hague Recueil*, vol. 32 (1930) (ii.), pp. 5-165—van Zanten in *R.J.* 3rd ser., 11 (1930), pp. 494-528—Ross, *ibid.*, 3rd ser., 12 (1931), pp. 652-668, and 13 (1932), pp. 112-130, and in *Z.o.R.*, 11 (1931), pp. 441-464—Kaufmann in *Hague Recueil*, vol. 55 (1935) (v.), pp. 349-377—Billinger, *ibid.*, vol. 62 (1938) (1), pp. 165-203—Aufricht in *Cornell Law Quarterly* November 1944 and March 1945—Kelsen in *Ind. Law Journal*, 53 (1944), pp. 207-220—Rousseau in *Hague Recueil*, 73 (1948) (iii) pp. 171-249. And see the comprehensive literature quoted below, § 70

§ 63. The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is therefore a member of the Family of Nations, is an International Person. There are, however,

Real and
apparent
International
Persons.

as will be seen, full and not-full sovereign States. Full sovereign States are perfect, not-full sovereign States are imperfect, International Persons, for not-full sovereign States are only in some respects subjects of International Law.

In contradistinction to sovereign States which are real, there are also apparent, but not real, International Persons—such as Confederations of States and insurgents recognised as a belligerent Power in a civil war. These are not, as will be seen,¹ real subjects of International Law, but in some points are treated as though they were International Persons, without thereby becoming members of the 'Family of Nations.

Concep-
tion of the
State.

§ 64. A State² proper—in contradistinction to colonies—is in existence when the people is settled in a country under its own sovereign Government. The conditions which must obtain for the existence of a State are therefore four :

There must, first, be a *people*. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.

There must, secondly, be a *country* in which the people has settled down. A wandering people is not a State.³ But it matters not whether the country is small or large : it may consist, as in the case of city States, of one town only.

There must, thirdly, be a *Government*—that is, one or more persons who are the representatives of the people and rule according to the law of the land. An anarchistic community is not a State.

There must, fourthly and lastly, be a *sovereign* Government. Sovereignty is supreme authority, an authority

¹ See below, § 88 (Confederated States), and vol. II. §§ 59 and 76 (Insurgents).

² As to the meaning of the word 'State' considered historically see Dowdall in *L.Q.R.*, xxxix. (1923) pp. 98-125. See also Reglaide in *Études Georges Scelle* (1950), vol. II., pp. 507-534.

³ Salmond, *Jurisprudence* (7th ed., 1924), p. 145, does not regard a fixed territory as essential in theory to the existence of a State. The following writers take the same view : Gemma, p. 180 ; Kelsen, *Das Problem der Souveränität* (1920), pp. 70-76 ; Donati, *Stato e territorio* (1924), pp. iii., 27, 30, whose view is summarised in Lauterpacht, *Analogies*, § 95 (n. 1).

which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country.

§ 65. A State in its normal appearance does possess independence all round, and therefore full sovereignty. Yet ^{Not-full Sovereign States.} there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full sovereign States. All States which are under the suzerainty or under the protectorate of another State, or are member-States of a so-called federal State, belong to this group. All of them possess supreme authority and independence with regard to a part of the functions of a State, whereas with regard to another part they are under the authority of another State. This fact explains the doubt as to whether such not-full sovereign States can be International Persons and subjects of the Law of Nations at all.¹

That they cannot be full, perfect, and normal subjects of International Law there is no doubt. But it is inaccurate to maintain that they can have no international position whatever. They often enjoy in many respects the rights, and fulfil in other points the duties, of International Persons. They frequently send and receive diplomatic envoys, or at least consuls. They often conclude commercial or other treaties. Their monarchs enjoy the privileges which, according to the Law of Nations, the Municipal Laws of the different States must grant to the monarchs of foreign States. No other explanation of these and similar facts can be given except that these not-full sovereign States are in some way or another International Persons and subjects of International Law. Such imperfect International Personality is, to some extent, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself.

¹ The question will be discussed again below, §§ 89, 91, 93, with regard to each kind of not full sovereign State. The object of the discussion here is the question whether such States can be con-

sidered as International Persons at all. Westlake, i. p. 21, answers it affirmatively by stating: 'It is not necessary for a state to be independent in order to be a state of International Law.'

Divisibility of Sovereignty contested

§ 66. The distinction between full sovereign States and not-full sovereign States is based upon the opinion that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But some deny the divisibility of sovereignty, and maintain that a State is either sovereign or not. It is therefore necessary to consider the conception of sovereignty more closely.¹

Meaning of Sovereignty in the Sixteenth and Seventeenth Centuries

§ 67. The term sovereignty was introduced into political science by Bodin in his celebrated work *De la République*, which appeared in 1577. Before Bodin, at the end of the Middle Ages, the word *souverain*² was used in France for an authority, political or other, which had no other authority above itself. Thus the highest courts were called *Cours Souveraines*. Bodin, however, gave quite a new meaning to the old conception. Being under the influence of, and in favour of, the policy of centralisation initiated by Louis XI. of France (1461-1483), the founder of French absolutism, he defined sovereignty as 'the absolute and perpetual power within a State.' According to Bodin, such power is the supreme power within a State without any restriction whatever except the Commandments of God and the Law of Nature. No constitution can limit sovereignty, which is an attribute of the king in a monarchy, and of the people in a democracy. A sovereign is above positive law. A contract is only binding upon the sovereign be-

¹ The literature upon sovereignty is extensive. The following authors give a survey of the opinions of the different writers: Landman, *Der Souveränitätsbegriff bei den französischen Theoretikern* (1890); Merriam *History of the Theory of Sovereignty since Rousseau* (1900); Rehm, *Allgemeine Staatslehre* (1899), §§ 10-16. See also Maine, *Early Institutions*, pp. 342-400; Lansing in *A.J.*, I (1907), pp. 106-128 and 297-320, and 15 (1921), pp. 13-27; Hobhouse, *Metaphysical Theory of the State* (1918); Laski, *Studies in the Problem of Sovereignty* (1917), *Foundations of Sovereignty* (1921), *A Grammar of Politics* (1925), pp. 44-88, and *The*

State in Theory and Practice (1935); MacIver, *The Modern State* (1926), pp. 165-290; Heller, *Souveränität* (1927); Mattern, *Concepts of State, Sovereignty and International Law* (1928); Musacchia, *La sovranità e il diritto internazionale* (1938), J. W. Jones, *Historical Introduction to the Theory of Law* (1940), pp. 79-97; Lindsay, *The Modern Democratic State* (1943), pp. 212-228; Friedmann, *Legal Theory* (1944), pp. 138-143, 386-398. And see below, § 70, and the works of Nelson, Duguit, and others referred to above, §§ 1 (n.) and 11 (n.).

² *Souverain* is derived from the late Latin *superanus*.

cause the Law of Nature commands that a contract shall be binding.¹

The conception of sovereignty thus introduced was at once accepted by writers on politics of the sixteenth century, but the majority of these writers taught that sovereignty could be restricted by a constitution and by positive law. Thus at once a somewhat weaker conception of sovereignty than that of Bodin made its appearance. On the other hand, in the seventeenth century, Hobbes went even beyond Bodin, maintaining² that a sovereign was not bound by anything, and had a right over everything, even over religion. Whereas a good many writers followed Hobbes, others, especially Pufendorf, denied, in contradistinction to Hobbes, that sovereignty involves omnipotence. According to Pufendorf, sovereignty is the supreme power in a State, but not absolute power, and sovereignty may well be constitutionally restricted.³ Yet in spite of all the differences in the definitions of sovereignty, all the authors of the sixteenth and seventeenth centuries agree that sovereignty is indivisible.

§ 68. In the eighteenth century matters changed again. The fact that the several hundred reigning princes of the member-States of the German Empire had in practice, although not theoretically, become more or less independent since the Westphalian Peace enforced upon writers the necessity of recognising a distinction between an absolute, perfect, full sovereignty, on the one hand, and, on the other, a relative, imperfect, not-full or half sovereignty. Absolute and full sovereignty was attributed to those monarchs who enjoyed an unqualified independence within and without their States. Relative and not-full sovereignty, or half sovereignty, was attributed to those monarchs who were, in various points of internal or foreign affairs of state, more or less dependent upon other monarchs. By this distinction the divisibility of sovereignty was recognised.⁴ And when

Meaning
of Sovereignty
in the
Eighteenth
Century.

¹ See Bodin, *De la République*, l. c. 8. On the influence of Bodin on International Law see Gardot in *Hague Recueil*, vol. 50 (1934) (iv), pp. 549-740; Biddleberg in *Archiv des öffentlichen Rechts*, 32 (1941), pp. 193-228.

² See Hobbes, *De Cive*, c. 6, §§ 12-15.

³ See Pufendorf, *De Jure Naturæ et Gentium*, vii. c. 6, §§ 1-13.

⁴ Patterson in *New York University Quarterly*, 24 (1949), pp. 535-575.

in 1787 the United States of America turned from a Confederation of States into a federal State, the division of sovereignty between the sovereign Federal State and the sovereign member-States became prominent in political theory. But the divisibility of sovereignty was not universally recognised in the eighteenth century. It suffices to mention Rousseau, whose *Contrat Social* appeared in 1762 and who again defended the indivisibility of sovereignty.

Meaning
of Sovereignty
in the
Nineteenth
Century.

§ 69. During the nineteenth century the old controversy regarding divisibility of sovereignty had by no means died out. It acquired a fresh stimulus, on the one hand, through Switzerland and Germany turning into federal States, and, on the other, through the conflict between the United States of America and her Southern member-States. The theory of the concurrent sovereignty of the federal State and its member-States, as defended by *The Federalist* (Alexander Hamilton, James Madison, and John Jay) in 1787, was in Germany taken up by Waitz,¹ who found many followers. The theory of the indivisibility of sovereignty was defended by Calhoun,² and many European writers followed him in time. In view of the somewhat academic nature of the controversy surrounding this subject it seems preferable to cling to the facts of life and the practical, though abnormal and possibly illogical, condition of affairs. As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible.

The
Problem
of Sovereignty
in the
Twentieth
Century.

§ 70. While in the nineteenth century the problem of sovereignty was, as has been shown, discussed largely with reference to the question whether sovereignty can be conceived of as divisible,³ it assumed a different aspect in the twentieth century before and after the First World War. The question which is now confronting the science of law and politics is how far sovereignty as it presents itself from the point of view of the internal law of the State, namely, as the highest, underived power and as the exclusive competence to determine its jurisdictional limits, is compatible with the

¹ *Politik* (1862).

² *A Disquisition on Government* (1851).

³ On the divisibility of sovereignty with regard to territory see below, § 171.

normal functioning and development of International Law and organisation. The very notion of International Law as a body of rules of conduct binding upon States irrespective of their Municipal Law and legislation, implies the idea of their subjection to International Law and makes it impossible to accept their claim to absolute sovereignty in the international sphere. Their mutual independence is indeed a fundamental rule of International Law ; but it is only by reference to a higher legal order that the mutual independence of States, viewed as a rule of law, is conceivable. On the other hand, owing to the weakness of International Law, its supremacy over the States composing the international community is limited to the duty which it imposes upon them to observe and, within a restricted sphere, to submit to the enforcement of the existing rules created by custom or treaty *or* flowing from the very existence of the society of States.¹ It does not as yet include a competence on the part of the international community to impose fresh obligations upon an unwilling State, or to interfere with its rights in cases in which changed conditions require the adaptation of International Law to the requirements of international peace and progress.² Neither does it as yet include the duty to submit international disputes to judicial determination.³ The abstract doctrine of equality of States⁴ is, to a large extent, yet another manifestation of that conception of sovereignty. These aspects of sovereignty have been the principal cause of the criticism levelled against it after the First and the Second World Wars. It is being increasingly realised that progress in International Law, the maintenance of international peace and, with it, of independent national States, are in the long run conditioned by a partial surrender of their sovereignty so as to render possible, within a limited sphere, the process of international legislation and, within a necessarily unlimited sphere, the securing of the rule of law as ascertained by international tribunals endowed with obligatory jurisdiction.⁵

¹ See above, § 19.

² See above, § 37a.

³ See vol. ii. § 12.

⁴ See below, § 116a.

⁵ For an examination of the problem of sovereignty from this point of view see Laski, *op. cit.* above ; Nelson, *Die Rechtswissenschaft ohne*

II

RECOGNITION OF STATES AS INTERNATIONAL PERSONS

Hall, §§ 2 and 26—Lawrence, §§ 44-47—Phillimore, ii. §§ 10-22—Westlake, i. pp. 49-58.—Wheaton, § 27—Moore, i. §§ 27-75—Fenwick, ch. vii.—Hyde, i. §§ 35-46—Bluntschli, §§ 28-38—Hackworth, i. §§ 21-35—Hefstter, § 23.—Holtzendorff in *Holtzendorff*, ii. pp. 18-33—Liszt, § 5, iv.—Strupp, *Éléments*, § 4—Fauchille, §§ 195-213 (9)—Sibert pp. 190-199—Pradier-Fodéré, i. §§ 136-145—Nys, i. pp. 73-120—Mérignhac, i. pp. 320-330—Rivier, i. pp. 57-61, 420-421—Calvo, i. §§ 87-98—Fiore, i. §§ 310-320, and *Code*, §§ 166-182—Anzilotti, pp. 88-102—Cavaglieri, pp. 174-201—Gemma, pp. 57-70—De Louter, i. pp. 216-224—Cruchaga, i. §§ 179-194—Suarez, i. §§ 22, 47, 48—Martens, i. §§ 63-64—Bustamante, pp. 463-184—Keith's Wheaton, pp. 42-50—Stowell, pp. 37-48—Baty, pp. 203-230—Smith, i. pp. 77-333—Romano, *Corso di diritto internazionale* (1926) pp. 51 *et seq.*—Anzilotti, pp. 160-177—Balladore Palieri, pp. 190-198—Scelle, i. pp. 97-105—Le Normand, *La reconnaissance internationale et ses diverses applications* (1899)—Borchard, § 85—Kelsen, *Das Problem der Souveränität und der Theorie des Völkerrechts* (1920), pp. 228-235, and *Principles of International Law* (1952), pp. 264-295—Spiropoulos *Die de facto Regierung im Völker*

Recht (1917), pp. 57-76, 192-203; Kelsen *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), *passim*, *General Theory of Law and State* (1945), pp. 363-390, and his other works referred to above, p. 15; Duguit, *Traité de droit constitutionnel* (2nd ed., 1921), i. pp. 560-565; Krabbe, *The Modern Idea of the State* (translation from Dutch, 1922), pp. 12-36, 233-274; Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923), *passim*, and particularly pp. 4-13; Politis, *The New Aspects of International Law* (translation from French, 1928), pp. 1-17; the same in *Hague Recueil*, vol. 6 (1925) (i.), pp. 10-23, and in *New Commonwealth Quarterly*, 1 (1935), pp. 215-222, 321-327; Ward, *Sovereignty* (1928); Kunz, *Die Staatenverbindungen* (1929), pp. 1-41; Tachi, *La souveraineté et l'indépendance de l'État et les questions intérieures* (1930); Hawtrey, *Economic Aspects of Sovereignty* (1930); Fehindler, *Verfassungsrecht und soziale Struktur* (1932), pp. 104-117; Gurvitch, *Le temps présent et l'idée du droit social* (1932), pp. 101-212; Keeton, *National Sovereignty and International Order* (1929); Friedmann, *The Crisis of the National State*

(1943); Siotto Pintor, *Souveraineté de la morale* (a lecture, 1936, (ano)); Schwarzenberger *Power Politics* (2nd ed., 1951), pp. 84-101; Grand in *Études Georges Scelle* (1950), vol. 1, pp. 253-266; Ch. de Vischer *Théorie et résultats en droit international public* (1953), Rousseau in *Hague Recueil*, 73 (1948) (ii), pp. 181-214; Briery in *B.Y.*, 5 (1924), pp. 12-14; Garner in *R.I.*, 3rd ser., 6 (1925), pp. 36-54 (with references at p. 37 to literature before the war), and in *Hague Recueil*, vol. 35 (1931) (i.), pp. 698-712; Morellet in *R.G.*, 33 (1926), pp. 106-119; Van Zanten in *R.I.*, 3rd ser., 11 (1930), pp. 491-528; Barthélemy in *R.I. (Paris)*, 5 (1930) No. 14 pp. 420-440; Jaqencko in *Nordisk T.A., Acta Scandinavica*, 3 (1932), pp. 3-27; Raestad in *R.I. (Paris)*, 17 (1936), pp. 26-44; and below, p. 117. See on the other hand Heller, *Die Souveränität* (1937); Montluc in *R.I. (Général)*, 4 (1926), pp. 255-268. And see Gurvitch in *Journal of Legal and Political Sociology*, 2 (1943), pp. 30-51; Radin, *ibid.*, pp. 15-20; Auffricht in *Cornell Law Quarterly*, November 1944 and March 1945. See also some of the writers referred to above, p. 120, n. 1.

recht (1926), pp. 11-62, 164-171—Kunz, *Die Anerkennung der Staaten und Regierungen im Völkerrecht* (1928)—Knubben, *Die Subjekte des Völkerrechts* (1928), pp. 305-349—Hervey, *The Legal Effects of Recognition in International Law* (1928)—Redslob, *Les principes du droit des gens moderne* (1937), pp. 48-69—Scalfati Fusco, *Il riconoscimento di stati nel diritto internazionale* (1938)—Venturini, *Il riconoscimento nel diritto internazionale* (1946)—Jimenez de Arechaga, *Reconocimiento de Gobiernos* (1947)—Lauterpacht, *Recognition in International Law* (1947), pp. 67-174—Jeasup, *A Modern Law of Nations* (1948), pp. 43-67—F'utelain in *Etudes Georges Scelle* (1950), vol. II., pp. 717-734—Chen, *The International Law of Recognition* (1951)—Biscottini, *Atti unilaterali nel diritto internazionale* (1951), pp. 36-66—Erich in *Hague Recueil*, 1926 (iii), pp. 431-502—Temperley, v. pp. 157-162; vi. pp. 284-309—Sanders in *Z.o.R.*, I (1919), pp. 132 ff.—Larnaud in *R.G.*, 28 (1921), pp. 457-503—McNair in *B.Y.*, 1921-1922, pp. 57-67—Charles de Visscher in *R.I.*, 3rd ser., 3 (1922), pp. 150-170, 300-305—Fraenkel in *Columbia Law Review*, 25 (1923), pp. 544-570—Salvioli in *Rivista*, 18 (1926), pp. 330-336—Micheli, *ibid.*, 19 (1927), pp. 169-186—Houghton in *American Law Review* (1928), pp. 224-247—Fischer Williams in *Grotius Society*, 15 (1929), pp. 53-81; in *H.L.R.*, 47 (1934) pp. 776-794; and in *Hague Recueil*, vol. 44 (1933) (ii.), pp. 202-312—Marshall Brown in *R.I.*, 3rd ser., 13 (1932), pp. 5-33—Kelsen in *Hague Recueil*, vol. 42 (1932) (iv.), pp. 260-294—Cavagliari in *Rivista*, 24 (1932), pp. 305-345—Dienna, *ibid.*, pp. 465-482—Salvioli in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 44-56—Scelle, *ibid.*, pp. 373-393, and vol. 55 (1936) (i.), pp. 107-137—Brierly, *ibid.*, vol. 58 (1936) (iv.), pp. 48-62—Heuss in *Z.F.*, 18 (1934), pp. 37-89, and *ibid.*, 19 (1935), pp. 1-38—Redslob in *R.I. (Paris)*, 13 (1934), pp. 429-443—Cavare in *R.G.*, 42 (1935), pp. 6-99—Ottolenghi in *Rivista*, 28 (1936), pp. 3-33, 152-171—Raestad in *R.I.*, 3rd ser., 17 (1936), pp. 257-313—Resolution of the Institute of International Law adopted in 1936, *A.J.*, 30 (1936), Suppl., p. 185—Kelsen in *A.J.*, 35 (1941), pp. 605-617—Lauterpacht in *Hague Recueil*, vol. 62 (1937) (iv.), pp. 244-296, in *Yale Law Journal*, 53 (1944), pp. 385-459, and in *Columbia Law Review*, 45 (1945) pp. 815-864, and 46 (1946) pp. 37-57—Juditi in *Rivista*, 36 (1953) pp. 30-63.

§ 71. As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not imply membership of the Family of Nations. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members as having been recognised by the body of members already in existence when they were born.¹ A State is, and becomes, an International Person through recognition only and exclusively.

Many writers do not agree with this opinion. They maintain that, if a new State comes into existence either by

¹ See above, §§ 27 and 28. On the formation of States see Biscottini in *Rivista*, 18 (1939), pp. 378-406.

Recognition a Condition of Membership of the Family of Nations.

breaking off from an existing recognised State, as Belgium did in 1831, or otherwise, such new State enters of right into the Family of Nations and becomes of right an International Person.¹ They do not deny that in practice such recognition is necessary to enable every new State to enter into official intercourse with other States. Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence of this fact.

Others hold the view that it is a rule of International Law that no new State has a right as against other States to be recognised by them; that no State has a duty to recognise a new State²; and that a new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members. In fact it is difficult to see what the function of recognition could be if the mere claim of a community to be an independent State, in the meaning of International Law, gave it a right to membership of the Family of Nations. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.³ However, as will be suggested below (§ 71a), while the granting of recognition is within the discretion of States, it is not a matter of arbitrary will but must be given or refused in accordance with legal principle. That principle, which

¹ See, for instance, Hall, § 2 and 26; Rivier, i. p. 57; Salvioh, *op. cit.*, Kelsen in *Hague Recueil*, vol. 42 (1923) (iv.), pp. 260-294, and in *R.I. (Paris)*, 4 (1929), pp. 613-641, Verdross, § 30; and in Strupp, *Wort.*, i. pp. 283-286; Balladore Pallieri, pp. 190-197; Fedozzi, *Trattato di diritto internazionale*, i. (2nd ed., 1933), pp. 101-108, distinguishes between long-established States, whose personality is grounded in the fact that they are already members of the international community, and new States; Wegner in *Festschrift für Paul Heilborn* (1931), pp. 181-202; Fischer Williams in *Hague Recueil*, vol. 44 (1933) (ii.), pp. 203-313, and in *H.L.R.*, 47 (1934), pp. 776-780. See also *Deutsche Continental Gas-Gesellschaft v. Polish State*, decided on

August 1, 1920, by the Germano-Polish Mixed Arbitral Tribunal, *Annual Digest*, 1929-1930, Case No. 5, for a pronouncement in favour of the declaratory view. But see Herz in *R.I.*, 3rd ser., 17 (1936), pp. 564-590.

² Rivier, i. p. 57; Fauchille, § 204; Anzilotti, pp. 156-168; Strupp in *Hague Recueil*, vol. 47 (1934) (i.), pp. 422-452; Cavaglieri in *Rivista*, 24 (1932) pp. 305-345. For a trenchant criticism of the legal conception of recognition see Kunz in *J.J.*, 44 (1950) pp. 713-719. See also Brown, *ibid.*, pp. 617-640 and Briggs, *ibid.*, 43 (1949) pp. 113-121.

³ See below, § 115. As to the status of unrecognised States before the Permanent Court of International Justice see Spiliopoulos in *R.I. (Geneva)*, 5 (1927), pp. 35-45.

applies alike to recognition of States, of Governments, and of belligerency, is that certain conditions of fact, not in themselves inconsistent with International Law, impose the duty of, and confer the right to, recognition; that recognition is not an act of arbitrary discretion or a political concession; and that it is constitutive of the rights and duties pertaining to statehood, governmental capacity, or belligerency.

§ 71a. In recognising a new State as a member of the international community the existing States declare that in their opinion the new State fulfils the conditions of statehood as required by International Law. In thus acting, the existing States perform, in the full exercise of their discretion, a quasi-judicial duty. In the absence of a special organ competent to fulfil that function, they are entrusted by International Law with the task of ascertaining whether the conditions of statehood as laid down by International Law¹ exist in any given case. The bulk of the practice of States probably supports the view that Governments do not deem themselves free to grant or refuse recognition² to new States in an arbitrary manner, by exclusive reference to their own political interests, and regardless of legal principle. Undoubtedly, as the recognising State is in this particular matter both the guardian of its own interests³ and an agent of International Law, it is unavoidable that political considerations may from time to time influence the act or refusal of recognition⁴. However, this duality of function

Recognition of States.

¹ See above, § 64.

² It follows that a community may have a legal, although for the time being unenforceable, right to recognition. See e.g. the Opinion of Adams, United States Secretary of State, addressed on August 24, 1918, to President Monroe with regard to the Venezuelan struggle for independence: 'There is a stage in such contests when the parties struggling for independence have a right to demand its acknowledgment by neutral parties,' Moore, i. p. 78. There is an instance of a State, after its independence had become firmly established, claiming compensation on account of losses suffered as the result of being refused belligerent rights during the struggle for independence. See the claims of the United States against Denmark in connection with the *Bergen Prizes*, Moore, i. p. 169; *Arbitrations*, v. p. 4572. See also the case of the *Macedonian*, a claim by the United States against Chile. Lapradelle-Politis, ii pp. 215-217.

³ In particular, the recognising State must exercise care not to commit a tortious act against the parent State, or a precipitate act of recognition. See below, § 72.

⁴ A considerable number of writers hold the view that apart from the duty owed to the parent State, recognition of States, governments, and belligerency is entirely within the political

does not affect its essential legal nature. Recognition, while declaratory of an existing fact, is constitutive in its nature. It marks the beginning of the international rights and duties of the recognised community. This is in itself, apart from what is believed to be the weight of practice, an additional reason why it is difficult to admit that it is a discretionary act governed by political considerations of self-interest.¹

Precipitate Recognition.

§ 72. Recognition is of special importance in those cases where a new State tries to establish itself by breaking off from an existing State in the course of a revolution. Foreign States must then decide whether the new State has really already safely and permanently established itself, or only makes efforts to this end without having already succeeded. That in every case of civil war a foreign State can recognise the insurgents² as a belligerent Power if they succeed in keeping a part of the country in their hands, set up a Government of their own, and conduct their military operations according to the laws of war, there is no doubt. But there is a fundamental difference between this recognition as a belligerent Power and the recognition of the insurgents and their part of the country as a new State. The question is precisely at what exact time recognition as a new State may be given as distinguished from the recognition as a belligerent Power. For an untimely and precipitate recognition as a new State is more than a violation of the dignity of the mother-State. It is an unlawful act, and it is frequently maintained that such untimely recognition amounts to intervention.³

In spite of the importance of the question, no hard-and-fast rule can be laid down as regards the time when it can be said that a State created by revolution has established itself safely and permanently. Indication of such safe and permanent establishment may be found either in the fact

discretion of States. For a detailed discussion of the subject see Lauterpacht in *Yale Law Journal*, 53 (1944), pp. 385-458 and *Recognition in International Law* (1947).

of the Executive, and not of the Judiciary, but, it will be noted, the executive organs within the State are often charged with the function of ascertaining and applying the law.

¹ Recognition of States is, of course, a political function in the meaning that it is within the province

² See below, vol. II, §§ 76, 76a.

³ See below, § 134.

that the revolutionary State has utterly defeated the mother-State, or that the mother-State has ceased to make efforts to subdue the revolutionary State, or even that the mother-State, in spite of its efforts, is apparently incapable of bringing the revolutionary State back under its sway¹ Of course, as soon as the mother-State itself recognises the new State, there is no reason and no legal justification for other States to withhold their recognition any longer. Recognition by the mother-State is conclusive proof of the fact that the new State has finally established its independence²

§ 73. Recognition of a new State must not be confused with recognition of a new Head or Government of an old State. Recognition of a change in the headship of a State,³ or in the form of its Government, or of a change in the title of an old State, are matters of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a foreign State refuses to recognise a new Head or a change in the form of the Government of an old State, the latter does not thereby lose its

¹ When, in 1903, Panama seceded from Colombia, the United States immediately recognised the new Republic as an independent State and prevented Colombia from asserting her authority over the rebellious province. Whatever may have been the ultimate justification of that step there is no doubt that it amounted to intervention. For the motives of this action see Moore, in § 344, pp. 46 and following, and Scott in *A J*, 15 (1921), pp. 430-439. The controversy between the United States and Colombia was finally settled by a treaty negotiated in 1914 and ratified in 1922. The Treaty provided, *inter alia*, for a payment of \$50,000,000 to be made to Colombia. For an account of the final stages of the controversy see Jones, *The Caribbean since 1900* (1936), pp. 314-338.

² The breaking off of the American States from their European mother States furnishes many illustrative examples. Thus the recognition of the United States by France in 1778 was precipitate. But when in 1782 Great Britain herself recognised the

independence of the United States, other States could accord recognition too without giving offence to Great Britain. Again, when the South American colonies of Spain declared their independence in 1810, no Power recognised the new States for many years. When, however, it became apparent that Spain, although she still kept up her claims, was not able to restore her sway, the United States recognised the new States in 1822 and Great Britain followed the example in 1824 and 1825. See Gibbs, *Recognition: A Chapter from the History of the North American and South American States* (1863), Moore, i. §§ 28-36; Smith, i. pp. 115-170. And see, in particular, for invaluable information, *Diplomatic Correspondence of the United States concerning the Independence of the Latin American Nations*, Edited by Manning, 3 vols. (1925), and *Britain and the Independence of Latin America, 1812-1830*, Edited by Webster, 2 vols. (1936). See also Robertson, *France and Latin American Independence* (1939).

³ See below, § 342.

recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given* either expressly or tacitly. If recognition of a new title¹ of an old State is refused, the only consequence is that the latter cannot claim any privileges connected with the new title.

When coming into Power normally and constitutionally.

§ 73a. In the case of the accession of a new Head of a State, whether it be a new monarch or a new President of a republic, other States are as a rule notified and usually recognise the new Head by some formal act such as a message of congratulation. But neither such notification nor recognition is strictly necessary according to International Law, because an individual becomes the Head of a State not through the recognition of other States but through the Municipal Law of his own State. Such notification and recognition are, however, not devoid of legal importance, because by notification the one State declares that the individual concerned is its highest organ and has, by its Municipal Law, the power to represent the State in the totality of its international relations; and, conversely, by recognition other States declare that they are ready to negotiate with such individual as the highest organ of his State. In practice, when the new Head has come into his position in a normal and constitutional manner, such as succession to the throne on the death of the reigning monarch or by a presidential election, recognition is granted as a matter of course. Similarly, if a State were to change its form of government, for instance, from a monarchy to a republic, in a constitutional manner and without anything in the nature of a *coup d'état*, there would be no question of withholding on that account the recognition of the new Government.²

When coming into Power abnormally and in a revolutionary manner.

§ 73b. When, however, the new Head or Government be it a monarch succeeding another monarch, a President of a republic succeeding another President, a monarch succeeding a President of a republic, or a President of a republic a monarch—comes into power not in a constitutional manner but after a *coup d'état*, a revolution (which need not involve

¹ See below, § 119.

of the change of the title of another State or of its Head see below, § 119.

² For the recognition by a State § 119.

bloodshed), or any other event involving a break in legal continuity, the determination by other States of the attitude to be adopted towards the new Head or Government is often difficult. They are called upon to arrive at a decision on the question whether the new authority can be properly regarded as representing the State in question. In arriving at that decision they exercise a discretion which, though necessarily wide, is not an arbitrary act.

§ 73c. For, as in the case of recognition of new States,¹ so The also in the matter of recognition of Governments the act of Legal Nature recognition is not a function which International Law can, of Recog- in principle, leave to be decided by purely political con- nition siderations on the part of third States. A State whose of Govern- Government is refused recognition is for most purposes deprived of the benefits of membership of the international community. It is accordingly difficult to admit that the withholding or withdrawal of those benefits is a question entirely outside legal regulation. A Government which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence, can be said to represent the State in question and as such to be entitled to recognition. The preponderant practice of States, at least that of Great Britain and of the United States, in the matter of recognition of Governments is based on the principle of effectiveness thus conceived. As a rule, that principle has been interpreted in the sense that the new Government must be supported by the 'will of the nation, substantially declared.'² and that there must be evidence of popular approval, adequately expressed, of the revolutionary change.³ After the First World War no such evidence was required in most cases. Exercise of power, with the apparent acquiescence of the population, was considered to be sufficient proof of effectiveness. In such cases British diplomatic representatives abroad were instructed to inform the new Government that the revolutionary change 'did not affect

¹ See above, § 71a.

² Jefferson to Gouverneur Morris, November 7, 1792; Moore i. p. 120.

³ See, e.g., the insistence of Great

Britain on a formal vote of the constituent Assembly as a condition for the recognition of the Government of the French Convention in 1870: B.F.S.P., 61 (1870-71), pp. 761, 995.

the relations between the two countries.¹ The practice of the United States underwent a similar change.² It is probable that the abandonment of the requirement of express popular approval was merely a passing phase in the practice of recognition at a time when the principle of government by consent suffered an eclipse in many parts of the world.

Occasionally States have refused to recognise foreign Governments either on the ground of their revolutionary origin and the degree of violence accompanying the change³

¹ See, for instance, with regard to the recognition in 1930 of the Governments of Peru, Bolivia, and Argentina: Hansard, *Parl. Debates, Commons*, 1930-1931, vol. 244, cols. 458, 1304.

² Thus with regard to Peru, Bolivia, and Argentina recognition was granted in 1930 on the basis of evidence that the new Governments in these countries 'are *de facto* in control of their respective countries and that there is no active resistance to their rule': *A. J.*, 25 (1930), p. 121; Hackworth, *l. c.* p. 223. This constituted a departure from the practice of recognition as previously pursued by the United States. For although the United States had always rejected the principle of legitimacy as a test of recognition, it adhered to the requirement of subsequent legitimation, by an adequate expression of popular approval, of the revolutionary change. This was so in particular during the administration of President Wilson, which in this matter was essentially in keeping with the principles enunciated by Jefferson (see above, p. 131, n. 3). But see the statement of the Secretary of State Stimson made in 1931: *Latin-American Series*, No. 4 (1931), p. 8. See, generally, Goebel, *The Recognition Policy of the United States* (1915); Cole, *Recognition Policy of the United States since 1901* (1928); MacCorkle, *American Policy of Recognition towards Mexico* (1933); McMahon, *Recent Changes in the Recognition Policy of the United States* (1934); Lauterpacht, *Recognition in International Law* (1947), pp. 87-174; Noel-Henry in *R.G.*, 35 (1928), pp. 201-267; Dennis in *Foreign Affairs* (U.S.A.), 9 (1931), pp. 204-221;

Hackworth, *l. c.* pp. 47-51, and in *A.S. Proceedings*, 1931, pp. 120-131.

³ For an early example see the refusal of Great Britain to recognise in 1792 the French revolutionary Government: Smith, *l. c.* pp. 80-98. See also *ibid.*, pp. 229-233, on the British refusal from 1903-1906 to recognise the new Serbian Government following upon the assassination of the Serbian King and Queen.

The five Central American Republics concluded in 1907 and 1923 treaties embodying the so-called Tobar doctrine in which they bound themselves not to grant recognition to any Government coming into existence by revolutionary means 'so long as the freely elected representatives of the people . . . have not constitutionally reorganised the country.' See Woolsey in *A.J.*, 28 (1934), pp. 325-329. In 1932 Costa Rica and in 1933 Salvador denounced the Treaty of 1923.

For the so-called Estrada doctrine enunciated in 1930 by the Mexican Foreign Minister and affirming the duty of continuing diplomatic relations, so far as possible, without regard to revolutionary changes see *A.J.*, 25 (1931), Suppl., p. 203. See also Jessup in *A.J.*, 25 (1931), pp. 719-723, and Nervo in *R.I. (Paris)*, 7 (1931), pp. 436-445.

See also the award of October 18, 1923, by the former President Taft in the arbitration between Great Britain and Costa Rica for the statement that non-recognition on the ground of illegitimacy of origin is not a rule of International Law: *Annual Digest*, 1923-1924, Case No. 15 (c).

or because of their supposed unwillingness to fulfil international obligations.¹ Neither of these tests can be regarded as satisfactory. In the absence of effective international guarantees for securing just government and proper administration of the law within the various States, it is impossible to insist on the perpetuation of any existing régime by a refusal to recognise its revolutionary successor. Neither is it in the long run practicable to adopt the indirect method of refusal of recognition as a means of compelling the fulfilment of international obligations. The more rational method is to grant recognition and then to insist, by such means as International Law offers, on the proper fulfilment of its obligations on the part of the recognised Government.²

It must be emphasised that the effect of a revolution resulting in a Government which for a time fails to secure any recognition from foreign States, does not destroy the international personality of the State or free it, permanently at any rate, from existing treaty obligations, though it involves an interruption in that State's legal capacity for international purposes.³

§ 73d. Within the United Nations and within international organisation generally the question arises as to the position ensuing from the fact that, as the result of a civil war or some other revolutionary change, two or more authorities claim to be the Government entitled to represent a Member State in the United Nations. The General

Recognition of Governments and Representation in the United Nations.

¹ Thus many States refused for a long time to recognise the Government of Soviet Russia on account of its unwillingness to fulfil obligations contracted by the former Russian Governments and to give assurances of abstention from subversive propaganda abroad. See below, p. 293, § 2. On the recognition of the Soviet Government by the United States in 1933 see *Documents*, 1933, pp. 459-472; Kleist, *Die völkerrechtliche Anerkennung Sowjetrusslands* (1934); Houghton in *International Conciliation* (Pamphlet No. 247, February 1929); Dickinson in *Michigan Law Review*, 30 (1931-1932), pp. 181-196; Kirovin in *Jona Law Review*, 19 (1933-1934), pp. 259-271.

² In time of war there is often

a tendency to shape the practice of recognition with the view to making it conform with belligerent requirements. Thus, for instance, in 1944 Great Britain and the United States declined to recognise the Argentinian Government on account of its failure to adopt a policy in keeping with that of other American Republics. But see Kunz in *A.J.*, 38 (1944), pp. 436-441, who regards the refusal of recognition in this case as corroborating the view that recognition is never due as a matter of legal duty.

³ See remarks by the Committee of Jurists in the Åland Islands question, *Off. J.*, Special Suppl. No. 3, p. 18.

Assembly was confronted with that question, in and after 1950, when the Government of the so-called People's Republic of China obtained effective control over the entire Chinese territory (with the exception of the Island of Formosa whose territorial status was doubtful) and claimed to represent the State of China in the United Nations. At that time that Government was recognised only by a minority of the Members of the United Nations. The General Assembly, after prolonged study of the matter, adopted in 1950 a Resolution stating that in cases of that description 'the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.'¹ Principle would seem to demand that a purely nominal authority, albeit continuing to be recognised as a State by a number or majority of the Members of the United Nations, is not entitled to represent the State in question. On the other hand, although a revolutionary change of government is not normally the proper occasion for reviewing the qualifications of active membership of a State, there is no obvious abuse of power involved in the disinclination of any member of the United Nations to give his assent to a change in the representation of a State in such manner as to recognise the credentials of a Government whose conduct is believed to be such as to disqualify it from membership if the case were one of admission of a new State. In any case, it follows from the principles governing the question of implied recognition² that assent to the admission of a new Government as representing a State within the United Nations does not necessarily imply recognition of that Government.³

***De facto
Recognition.***

§ 74. *De facto* recognition of a State or Government⁴ takes

¹ Resolution 396 (I) of December 14, 1950.

² See below, § 73d.

³ See on the question of the representation of China in the United Nations Liang in *A.J.*, 45 (1951), pp. 689-707; Briggs in *International Organization*, 6 (1952), pp. 192-209; and Fitzmaurice in *Year Book of World Affairs* 1952, pp. 36-55. And

see generally Amdt in *A.J.*, 43 (1919), pp. 679-704.

⁴ On *de facto* recognition and the status of Governments recognised *de facto* see (in addition to the literature cited above, § 71) Rougier, *Les guerres civiles et le droit des gens* (1903), pp. 478-500; Spiropoulos, *De facto Regierung im Völkerrecht* (1926); Noël-Henry, *Les gouvernements de fait devant le juge* (1927); Hervey, *The*

place when, in the view of the recognising State, the new authority, although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not as yet offer prospects of complying with other requirements of recognition such as willingness or ability to fulfil international obligations.¹ Thus, after the First World War, the Governments of various new States, such as Finland, Latvia and Esthonia, which formerly constituted part of the Russian Empire, were recognised in the first instance as *de facto* Governments pending the final territorial settlement in that part of the world.² The Government of Soviet Russia, although, to all appearances, firmly and effectively established, was recognised for a number of years after its establishment by many States *de facto* only on the ground that, in their view, it was unwilling to fulfil its international

Legal Effects of Recognition in International Law (1928), pp 13-18; Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (1928), pp 50 53, 132 169; Stille, *Die Rechtsstellung der de facto Regierung in der englischen und amerikanischen Rechtsprechung* (1932); Schluter, *De facto Anerkennung im Völkerrecht* (1936), Hackworth, 1 §§ 27-29, Hershey in *A.J.*, 14 (1920), pp. 490 518, Larnaud in *R.G.*, 28 (1921), pp. 457-503, Podesta Costa, *ibid.*, 29 (1922), pp 47-59, Dickinson in *Michigan Law Review*, 22 (1923), pp 29 45, 118 134, and in *A.J.*, 19 (1925), pp 263-272, 753-766; Baty in *Yale Law Journal*, 31 (1922), pp 469-488; Houghton in *Minnesota Law Review*, 14 (1929-1930), pp 251-269, Lauterpacht in *B.Y.*, 22 (1945), pp. 164-190. It must be noted that both *de facto* and *de jure* recognition are legal acts. The expression '*de facto* recognition' is a convenient abbreviation for 'recognition as a *de facto* Government (or State),' and *de jure* recognition for 'recognition as a *de jure* Government (or State).' The distinction between *de facto* and *de jure* recognition has no bearing upon the legitimacy or otherwise of the new authority from the point of view of the constitutional law of the State concerned. For an emphatic repudiation of the view that

constitutional legitimacy is a condition of recognition of governments in International Law see the award of Taft in the arbitration between Great Britain and Costa Rica in 1923. *A.J.*, 17 (1924), pp 147 174, *Annual Digest*, 1923-1924, Case No. 15. See also *Republic of Peru v. Peruvian Guano Co* (1887), 36 Ch D. at p. 497; *Republic of Peru v. Dreyfus Brothers Co.* (1888), 38 Ch D 384, where, it appears, the Court refused to consider as relevant the circumstance that the Peruvian Government, recognised by Great Britain, was a revolutionary '*de facto*' dictatorship.

¹ Thus in the case of *The Gagara*, the Foreign Office informed the Court that His Majesty's Government had 'for the time being provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a *de facto*, independent body, and accordingly has received a certain gentleman as the informal representative of the provisional Government'. [1919] P. 95.

² For a list of States which recognised the Soviet Government in that way see *A.J.*, 28 (1934), p. 97. See also Appendix XXIV in Taracouzio, *The Soviet Union and International Law* (1935); Toynebee, *Survey*, 1924, pp. 228 262.

obligations in such matters as compensation for the confiscated property of foreign subjects and acknowledgment of liability for financial obligations incurred by its predecessors.

Recognition *de facto* is, in essence, provisional and liable to be withdrawn if the absent requirements of recognition fail to materialise. It is indistinguishable from *de jure* recognition inasmuch as the legislative and other internal measures of the authority recognised *de facto* are, before the courts of the recognising State, treated on the same footing as those of a State or Government recognised *de jure*.¹ Similarly, a State or Government recognised *de facto* enjoys jurisdictional immunity in the courts of the recognising State.² But it is not correct to assume that no legal consequences follow from the distinction between *de jure* and *de facto* recognition. Thus, at a time when, in 1937, Great Britain recognised *de facto* the Italian rule over Abyssinia, it was held that Italy could not be regarded as entitled, by virtue of State succession, to the assets of Abyssinia.³ The legal position underwent a change in this respect after the annexation of Abyssinia had been recognised *de jure*.⁴ According to the practice of some countries, including Great Britain, *de facto* recognition does not, as a rule, bring about

¹ *Luther v. Sagor*, [1921] 3 K B 532. The rule laid down in this case that there is no distinction between *de facto* and *de jure* recognition for the purpose of giving effect to the internal acts of the recognised authority - but not necessarily for other purposes - has since been applied in numerous cases. Thus in *Bank of Ethiopia v National Bank of Egypt and Ligon*, the Court held that, in view of the fact that the British Government recognised the Italian Government as being the *de facto* government of the area of Abyssinia then under Italian control, effect must be given to an Italian decree in Abyssinia dissolving the plaintiff Bank and appointing a liquidator: [1937] Ch. 513. For a criticism of this decision see McNair, *Legal Effects of War* (2nd ed., 1944), p. 341. See also *Banco de Bilbao v. Sancha and Rey*, where it was held that the decrees of the *de jure* Spanish

Government had no effect, so far as English courts were concerned, in the territory under the control of the Nationalist Government recognised *de facto*. [1938] 2 K B. 176; *Annual Digest*, 1938-1940, Case No. 29.

² *The Gagara*, [1919] P. 95. In *The Arantzazu Mendiz* it was held that the Nationalist Government of Spain, which was recognised as a *de facto* Government of the part of Spain under its control, was entitled to jurisdictional immunity in an action brought against it by the *de jure* Government of Spain: [1938] P. 233; [1939] P. 37, [1939] A.C. 216; *Annual Digest*, 1938-1940, Case No. 25. For a criticism of the decision see Lauterpacht in *Modern Law Review*, 3 (1939-1940), pp. 1-20, and Briggs in *A.J.*, 33 (1939), pp. 689-699.

³ *Hasle Selassie v. Cable and Wireless Ltd* (No. 2), [1939] Ch. 182.

⁴ *Ibid.*

either full diplomatic intercourse¹ or the conferment of diplomatic immunities upon the representatives of the *de facto* Government.²

§ 75. Among the more important consequences which flow from the recognition of a new Government or State are these: (1) it thereby acquires the capacity to enter into diplomatic relations with other States and to make treaties with them; (2) within limitations which are far from being clear, former treaties (if any) concluded between the two States, assuming it to be an old State and not a newly-born one, are automatically revived and come into force³; (3) it thereby acquires the right which, at any rate according to English law, it did not previously possess, of suing in the courts of law of the recognising State⁴; (4) it thereby acquires for itself and its property immunity from the jurisdiction of the courts of law of the State recognising it and the ancillary rights which are discussed later⁵ - an immunity which, according to English law at any rate, it does not enjoy before recognition.⁶ (5) It also becomes en-

Consequences of Recognition of New Heads and Governments.

¹ See the statement of the Foreign Office in the course of the proceedings in *Fenton Textile Association v. Krassin* (1922) 38 T.L.R. 260. See also House of Commons, *Debates*, vol. 139, col. 2198, for the statement that the representatives of the Soviet Government, subsequent to its recognition *de facto*, would not be recognised as diplomatic representatives.

² However, it appears from the language used by Scrutton and Atton L.J.J. in the above case that the matter might have been open to doubt but for the fact that the Trade Agreement with Soviet Russia of 1921 excluded, by implication, the grant of diplomatic immunities. According to the practice of the United States, representatives of a government recognised *de facto* enjoy diplomatic immunities.

³ See British Note to Russian Soviet Government Townsbee, *Survey*, 1924, p. 491.

⁴ *City of Berns v. Bank of England* (1804) 9 Ves. Jun. 347; *Jones v. Garcia del Rio* (1823) Turn. and Russ. 207, p. 57; *Taylor v. Barclay* (1828) 2 Sim. 213 (the last two are cases of

new and unrecognised States whose Governments were consequently unrecognised, but much of the reasoning is relevant. See as to these cases *Bushé-Fox*, cited below, p. 138, n. 3; and see *Spiropoulos*, *op. cit.*, pp. 128-140, who contrasts the attitude of the English courts with that of the French courts. The American law appears to be the same: *Russian Socialist Republic v. Cibrario* (1923) 235 N.Y. 255; *Cibrario v. Russian Trade Delegation in Italy*, *Annual Digest*, 1931-1932, Case No. 26; for the American literature see below, n. 6.

⁵ See below, § 115.

⁶ A fair inference from *The Jupiter*, [1924] P. 236. See also *The Annette*, *The Dora*, L.R. [1919] P. 105. American courts have granted certain immunities to an unrecognised Government, the ground being that immunity ought not to depend on recognition but on the nature of the action: see *Wulfsohn v. Russian Socialist Republic* (1923) 234 N.Y. 372, 138 N.E. 24; *Underhill v. Hernandez* (1807), 168 U.S. 260; *Nankivel v. Omek All Russian Government*, *Annual Digest*, 1923-1924, Case

titled to demand and receive possession of property situate within the jurisdiction of a recognising State, which formerly belonged to the preceding Government at the time of its supersession.¹ (6) Recognition being retroactive² and dating back to the moment at which the newly recognised Government established itself in power, its effect is to preclude the courts of the recognising State from questioning the legality or validity of such legislative and executive acts,³ past and future, of that Government as are not contrary to Inter-

No. 70; *Voevodine v. Government of the Commander-in-Chief of the Armed Forces in the South of Russia*, *ibid.*, 1931-1932, Case No. 25; see also *Sokoloff v. National City Bank* (1924) 239 N.Y. 158, 145 N.E. 917, for a discussion of the same point, and Borchard in *Yale Law Journal*, 31 (1922), pp. 534-537; Dickinson in *Michigan Law Review*, 22 (1923), p. 131, and in *A.J.*, 19 (1925), pp. 263-272.

¹ For instance, *land*; see Answers in the House of Commons on May 12 and 14, 1924; Hansard, *Commons*, 1924, vol. 173, columns 878, 1312. *State archives: Union of Soviet Socialist Republics v. Belaiew* (1925) 42 T.L.R. 21; *the same v. Onou* (1925) 69 *Solicitors' Journal*, 676, *London Times* newspaper, May 14, 1925. *Merchant Ships The Jupiter* [1924] P. 236.

² See below § 75f.

³ *A. M. Luther Co. v. Sagor & Co.*, [1921] 3 K.B. 532. See Fachiri in *B.Y.*, 12 (1931), pp. 95-106. This is the established doctrine of English and, until 1933, of American courts. In 1933, in *Salimoff v. Standard Oil Company*, 262 N.Y. 220; 186 N.E. 679; *Annual Digest*, 1933-1934, Case No. 8, the Court of Appeals of New York held that the nationalisation decrees of the unrecognised Soviet Government with regard to property situated in Russia were to be treated as valid. The decision of the Court was probably influenced by the statement of the Department of State which was presented before the Court and which affirmed that the Soviet Government exercised effective power in Russia and that the refusal to recognise it was due to reasons other than absence of effectiveness.

In the case of *Sokoloff v. National City Bank* (1924) 239 N.Y. 158, 166; *A.J.*, 19 (1925), pp. 269, 270, it was pointed out that courts might recognise acts and decrees of an unrecognised foreign Government 'if violence to fundamental principles of justice or to our own public policy might otherwise be done.' See also *Eck v. Nederlandach Amerikaansche Stoomvaart* (1944) N.Y. Supp. 2d 367; *Annual Digest*, 1946, Case No. 13, where it was held that the refusal of the Government of the United States to give legal recognition to the German annexation of Austria did not mean that German law was inoperative there. See generally on the judicial practice in the United States in matters of recognition, Dickinson in *A.J.*, 25 (1931), pp. 214-237; Tennant in *Michigan Law Review*, 29 (1930-1931), pp. 708-741; Borchard in *A.J.*, 28 (1932), pp. 261-271. For a learned and trenchant although somewhat one-sided plea for an independent judicial treatment of these questions see Jaffe, *Judicial Aspects of Foreign Relations* (1933), and Mann in *Grotius Society*, 29 (1943), pp. 143-170. So long as the function of recognition is performed by the Executive, it is difficult to see how the judicial organs of the State can treat as valid the legislation of a foreign authority which the executive organs of the State treat as non-existent. On the position of unrecognised Governments generally see also Houghton in *Indiana Law Review*, 4 (1928-1929), pp. 519 *et seq.*, and in *Minnesota Law Review*, 13 (1929), pp. 216 *et seq.*; Bushe-Fox in *B.Y.*, 12 (1931), pp. 63-75, and 13 (1932), pp. 39-48; Wright in *A.J.*, 26 (1932), pp. 342-348; Kalis in *Virginia Law Review*, 20 (1933-

national Law¹; it therefore validates, so far as concerns those courts of law, certain transfers of property and other transactions which before recognition the courts would have treated as invalid.²

1934), pp. 1 *et seq.*; Makarov in *Z.o.V.*, 4 (1934), pp. 1-24; Doukas, *ibid.*, 35 (1937), pp. 1071-1098. For further literature see below, § 75f. In *Russian Volunteer Fleet v. United States* (1931), 282 U.S. 481; *Annual Digest*, 1931-1932, Case No. 24, the Supreme Court of the United States held that non recognition does not deprive the nationals of a State with an unrecognised Government of a right of action. And see generally on the effect of recognition on application of foreign law Laptem in *Grotius Society*, 35 (1950), pp. 157-188; Stevenson in *Columbia Law Review* 51 (1951), p. 710; and comment in *University of Chicago Law Review* 19 (1951), p. 73.

¹ See below § 115ab.

² Charles de Visscher, *op. cit.*, pp. 162-166; Sproopoulos, *op. cit.*, pp. 164-168; McNair, *op. cit.* at p. 61; Mervyn Jones in *B.Y.*, 16 (1935), pp. 42-55; A. M. Luther (*o. v. Nagor*) (1921) 3 K.B. 532; *Williams v. Bruffy* (1877) 96 U.S. 176; *U.S. v. Trumbull* (1891) 48 Fed. 94; Scott, *Cases*, p. 322; *Tejfen v. Central Leather Co.* (1917) 246 U.S. 397; Scott, *Cases*, p. 70; *Ricaud v. American Metal Co.* (1917) 246 U.S. 304. For other applications of the principle of retroactivity in International Law see below, § 157f. See also Prudhomme in 52 *Clunet* (1925), pp. 318-330, who points out that one of the first practical consequences of the French recognition of the Soviet Government was that the French assets of French branches of corporations having their *siège social* in Russia were placed *sous séquestre* as the result of the recognition of the Russian nationalisation decrees; it seems, however, that this was a provisional measure (see a judgment in 1925 by the Court of Appeal in Aix, December 23, reported by Kemein in *Zeitschrift für ausländisches und internationales Privatrecht*, 1 (1927) pp. 315, 316, and in *Annual Digest*, 1925-1926, Case No. 17, where the Court refused to recognise the validity in France of the Soviet

nationalisation decrees 'as violating the very bases of the French legal system'). For a clear statement of the attitude of French courts see *Cie. Nord de Moscou v. Phenix Espagnol*, decided in 1928 by the Paris Court of Appeal: Sirey, 1928, II. p. 161; *Annual Digest*, 1927-1928, Case No. 42. Similarly, the courts of the United States, while adhering to the view that recognition has the effect of validating the legislation of a foreign Government inside its territory, have held that no extra-territorial effect will be given in case of conflict with the public policy of the recognising State: *Vladikavkazsky Rly. Co. v. New York Trust Co.* (1934) 263 N.Y. 369, 189 N.E. 456. On this case see *Columbia Law Review*, 34 (1934), p. 962; Panter in *Illinois Law Review*, 29 (1934), p. 248; *Z.o.V.*, 4 (1934), p. 698. See, however, *United States v. Pink* (1942) 315 U.S. 203; *Annual Digest*, 1941-1942, Case No. 13, where the majority of the members of the Supreme Court held that the recognition of the Soviet Government by the United States had the effect of rendering inoperative the law of the State of New York in so far as it refused to give extra-territorial effect in New York to Russian confiscatory decrees. For a criticism of that decision see Borchard in *A.J.*, 36 (1942), p. 275, and Jessup, *ibid.*, p. 282. The Supreme Court seemed, in this matter, to assimilate recognition to a treaty which, according to the Constitution, overrides the law of any single State. And see below, § 144b, on the extra-territorial effect of legislation generally. English courts found originally that they were not bound to hold that the dissolution of a foreign corporation by a decree of the Government of the State which gave it birth prevents the members or representatives of the dissolved corporation from suing in England. However, in subsequent decisions English courts largely abandoned that view: see *Russian Commercial and Industrial Bank v. Comp. toir d'Escompte de Mulhouse and others*

Recogni-
tion of In-
surgency.

§ 75a. In addition to the kinds of recognition discussed above, the following have acquired prominence: (a) recognition of belligerency; (b) recognition of insurgency; (c) recognition of new territorial titles and international situations.

(a) *Recognition of belligerency* brings about the normal operation of the rules of war proper and is therefore discussed below, vol. ii. §§ 55, 76, 76a.

(b) *Recognition of insurgency*.-- It often happens that the scope and character of a civil war do not, in the opinion of third States, permit or call for the recognition of a formal condition of belligerency. This may occur, for instance, when the rebellious forces do not act under the command of an organised authority in possession of considerable territory¹ or when they do not by their conduct offer the necessary guarantees of complying with the accepted rules of war. In these and similar cases third States, without making a formal pronouncement and without conceding to the rebellious forces belligerent rights affecting foreign nationals, refrain from treating them as law-breakers (so long as they do not arrogate to themselves the right to

[1925] A.C. 112, and *Banque Internationale de Commerce de Petrograd v. Goukassow*, *ibid.*, 150; *Sedgwick Collins & Co. v. Russia Insurance Co.* [1926] 1 K.B. 1; *Lazarus Bros. & Co. v. Banque Industrielle de Moscou* [1932] 1 K.B. 617 (where the Court admitted that Russian banks formed before the Revolution had been dissolved by Soviet legislation); *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Re Russo-Asiatic Bank* [1934] Ch. 720; *Russian and English Bank v. Baring Bros. & Co.* [1936] 1 All E.R. 505. See Wortley in *B.Y.*, 14 (1933), pp. 1-17, Westlake, *Private International Law*, 7th ed. (1925), § 306a, and Dicey, *Rules* 74 and 139. See also some American cases cited by Dickinson and Fraenkel, *op. cit.* And see Wohl, *The Nationalisation of Joint Stock Banking Corporations in Soviet Russia and its Bearing on their Legal Status Abroad* in *University of Pennsylvania Law Review*, vol. 75 (1927), pp. 385-410, 527-543, and 622-645. See also Thormodsgard and

Moore in *St. Louis Law Review*, 1927, pp. 108-117.

As to the position with regard to the non recognition of Soviet Russia after the First World War see Lagarde, *La reconnaissance du gouvernement des Soviets* (1925); Prudhomme in 52 *Cunet* (1926), pp. 318-330; Freund, *ibid.*, pp. 331-343; Nölde in *Annales contemporaines*, No 24 (1925), pp. 335-349; Kunz in *Z.I.*, 13 (1926), pp. 580-586; Nebolsine in *Yale Law Journal*, 39 (1929-1930), pp. 1130-1162; Philonenko in 56 *Cunet* (1929), pp. 13-24; Trachtenberg in *Répertoire*, II, pp. 380-386; Nölde in *R.I. (Geneva)*, 7 (1929), pp. 201-213. And see, in particular, Stoupinitzky, *Statut international de l'U.R.S.S. État commerçant* (1936), pp. 235-310.

¹ See e.g. the Message of President Grant of December 7, 1875, justifying on these grounds, the refusal to recognise the belligerency of Cuban insurgents. Moore, i. p. 196.

interfere with foreign subjects outside the territory occupied by them), consider them as the *de facto* authority in the territory under their occupation, and maintain with them relations deemed necessary for the protection of their nationals, for securing commercial intercourse and for other purposes connected with the hostilities. When that happens the rebels possess as against third States the status of insurgents.¹ On occasions third States have exacted from the legitimate Government the recognition of the consequences of the situation thus created. They have, for instance, insisted that the legitimate Government is not entitled to close by decree the ports occupied by insurgents unless such closure is accompanied by a blockade effectively maintained.²

§ 756. (c) As a rule States may acquire new territorial or other rights by unilateral acts, such as discovery or annexation, or by treaty, without recognition on the part of third States being required for their validity.³ The position is different, however, when the act alleged to be creative of a new right is in violation of an existing rule of customary or conventional International Law.⁴ In such cases the act

Recognition of New Territorial and International Situations.

¹ On insurgency, see Lauterpacht, *Recognition in International Law* (1947), pp. 270-310; Hall 5a; Lawrence, § 142; Hyde, i. § 50; Fauchille, § 199; Wilson, *International Law* (9th ed., 1935), § 28, and in *A.J.*, 1 (1907), pp. 40-60; Woolsey in *A.J.* 14 (1950), pp. 350-356; *The Three Friends* (1897), 166 U.S. 1. The characteristic feature of the status of insurgency, so far as third States are concerned, is the refusal to recognise fully a state of belligerency with the concomitant grant of belligerent rights as against neutrals. Care must accordingly be taken not to commit the mistake of implying such recognition from the fact that third States maintain close contact with insurgents and otherwise recognise their effective authority in the territory occupied by them. See *Spanish Government v. North of England Steamship Company*, where it was held that a 'blockade' instituted by the insurgent Spanish authorities which, though recognised as a *de facto* Nationalist Government, were not recognised as belligerents,

was not a blockade in the legal sense: (1935) 51 *T.L.R.* 852; *Annual Digest*, 1938-1940, Case No. 30. And see, to the same effect, *Tatem v. Gamboa* [1938] 3 All E.R. 135; *Annual Digest*, 1938-1940, Case No. 31. See also generally on civil war in International Law Wehberg in *Hague Recueil*, vol. 63 (1938) (i.), pp. 7-123.

² See Dickinson in *A.J.*, 24 (1930), pp. 69-78, and the *Oriental Navigation Company Case*, *Annual Digest*, 1927-1928, Case No. 361; *A.J.*, 23 (1929), p. 434. It is often maintained that so long as the position is one of insurgency as distinguished from belligerency, the lawful Government is in principle responsible for damage to aliens occurring in the territory occupied by the insurgents. However, this must be understood in the light of the principles limiting the responsibility of the State for the acts of rioters and rebels in civil war. See below, § 1656.

³ See below, § 241.

⁴ See Verzijl in *R.I. (Paris)*, 15 (1935), pp. 284-339, for an admirable discussion of this question.

⁵ As to treaties see below, § 503.

in question is tainted with invalidity and incapable of producing legal results beneficial to the wrongdoer in the form of a new title or otherwise.¹ That invalidity may, in the absence of an international legislature, be wholly or partially cured by an individual or collective act of other States who, by an express act of recognition, may henceforth treat as valid the new title or situation notwithstanding the initial illegality of the act on which it is based. Such express recognition has also often been sought and given when the validity of the title claimed by a State has been doubtful or controversial.² In such cases recognition, to the extent to which it is given,³ amounts to an express waiver of claims conflicting with the right thus recognised.

§ 75c. A State confronted either with an attempt by another State to bring about a new title, treaty or situation

The Obligation of Non-recognition.⁴

¹ The Permanent Court of International Justice repeatedly held that a unilateral act which is not in accordance with law cannot confer upon a State a legal right. See the Order of December 6, 1930, in the case of the *Free Zones of Upper Savoy and the District of Gex* (2nd phase): P.C.I.J., Series A, No. 24; the Order of August 3, 1932, concerning the *South-Eastern Territory of Greenland*: *ibid.*, Series A/B, No. 48, p. 285; the Advisory Opinion of March 3, 1928, in the case of the *Jurisdiction of the Courts of Danzig*: *ibid.*, Series B, No. 15, p. 26; and the Judgment of April 5, 1933, in the case of the *Legal Status of Eastern Greenland*: *ibid.*, Series A/B, No. 53, pp. 75, 95. For an apparent but not real exception see the Judgment of June 24, 1932, concerning the *Interpretation of the Statute of Memel* (jurisdiction): *ibid.*, Series A/B, No. 47, p. 336.

² See e.g. the recognition in 1920 of the sovereignty of Norway over the Spitzbergen: Treaty Series, No. 18 (1924), Cmd. 2092; the recognition in 1920 of Roumanian sovereignty over Bessarabia: Hertalet's *Commercial Treaties*, xxix. p. 1024; the recognition in 1929 by the Vatican City of the existing territory of the Kingdom of Italy: see below, § 106; and see the Judgment of the Permanent Court of International Justice of April 5, 1933, in the case of the

Legal Status of Eastern Greenland, for an account of the Danish efforts to secure formal recognition of her sovereignty over Greenland: P.C.I.J., Series A, B, No. 53.

³ See the Exchange of Notes of November 18 and 19, 1930, between Great Britain and Norway in which the former recognised Norwegian sovereignty over Jan Mayen Island. As Great Britain had no information concerning the reasons for the Danish Decree extending Danish sovereignty to the island in question, the British recognition was expressed to be 'independently of and with all due reserves in regard to the actual grounds on which the annexation may be based': Treaty Series, No. 14 (1931), Cmd. 3792. See also below, p. 556, on the recognition by Norway in 1930 of British (Canadian) sovereignty over Sverdrup Island.

⁴ On the doctrine of non-recognition see Hill, *Recent Policies of Non-recognition* (International Conciliation Pamphlet, 1933, No. 293, pp. 37-44); Graham, *In Quest of a Law of Recognition* (1933), pp. 19 et seq.; Wild, *Sanctions and Treaty Enforcement* (1934), pp. 160-179; Sharp, *Non-recognition as a Legal Obligation* (1934), pp. 152-172, and in *Geneva Special Studies*, v. No. 4 (1934); Lauterpacht in *Legal Problems in the Far Eastern Conflict* (1941), pp. 129-156; Borchard and Morrison, *ibid.*, pp. 157-178;

by means of an illegal act or with an actually consummated act of that nature, may expressly declare that it will not in the future validate by an act of recognition the fruits of the illegal conduct. Thus when in the autumn of 1931 Japan invaded the Chinese province of Manchuria, Mr. Stimson, United States Secretary of State, informed both Japan and China on January 7, 1932, that the United States 'cannot admit the legality of any situation *de facto* nor does it intend to recognise any treaty or agreement entered into between these Governments or agents thereof which may impair the treaty rights of the United States . . . and that it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Treaty of Paris of August 27, 1928. . . .'¹ This, upon analysis, was nothing else than a declaration that the United States will not in the future do anything to legalise by recognition the illegal act and its presumably invalid results. As the result of that declaration the United States did not assume any legally binding obligation not to grant in the future the recognition in question.

However, third States may assume an express obligation not to validate the illegal act and its consequences in the future by means of recognition. Thus in the Resolution adopted on March 11, 1932, the Special Assembly of the League declared that 'it is incumbent upon the Members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.'² So far as members of the League were

Langer, *Seizure of Territory The Stimson Doctrine and Related Principles* (1947), Wright in *I.J.*, 26 (1932), pp. 342-348, and *ibid.* 27 (1933), pp. 39-61; McNair in *B.Y.*, 14 (1933), pp. 65-74; Fischer Williams in *Gratius Society*, 18 (1933), pp. 109-129, in *Hague Recueil*, 44 (1933) (ii), pp. 263-309, and in *H.L.R.*, 47 (1934), pp. 776-794; Middlebush in *A.S. Proceedings*, 1933, pp. 40-53; Chauley in *R.I. (Paris)*, 13 (1934), pp. 151-174, Herz in *R.I.*, 3rd ser., 17 (1936), pp. 581-590; Scelle in *Hague Recueil*,

vol. 55 (1936) (i), pp. 126-135; Wehberg *Krieg und Eroberung im Wandel des Völkerrechts* (1953) pp. 88-115. See also below p. 144 n. 3.

¹ See *A.J.*, 26 (1932), p. 342; *Documents*, 1932, p. 262.

² *"J.*, Special Suppl. No. 101, p. 8. *Documents*, 1932, p. 284. And see to the same effect the communication of February 16, 1932, of the President of the Council to the Japanese representative *Off. J.*, 1932, p. 383.

concerned, the obligation implied in that Resolution must be regarded as declaratory of the obligations of Article 10 of the Covenant in which members of the League agreed to guarantee the existing territorial integrity and political independence of other members of the League.¹ It constituted the very minimum of the duties of a guarantor, and while binding with special force those members of the League who expressly agreed to it,² it did not constitute an extension of the obligations of the Covenant.³

On October 10, 1933, a considerable number of American States, including the United States, signed an Anti-War Pact of Non-Aggression and Conciliation in which they undertook not to recognise territorial arrangements not obtained through pacific means or 'the validity of an occupation or acquisition of territory brought about by armed force.'⁴ A number of European States subsequently adhered to that

¹ In fact in the Resolution of the Council of the League of February 16, 1932 (see above, p. 143, n. 2), the obligation of non-recognition is described as following from the terms of Article 10.

² There was a disposition to question the binding character of this, as indeed of any other Resolution of the Assembly: see B.Y., 16 (1935), pp. 157-160. Probably there is no good reason for denying generally that a State may undertake a binding obligation by consenting to a Resolution of the Assembly. Ratification of a signed treaty is not the only way of assuming binding obligations in International Law (see below, p. 888, n.). In the Advisory Opinion of October 15, 1931, concerning the *Railway Traffic between Lithuania and Poland* (P.C.I.J., Series A/B, No. 42), the Permanent Court of International Justice considered that a Resolution of the Council assented to by Poland and Lithuania was in the nature of an engagement binding upon them.

³ On the non-recognition of Manchukuo see Toynbee, *Survey*, 1932, pp. 452-469; Ling, *La Position et les droits du Japon en Mandchourie* (1933); Mong, *La position juridique du Japon en Mandchourie* (1933); *Geneva Special Studies*, v. No. 3

(1934), Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 516-535; Z.o.V., 4 (1934), pp. 72, 73, Chailley in R.I. (Paris), 13 (1934), pp. 151-174; Cavaré in R.G., 42 (1935), pp. 5-99. The Resolution of the Assembly of March 11, 1932, was general in character and not limited to the particular dispute then before the Council. Thus, although in the course of the Italo-Abyssinian conflict in 1936, neither the Assembly nor the Council expressly reiterated the obligation of non-recognition, it was generally assumed that the obligation formulated in the Resolution of 1932 held good. This apparently was the view of Great Britain in 1938 when she took steps in order to obtain a declaration of the Council of the League that the question of the recognition of the position of Italy in Abyssinia was one for each member of the League 'to decide for itself in the light of its own situation and its own obligations' (*Off. J.*, 1938, May-June, p. 335). See also the declaration of the British Prime Minister of April 13, 1938. House of Commons, *Debates*, vol. 334, col. 1099. And see Rousseau, *Le conflit Italo-Ethiopien devant le droit international* (1938), pp. 251 et seq.

⁴ Article 3: *Documents*, 1933, p. 476.

Convention. In 1938 the Conference of American States adopted at Lima an emphatic Resolution on non-recognition of acquisition of territory by force.¹ The Bogotá Charter of the Organisation of American States of April 30, 1948, provides that 'no territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognised.'²

It must be noted that neither the proclamation of the principle nor the assumption of the obligation of non-recognition have the effect of invalidating an otherwise legal situation. Their effect is to announce the intention or to undertake the obligation to make full use of the right to treat as invalid the results of an illegal act. The instrument of non-recognition is admittedly an imperfect weapon of enforcement. However, in the absence of regularly functioning international machinery for enforcing the law, it must be regarded as a supplementary weapon of considerable legal and moral potency. It prevents any law-creating effect of prescription. It constitutes a standing challenge to the legality of the situation which results from an unlawful act and which, in relation to the courts of the non-recognising State, is a mere nullity.³

¹ The Resolution, after reiterating previous American declarations on the subject of non-recognition, declared, as a fundamental principle of the public law of America, that the occupation or acquisition of territory as the result of conquest by force has no legal effect. It was declared that the pledge of non-recognition was an obligation which could not be avoided either unilaterally or collectively: A.J., 34 (1940), Suppl., p. 197. And see Gutierrez, *La doctrina del non reconocimiento de la conquista en América* (1938). In July 1940, at the meeting of the Ministers of Foreign Affairs of the American Republics, a Convention was adopted providing, in view of the principle of non-recognition of transfers of territory brought about by force, for provisional administration of the territories in question, situated in the Western Hemisphere, by one or more American States on lines approaching substantially those of the mandate system

under the Covenant of the League A.J., 35 (1941), Suppl., p. 23.

² Art. 16 (1952) Suppl., p. 47.

³ See above, § 75, on the effects of recognition.

In consequence of the refusal of the United States to recognise the annexation of the Baltic Republics by Soviet Russia in 1939 the United States courts declined to give effect to the decrees of the authorities in the annexed territories or to issue letters rogatory to them. See *The Kalkas*, Annual Digest, 1941-1942, Case No. 15; *The Signe*, *ibid.*, Cases No. 16 and 19; *The Maret* (1944) F. (2d) 131. See also *Latvian State Cargo and Passenger Lin. v. Clark* (1948) F. Supp. 153; Annual Digest, 1948, Case No. 16; *the Sama v. McGrath* (1951), 188 F. (2d) 1000, and in Bishop *International Law* (1953), p. 252. See also, to the same effect, the decision of the High Court of Eire in *The Rumara*, *ibid.*, Case No. 20. On the other hand, see *The Denny*,

Implied
Recogni-
tion.

§ 75d. Recognition can be either express or implied. Express recognition takes place by a formal notification or declaration clearly announcing the intention of recognition, such as a note addressed to the State or Government which has requested recognition. Implied recognition¹ takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it. Such acts may properly be referred to as modes of recognition.² As recognition is a matter of intention and as important legal consequences follow from the grant or refusal thereof, care must be taken not to imply recognition from actions which, although amounting to a limited measure of intercourse, cannot properly be regarded as modes of recognition.³ Thus, in the absence of an unequivocal intention to the contrary, no recognition is implied in participation in an international conference in which the unrecognised authority takes part⁴; in the conclusion of

ibid., Case No. 18, decided in 1942 by a United States Circuit Court of Appeals. And see Briggs in *A.J.*, 37 (1943), pp. 585-596. On the British refusal to grant *de jure* recognition see the *Tallinna Laerauhiskus* case (1940), 70 *Lloyd's List L.R.*, 245. As to Canada see *The Elise* [1948] *C. Ex R.* 435 and the comment thereon in *B.Y.*, 26 (1949), pp. 427-430.

¹ For a detailed discussion see Lauterpacht in *B.Y.*, 21 (1944), pp. 123-150. See also Kunz, *Die Anerkennung der Staaten und Regierungen im Völkerrecht* (1928), pp. 48 *et seq.*; Scalfati Fusco, *Il riconoscimento di stati nel diritto internazionale* (1938), pp. 263-257.

² On the question of modes of recognition generally see Temperley, *v.* pp. 157-162; Hackworth, *i.* § 32; Fauchille, §§ 206-208; Spiropoulos, *Die de facto Regierung im Völkerrecht* (1928), pp. 14-19; Gemma in *Hague Recueil*, 1924 (iii.), pp. 369-378.

³ In connection with the *Trent* case Earl Russell insisted on the right of neutral States to receive from unrecognised Governments special agents not possessing diplomatic character for the purpose of protecting British subjects; *U.S. Diplomatic Correspondence*, 1862, p. 8; *British Parl. Papers*, 1862, lxii. p. 575. A similar

right was claimed in 1792 by Jefferson for the purpose of 'reforming the unfriendly restrictions on our commerce and navigation'. Moore, *i.* p. 120. In 1937, during the Spanish Civil War, Great Britain sent to and received from the insurgents, at that time not recognised as a government, agents for the protection of commercial and financial interests. The British Foreign Secretary stated on November 8, 1937, that 'the reception of such an agent in London will not in any way constitute recognition by His Majesty's Government of the authorities of the territories under the control of General Franco': House of Commons, *Debates*, 1937-1938, vol. 328, col. 1386. And see Hackworth, *i.* pp. 327-364, on 'Acts Falling Short of Recognition.'

⁴ In its instruction to the delegation of the United States to the Conference on the supervision of the international trade in arms and ammunition the Department of State expressed in 1925 the view that the participation of the United States at a conference attended by delegates of the Soviet Government, at that time not recognised by the United States, would, in the matter of recognition, 'signify nothing'. Hackworth, *i.* p. 348.

a multilateral treaty to which that authority is a party¹; in the retention (as distinguished from fresh appointment) of diplomatic representatives for an interim period²; in the retention, replacing, and (probably) sending and reception of consuls (especially if the latter is not accompanied by a request for or issue of an exequatur)³; in the fact and manner of communication with foreign authorities⁴; in the request for and grant of extradition⁵; in the maintenance of contact with the insurgents in a civil war⁶; or in admission, so far as States opposed to such admission are concerned, to an international organisation such as the United Nations.⁷ The only legitimate occasions for

¹ Occasionally, a declaration is attached, *ex abundante cautela*, to the effect that participation in a multilateral treaty does not amount to recognition. See e.g. the Declaration of the United States in signing the International Sanitary Convention of June 21, 1926 (Hudson, *International Legislation*, vol. iii. p. 1975). For other instances see Lauterpacht, *op. cit.*, p. 126. However, on other occasions no such declaration has been deemed necessary: see Hudson in *A.J.*, 22 (1929), p. 130. See also Hackworth, i. p. 353.

² It has been the practice of most States in case of a revolutionary change of government in a foreign country to instruct their diplomatic representatives to remain at their posts and to maintain necessary contacts with the new authority without, however, officially recognising it as a government.

³ See below, § 428. For a survey of the British and American practice see a Foreign Office Memorandum prepared in 1873 by the Librarian of the Foreign Office and printed in Smith, i. pp. 251-257. For the more recent practice of the United States see Moore, i. § 72, and v. § 698, and Hackworth, iv. pp. 688 *et seq.* See also *Harvard Research, Consuls* (1932), Article 6, pp. 238-261. In the opinion of the Advisory Committee of the Assembly of the League of Nations set up in connection with the non-recognition of Manchukuo, the replacing of consuls did not imply

recognition: *Off. J.*, Special Suppl., No. 113, p. 3.

⁴ Thus, for instance, on December 2, 1929, in the course of the conflict between Russia and China, the Government of the United States, which at that time did not recognise the Soviet Government of Russia, addressed identical notes to the two States engaged in the dispute reminding them of their obligations under the General Treaty for the Renunciation of War: *Documents on International Affairs*, 1929, p. 277. For various examples of precautions taken to obviate the suggestion of implied recognition following upon intercourse with unrecognised authorities see Hackworth, i. pp. 343 *et seq.* On the question of the possible implied recognition of the annexation of Abyssinia by Italy as the result of communications addressed to the 'King of Italy and Emperor of Abyssinia' see Lauterpacht, *op. cit.*, pp. 139, 140.

⁵ See Hall (4th ed., 1896), p. 93.

⁶ See below, § 168.

⁷ The Commercial Tribunal of Luxembourg held in 1935 that the admission of Soviet Russia to the League of Nations implied the recognition of the Soviet Government by Luxembourg: *Union of Soviet Socialist Republics v. Luxembourg and Saa. Company, Annual Digest*, 1935-1937, Case No. 34. See also, to the same effect, Scelle in *R.G.*, 27 (1921), pp. 122-138; Fauchille, vol. i. (1922), pp. 334, 335; Anzilotti, *Corso di diritto internazionale* (3rd ed., 1928),

implying recognition are: (a) the conclusion of a bilateral treaty, such as a treaty of commerce and navigation, regulating comprehensively the relations between the two States¹; (b) the formal initiation of diplomatic relations; (c) probably, the issue of a consular exequatur²; (d) in the case of recognition of belligerency, a proclamation of neutrality or some such unequivocal act.

Condi-
tional
Recogni-
tion.

§ 75e. Recognition, in its various aspects, is neither a contractual arrangement nor a political concession. It is a declaration of capacity. This being so, it is improper to make it subject to conditions other than the existence---

p. 172. See also Schücking-Wehberg, pp. 267-269; Rougier in *R.G.*, 28 (1921), pp. 222-242; Coucke in *R.I.*, 3rd ser., 2 (1921), pp. 325-329; Graham, *The League of Nations and Recognition of States* (1933). Some members of the League, such as Switzerland and Belgium, asserted their right to continue in their refusal to recognise the Government of Soviet Russia after the admission of that country to the League. See Makarov in *Z.o.F.*, 5 (1935), pp. 58-59. Following upon the Vilna dispute Lithuania refused to maintain diplomatic relations with Poland. See Brocklebank in *A.J.*, 20 (1926), pp. 483-501; Chklover in *R.I. (Paris)*, 2 (1928), pp. 224-250; and P.C.I.J., Series A/B, No. 42 (Advisory Opinion in the matter of the *Railway Traffic between Poland and Lithuania*). In 1935 Uruguay suspended diplomatic relations with the Soviet Government on account of alleged communist propaganda. For the correspondence on the subject and the Russian appeal to the League see *Off. J.* 1936, pp. 138, 232.

The question of recognition implied in the admission of a new member is one which must confront any general international organisation. It is reasonable to assume that States voting for admission thereby grant recognition—if they have not done so before. With regard to States voting against admission the proper course would seem the adoption of an express rule to the effect that as admission to the Organisation is in itself sufficient evidence of the possession of the required attributes of statehood or of

governmental capacity, such admission is tantamount to recognition by all the members of the Organisation. On the question of implied recognition through admission to an international organisation see Antricht in *A.J.* 43 (1919), pp. 679-701. See also Schachter in *I.L.*, 25 (1948), pp. 109-115, and Rosenne, *ibid.*, 26 (1949), pp. 427-447, as to the United Nations.

¹ Thus, for instance, France recognised the independence of the United States by concluding with it a Treaty of Amity and Commerce in 1778. This mode of recognition of a seceding community has often been adopted in order to spare the susceptibilities of the parent State. For an interesting despatch by Canning on the subject, written in 1825, see *Britain and the Independence of Latin-America*, edited by Webster (1938), vol. 1, p. 291. On the other hand agreements for limited purposes do not necessarily imply recognition. See, e.g., the Agreement between the British and Russian Governments of February 12, 1920, for the exchange of prisoners of war, registered in September 1920 with the Secretariat of the League: *L.A.T.S.*, 1, p. 264. In November 1920 the Foreign Office informed the Court, in connection with the proceedings in *Luther v. Nagor*, that 'His Majesty's Government have never officially recognised the Soviet Government in any way': [1921] *I.K.B.* 468.

² As distinguished from a request for the issue of an exequatur—a matter on which the practice of Governments seems to be divided. See Lauterpacht, *op. cit.*, pp. 134-136.

including the continued existence—of the requirements which qualify a community for recognition as an independent State, a Government, or a belligerent in a civil war. In fact, the practice of States shows few examples, if any, of conditions of recognition in the accepted sense, *i.e.* of stipulations the non-fulfilment of which justifies withdrawal of recognition. When in 1878, at the Berlin Congress, Bulgaria, Montenegro, Serbia and Roumania were recognised as independent States, a condition was imposed upon them to the effect that they should not impose religious disabilities upon their subjects.¹ There was general agreement that any failure on the part of these States to fulfil those conditions would not justify or make legally possible withdrawal of recognition.² This applies even more cogently to cases in which the recognising State obtains, as the price of recognition, promises and undertakings given not in the general interest but for its particular advantage. Such stipulations, which are contrary to the true function of recognition,³ are a relatively rare occurrence.⁴ They do not in any case constitute a condition in the accepted legal sense of the term.⁵

§ 75f. According, at least, to the practice of British and American courts, recognition is retroactive in the sense that courts treat as valid the acts of the newly recognised State or Government dating back to the commencement of the

Retro-
activity
of Recog-
nition

¹ See Articles 5, 27, 35 and 44 of the Treaty of Berlin of 1878, in Martens, *N R G*, 2nd ser., iii. p. 449.

² See, *e.g.*, Rivier, i p. 61.

³ When during the Peace Conference in 1919 it was suggested by some States that the recognition of Finland be made dependent upon the acceptance of certain undertakings relating to the military situation in the Baltic, especially with regard to Soviet Russia, the representative of the United States objected to the proposal on the ground that 'a nation was entitled to recognition of independence . . . as a matter of right, and it was not justifiable to put conditions on such a recognition simply to serve some political purpose.' See Graham, *The Diplomatic Recognition of Border States*, Part I, Finland (1936), p. 142.

⁴ See Hackworth, i p. 192, who points out that, since 1906, the United States have not accorded conditional recognition to any State. The same applies to the period prior to 1906.

Thus, for instance, when in 1933 the United States recognised the Soviet Government, the Governments of both States gave mutual undertakings and explanations with regard to their future policy in such matters as religious freedom and the protection of economic rights. It was with reference to these various undertakings 'at the Supreme Court of the United States referred, somewhat widely, to conditional recognition: *United States v. Pink* (1942), 315 U.S. 203, 229. See generally on so-called conditional recognition Lauterpacht in *B Y.*, 22 (1945), pp. 185-187.

activities of the authority thus recognised.¹ That rule, for which there appears to be no direct international authority,² is one of convenience rather than of principle. Convenience and good understanding between nations would seem to demand that once a foreign State or Government has been recognised, none of its acts, including those prior to recognition, should be regarded as a mere nullity.³ In principle, there is little to be said for treating as legally effective legislative acts performed at a time when the authority in question was, in the view of the non-recognising State, a mere instrumentality of power.⁴

With-
drawal of
Recogni-
tion.

§ 75g. Recognition is a declaration, on the part of the recognising State, that a foreign community or authority is

¹ *Luther v. Sagor* [1921] 3 K.B. 432; *White, Child & Beney, Ltd. v. Eagle Star and British Dominions Insurance Company, Ltd.* (1922) 38 T.L.R. 616; *The Jupiter* [1927] P. 122, 250; *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1937) 53 T.L.R. 751; *Oetjen v. Central Leather Co.* (1916) 246 U.S. 297; *Ricaud v. American Metal Company* (1918) 246 U.S. 304; *United States v. Belmont* (1936) 301 U.S. 324; *A.J.*, 31 (1937), p. 537 (and comment thereon by Jessup, *ibid.*, pp. 481-484); *Boguslawski v. (Idynia) Amerzyka Linie* [1950] 1 K.B. 157; [1950] 2 All E.R. 355; [1953] A.C. 11, where the Court distinguished the case from *Luther v. Sagor*, both on the facts and on the wording of the certificate of the Foreign Office; *Civil Air Transport Incorporated v. Central Air Transport Corporation* [1952] 2 All E.R. 733 (and comment thereon by Johnson in *B.Y.*, 29 (1952), pp. 464-470). For a criticism of the doctrine of retroactivity see Hervey, *The Legal Effects of Recognition in International Law* (1928), pp. 68, 101, 110; Mervyn Jones in *B.Y.*, 16 (1935), pp. 42-55; Nisot in *Canadian Bar Review*, 21 (1943), pp. 627 *et seq.*

² See the observations of the Permanent Court of International Justice in the case of *Certain German Interests in Polish Upper Silesia*, Series A, No. 7, pp. 28, 29, 84, and of Erich in *Illegus Recueil*, vol. 13 (1928) (iii.), pp. 499-502. And see the comments by Mervyn Jones, *op. cit.*, pp. 51, 52.

on the *Andrew Allen* case which came in 1799 before the British-American Mixed Commission under the Jay Treaty. See also Moore, *International Adjudications*, in. (1931), pp. 238-252.

³ It was on some such considerations that the Supreme Court relied in *United States v. Pink* (1942) 315 U.S. 203. In that case the Supreme Court gave a comprehensive and highly controversial extension to the principle of retroactivity. It laid down that, in some cases, recognition endows with legal effect, outside its territory, such acts of the recognised Government as have hitherto been treated as invalid by the *lex fori* for reasons not connected with non-recognition. For a criticism of that decision see Borchard in *A.J.*, 36 (1942), p. 275, and Jessup, *ibid.*, p. 282.

⁴ It has been held by the Supreme Court of the United States that the principle of retroactivity is not applicable to transactions, in the United States, between American nationals and the predecessor of the newly recognised Government: *Guaranty Trust Company v. United States* (1938) 304 U.S. 126; *A.J.*, 32 (1938), p. 848; *Annual Digest*, 1938-1940, Case No. 69. In the absence of some such qualification of the principle of retroactivity, nationals of a State could not safely deal with the predecessor of the newly recognised Government during the period when the former was still recognised.

in possession of the necessary qualifications of statehood, of governmental capacity, or of belligerency. These qualifications are not necessarily enduring for all time. A State may lose its independence; a government may cease to be effective; a belligerent party in a civil war may be defeated. In all these cases withdrawal of recognition is both permissible and indicated.¹ On occasions, withdrawal of recognition is accomplished by means of an express notification to the authority from which it is withdrawn.² As a rule, however, withdrawal of recognition takes place by the recognition *de jure* of the rival Government which has succeeded in establishing itself, or of the sovereignty of the State which

¹ The Institute of International Law, while laying down, in a Resolution adopted in 1936, that recognition *de jure* of a State is irrevocable, in effect qualified that rule by adding that such recognition ceases to have effect in case of a definite disappearance of one of the essential elements of statehood obtaining at the moment of recognition (Article 5). *A.J.*, 30 (1936), Special Suppl., p. 186. Hyde, i. § 38, and Fauchille, § 213, consider recognition to be capable of withdrawal. For the withdrawal of the recognition of Finland by France in 1918 see Temperley, vi. p. 289. Fauchille, i. (1) No 167 (4). Probably this was a case of withdrawal of recognition from a particular Government. See Lauterpacht in *B.Y.*, 22 (1945), p. 140.

If recognition *de jure* is capable of withdrawal, and if, as suggested, the essence of recognition *de facto* is that it is provisional and revocable, what, it may be asked, is the difference, if any, between *de facto* and *de jure* recognition? The answer is that the revocability of the former is one which is inherent in the situation as it exists at the time when recognition is granted and that it can therefore be withdrawn more easily, whereas in the case of recognition *de jure* a most stringent proof is required of the final disappearance of the essential elements of statehood, of governmental capacity, or of belligerency. For the other legal consequences of the distinction between *de jure* and *de facto* recognition see above, § 74.

² See, e.g., the British communication sent in 1861 to the *Chargé d'Affaires* of Naples subsequent to the recognition of the Kingdom of Italy which had annexed the Neapolitan territories: Satow, *A Guide to Diplomatic Practice* (3rd ed., 1932), p. 113. See, as to the withdrawal of the United States recognition of Montenegro, the communication addressed in 1921 by the Acting Secretary of State to the Montenegrin Consul-General in charge of the Legation: *U.S. For. Rel.*, 1921 (ii), p. 946. As to the withdrawal of recognition from the various representatives of the former Russian régime subsequent to the recognition of the Soviet Government by the United States in 1933 see *A.J.*, 28 (1934), Suppl., p. 13. For an instance of withdrawal of recognition not accompanied by simultaneous recognition of a new authority, see the withdrawal of recognition by the United States from the revolutionary Walker Government in Nicaragua in 1936: Moore i. p. 143. On January 6, 1950, when the United Kingdom recognised the Government of the People's Republic in China, concurrently with the recognition of that Government she withdrew her recognition of the Nationalist Government and informed the Chinese Ambassador in London accordingly. *The Times* newspaper January 7, 1950. For the complicated details of that recognition see Johnson in *B.Y.*, 20 (1952), pp. 464-468, and 'Aristides' in *I.L.Q.*, 4 (1951), pp. 159-177.

has annexed another. Thus Great Britain withdrew in 1938 her recognition of Abyssinia as an independent State by recognising *de jure* the annexation of that country by Italy.¹ In 1939 she withdrew her recognition from what had been hitherto the *de jure* Government of Spain by recognising the revolutionary Government, hitherto recognised *de facto*, as the *de jure* Government of the whole of Spain.²

In view of the far-reaching consequences of withdrawal of recognition it must be noted: (a) that such effect can be attributed only to the *de jure*, and not to the *de facto*, recognition of the new authority replacing the State or Government from which it is being withdrawn: and (b) that it is not permissible to infer withdrawal of recognition from acts other than those which are unequivocally, and not by mere implication, expressive of the intention of the State in question.

III

CHANGES IN THE CONDITION OF INTERNATIONAL PERSONS

Grotius, ii. c. 9, §§ 5-13—Pufendorf, viii c. 12—Vattel, i. § 11 Hall, § 2—Phillimore, i. §§ 124-137 Westlake, i. pp. 58-66 Wheaton, §§ 22-32 Moore, i. §§ 76-79—Bluntschli, §§ 39-53 Hackworth, i. § 56 Heffter, § 24—Fauchille, §§ 214-215 (6), 221, 222, 230 Pradier-Fodere, i. §§ 146-157 Nys, i. pp. 432-435 Rivier, i. § 3, pp. 62-67—Calvo, i. §§ 81-106 Fiore i. §§ 321-332, and Code, §§ 124-146 Martens, i. §§ 65-69 Bustamante, pp. 141-159—Baty, pp. 191-197—Borchard, § 84 McNair, Chapters 34 (1) and (3) and 35 (2)-35 (5) Ballardore Pallieri, pp. 240-245, and the same in *Annali dell' Istituto di scienze giuridiche* of the University of Messina, v. (1930-1931) Redflob in *R.I. (Paris)*, 13 (1931), pp. 446-483—Cassacchi in *Comunicazioni e Studi*, 4 (1952), pp. 25-97.

¹ See Toynbee, *Survey*, 1938 (1), pp. 158-163. See also *Haile Selassie v. Cable and Wireless, Ltd.* (No. 2) [1939] Ch. 182.

² The withdrawal by Great Britain in 1866 of her recognition of the belligerency of the Confederate States was announced in a letter from the Foreign Secretary to the various Government Departments informing them that in the view of the British Government 'neutral nations could

not but consider the Civil War in America at an end': *London Gazette*, June 6, 1866. For an example of withdrawal of recognition of conquest see *Azazh Kebbede Tesema v. Italian Government*, a case decided in 1940 by the Palestine Supreme Court. In this case the Court received official information that the British recognition of the Italian conquest of Ethiopia had been withdrawn: *Annual Digest*, 1938-1940, Case No. 36.

§ 76. The existence of International Persons is exposed to the flow of things and times. There is a constant and gradual change in their citizens through deaths and births, emigration and immigration. There is a frequent change in those individuals who are at the head of the States, and there is at times a change in the form of their Governments, or in their dynasties if they are monarchies. There take place changes in their territories through loss or increase of parts thereof, as well as changes regarding their independence through partial or total loss of the same. Several of these and other changes in the condition and appearance of International Persons involve no questions of International Law, although they may be of great importance for the inner development of the States concerned, and, directly or indirectly, for international policy. Those changes, on the other hand, which are, or may be, of importance to International Law must be divided into three groups* according to their influence upon the character of the State concerned as an International Person. For some of these changes affect a State as an International Person, others do not; again, others extinguish a State as an International Person altogether.¹

§ 77. A State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory. International Law cannot be said to be indifferent to these changes. Although strictly no notification to or recognition by foreign Powers is necessary, according to the Law of Nations, in case of a change in the headship of a State or in its entire dynasty,

¹ On the birth of new States see Hall, § 1, Westlake, 1 pp 44 50, Smith, 1. pp. 233 245, Pauchille §§ 195-198 (3); *Off. J.*, Special Suppl. No. 3 (Report of Committee of Jurists on the Aaland Islands question), Masaryk, *The Making of a State* (Czechoslovakia) (1927), pp 443 347; and Kelsen in *RI* (Paris), 3 (1929), pp 613 641. As to the Baltic States see Rutenberg, *Die baltischen Staaten und das Völkerrecht* (1928); Montfort, *Les nouveaux États de la Baltique* (1933), (Graham, *The*

Diplomatic Recognition of the Border States, Finland (1933). On the question whether Yugoslavia as enlarged after the First World War was a new State see Kaufmann in *Z I* 31 (1923-1924) pp 211 251. In *Artw. Kovac v. Boyli* (1952) 107 F. Suppl. 11, *A J* 47 (1953) p 319 a United States District Court held that the United States treaties with Serbia did not apply to Yugoslavia. And see Iomitch, *La formation de l'État Yougoslave* (1927). And see below, § 78.

or if a monarchy becomes a republic or *vice versa*, no official intercourse is possible between the Powers refusing recognition and the State concerned. Although, further, a State can assume any title it likes, it cannot claim the privileges of rank connected with a title if foreign States refuse recognition.

But whatever may be the importance of such changes, they neither affect a State as an International Person, nor affect the personal identity of the State concerned.¹ France, for instance, has retained her personal identity from the time the Law of Nations came into existence until the present day, although she acquired, lost, and regained parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now, finally as it seems, a republic. All her international rights and duties² as an International Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance.³ Even such loss of territory as occasions the reduction of a Great Power to a small Power does not affect a State as an International Person.

Changes
affecting
States as
International
Persons.

§ 78. Changes which affect States as International Persons are of a different character.

(1) As in a Real Union the member-States of the union, although fully independent, make one International Person,⁴ two States which hitherto were separate International Persons are affected in that character by entering into a

¹ For this reason a State is responsible for all acts committed by a former Head, although such Head may have attained his position through revolution. See above, § 73a, and the case of *The Republic of Peru v. Dreyfus Brothers* (1888) 38 (Ch. 1) 348, and Spiropoulos, *op cit.*, pp. 172-177. It is believed that this responsibility exists, whether or not the former Head was recognised by the State demanding redress.

² The repudiation in February 1918 by the Russian Soviet Government of the public debts of Russia incurred by previous duly recognised Governments was a breach of International Law as generally understood at that time; see Fauchille, § 215 (4),

and literature there cited. And see Chailley, *La nature juridique des traités internationaux* (1932), pp. 135-146. This attitude of the Soviet Government constituted one of the reasons why a number of States refused at that time to recognise that Government. There appears to be room for a reconsideration of the existing rule on the subject in cases when the social and political upheaval accompanying a revolutionary change of government is such as to render equitable and reasonable a modification of the obligations contracted by the former régime.

³ Hyde, ii. § 642.

⁴ See below, § 87, where the character of a Real Union is fully discussed.

Real Union. For through that change they appear henceforth together as one and the same International Person.

(2) Other changes affecting States as International Persons are such changes as involve a partial loss of independence on the part of the States concerned. Many restrictions may be imposed upon States without interfering with their independence proper,¹ but certain restrictions involve inevitably a partial loss of independence. In the Advisory Opinion concerning the *Customs Régime between Germany and Austria* the Permanent Court of International Justice held in September 1931 that, in the circumstances of the case, the entering into a customs union with another State constituted a change in status amounting to compromising a State's independence.² If a hitherto independent State comes under the protectorate of another State, its character as an International Person is affected. Again, if several hitherto independent States enter into a federal State, they transfer a part of their sovereignty to the Federal State and become thereby part sovereign States.

§ 79. A State ceases to be an International Person when it ceases to exist.³ Practical causes of extinction of States are: merger of one State into another, annexation after conquest in war, breaking up of a State into several States,⁴

Extinction
of Inter-
national
Persons.

¹ See below, §§ 126, 127, where the different kinds of these restrictions are discussed.

² See below, § 124.

³ See Raestad in *R I*, 3rd ser., vol 20 (1939), pp 441-449.

⁴ But when does a State cease to be the same State? As to the case of Austria-Hungary after the First World War see, in favour of the view that the new Austrian Republic is a new State, Strupp, *Éléments*, § 5, p. 110; contra, Temperley, vol. iv, pp 417, 418; Soubbotitch, *Effets de la dissolution de l'Autriche-Hongrie sur la nationalité de ses ressortissants* (1926), pp. 41-45, and Borchard in *A.J.*, 19 (1925), pp. 358, 359; the matter is also discussed by Anzilotti, p. 86; Fock, *Les effets des transformations de l'État*, etc., vol. 1. (1927); and Udina, *L'estinazione dell'imperio Austro-Ungarico nel diritto inter-*

nazionale (2nd ed., 1933). The question has also arisen in connection with the old Ottoman Empire and the new Turkish Republic. In the *Ottoman Debt Arbitration* of 1925, it was held that the latter is not a new State, but a continuation of the former; see *Annual Digest*, 1925-1926. See also Hall, 8th ed., p. 116 (n.); Hyde, 1. § 129; Kelsen in *Hague Recueil*, vol. 42 (1932) (4), pp. 294-297; Balladore Pallieri, cited above at p. 147; Anzilotti, pp. 177-186. As to the end of the Kingdom of Montenegro see *In re Savini*, decided in October 1927 by the Court of Appeal of Rome: *Annual Digest*, 1927-1928, Case No 106. On the continuity of the Czechoslovak Republic in the years 1938-1945 see Kerua in *Bulletin de droit tchécoslovaque*, 5 (1947), pp. 45-59. See also Vošta, *O přetrvání kontinuitě resho-*

and breaking up of a State into parts which are annexed by surrounding States.

By voluntarily merging into another State, a State loses all its independence and becomes a mere part of another. In this way the Congo Free State merged in 1908 into Belgium, Korea in 1910 into Japan, and Montenegro in the Serb-Croat-Slovene State after the First World War. And the same is the case if a State is subjugated by another. In this way the Orange Free State and the South African Republic were absorbed by Great Britain in 1901. An example of the breaking up of a State into parts which are annexed by surrounding States is the absorption of the old State of Poland by Russia, Austria, and Prussia in 1795. The absorption of Estonia, Latvia and Lithuania by Soviet Russia in 1940 was claimed by the latter to be a voluntary merger. Some States, including the United States, have regarded it as a case of forcible annexation in violation of International Law and have continued to recognise the existence of the three above-mentioned States.¹

IV

SUCCESSION OF INTERNATIONAL PERSONS

Grotius, ii. c. 9 and 10—Pufendorf, viii. c. 12—Hall, §§ 27-29—Phillimore i. § 137—Sibert pp. 217-224—Westlake i. pp. 68-83 and *Papers* pp. 475-497—Wharton, i. § 5—Moore, i. §§ 92-99—Hyde, i. §§ 120-123, ii. §§ 543-545—Borchard, § 83—Fenwick, pp. 117-122—Bluntschli §§ 47-59—Schwarzenberger, pp. 70-79—Fauchille §§ 216-234 (5)—Pradier-Fodéré, i. §§ 156-163—Nys, i. pp. 432-435, ii. pp. 24-38—Rivier, i. § 3, pp. 69-75—Calvo, i. §§ 99-104—Fiore, i. §§ 349-366—Cavaglieri, pp. 201-217—De Loutre, i. pp. 224-232—Cruchaga, i. §§ 200-204—Hackworth, i. §§ 79-82—Keith's Wheaton, pp. 57-78—Baty, pp. 197-203—Smith, i. pp. 331-416—Balladore Pallieri, pp. 281-297—Audinet in *Répertoire*, i. pp. 573-626—Appleton, *Des effets des annexions de territoires sur les dettes de l'État démembré ou annexé* (1895)—Huber, *Die Staatensukzession* (1898)—Keith, *The Theory of State Succession, with special reference to English and Colonial Law* (1907)—Cavaglieri, *La dottrina della successione di Stato a Stato*, etc. (1910)—Focherini, *Le successioni degli Stati*, etc. (1910)—Schoenborn, *Staatensukzessionen* (1913), and in Strupp, *Wort.*, ii. pp. 578-588—Michel, *Die Einverleibung Frankfurts in den preussischen Staat als Fall einer Staatensukzession* (1913)—Schmidt, *Der Uebergang der*

slovenské republiky (1947), and Ko-
jecký, *Československo ve světle teorie*

mezírodního práva o uznání (1947).

¹ See above, § 76c.

Staatsschulden bei Gebietsabtretungen (1913)—Phillipson, *Termination of War and Treaties of Peace* (1916), pp. 34-51 and 290-334—Barclay, Struycken, Kaufmann, *Studien zur Lehre von der Staatensukzession* (1923)—(Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatswechsel* (1925) Sack, *Les effets des transformations des États sur leurs dettes publiques et autres obligations financières*, vol. 1. (1927)—the same, *Succession aux dettes publiques d'État* (1929) (a comprehensive treatise), and in *Hague Recueil*, vol. 23 (1928) (iii.), pp. 145-321—Feilchenfeld, *Public Debts and State Succession* (1931) (a leading treatise)—Fabri, *Effetti giuridici delle annessioni territoriali* (1931)—Richard in *Law Magazine and Review*, 28 (1903), pp. 120-141—Keith in *Z. I.*, 3 (1909), pp. 618-648—Hershey in *A.J.*, 5 (1911), pp. 285-297—Sayre in *A.J.*, 12 (1918), pp. 475-497, and 705-743—Hurst in *B.Y.*, 1924, pp. 163-178—Cavaglieri in *Rivista*, 3rd ser., vol. 3 (1924), pp. 26-46, 230-271—the same in *Annuaire*, 36 (1) (1931), pp. 185-255; in *R.G.*, 38 (1931), pp. 257-296; and in *R.I.*, 3rd ser., 15 (1934), pp. 219-248—Kelsen in *Hague Recueil*, vol. 42 (1932) (iv.), pp. 312-349—Udina, *ibid.*, vol. 44 (1933) (n.), pp. 667-772—Strupp, *ibid.*, vol. 47 (1934) (1), pp. 468-490—Monaco in *Rivista*, 26 (1934), pp. 289-320, 462-502—Kaeckenbèck in *B.Y.*, 17 (1936), pp. 1-16, and in *Hague Recueil*, vol. 59 (1937) (i.), pp. 325-354—Waltz in *Z. V.*, 21 (1937), pp. 1-18—Garner in *A.J.*, 32 (1938), pp. 421-438—Canasacchi in *Rivista*, 32 (1940), pp. 133-193, 321-378—Castro in *Hague Recueil* 78 (1951) (1), pp. 345-498—Canasacchi in *Rivista*, 37 (1954), pp. 19-71.

§ 80. Although there is no unanimity among the writers on International Law with regard to the so-called succession of International Persons, nevertheless the following common doctrine can be stated to exist.

Common
Doctrine
regarding
Succession
of
Inter-
national
Persons.

A succession of International Persons occurs when one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition.

Universal succession takes place when one International Person is completely absorbed by another, either through subjugation or through voluntary merger. And universal succession further takes place when a State breaks up into parts, which either become separate International Persons of their own or are annexed by surrounding International Persons.

Partial succession takes place, first, when a part of the territory of an International Person breaks off in a revolt and by winning its independence becomes itself an International Person; secondly, when one International Person acquires a part of the territory of another through cession; thirdly, when a hitherto full sovereign State loses part of its

independence through entering into a federal State, or coming under suzerainty or under a protectorate, or when a hitherto not-full sovereign State becomes full sovereign.

Nobody has ever maintained that on the successor devolve all the rights and duties of his predecessors. But after stating that a succession takes place, writers try to deduce the consequences and to make out what rights and duties do, and what do not, devolve.

Several writers,¹ however, contest the common doctrine, and maintain that a succession of International Persons never takes place. Their argument is that the rights and duties of an International Person disappear with the extinguished Person,² or become modified, according to the modifications an International Person undergoes through losing part of its sovereignty.

How far
Succession
actually
takes
place

§ 81. The practice of States shows that no *general* succession takes place according to the Law of Nations. With the extinction of an International Person disappear its rights and duties as a person. But it is equally wrong to maintain that no succession whatever occurs. For nobody doubts that certain rights and duties actually and really devolve upon an International Person from its predecessor. And since this devolution takes place through the very fact of one International Person following another in the possession of State territory, there is no doubt that, as far as these devolving rights and duties are concerned, a succession of one International Person to the rights and duties of another really does take place. But no general rule can be laid down concerning all the cases in which a succession takes place. These cases must be discussed singly.

Succession
in
consequence
of
Absorption.

§ 82. When a State merges voluntarily into another State—as, for instance, Korea in 1910 did into Japan—or when a State is subjugated by another State, the latter remains one and the same International Person and the former becomes totally extinct as an International Person.

(a) *Political Rights and Duties*.—No succession takes place, therefore, with regard to rights and duties of the extinct

¹ For instance, Gareis, pp. 66-70; *di Stato a Stato* (1910); Focheris, Cavaglieri, *La dottrina della successione* op. cit.

² See above, § 79

State arising either from the character of the latter as an International Person or from its purely political treaties. Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which concluded them. They are personal treaties, and they naturally, legally, and necessarily presuppose the existence of the contracting State. But it is controversial whether treaties of commerce, extradition,¹ and the like, made by the extinct State remain valid, so that a succession takes place. The majority of writers—correctly, it is believed—answer the question in the negative,² because such treaties, although they are non-political in a sense, possess some prominent political features.³

(b) *Local Rights and Duties*.—A genuine succession takes place, however, with regard to such international rights and duties of the extinct State as are locally connected with its land, rivers, main roads, railways, and the like. According to the principle *res transit cum suo onere*, treaties of the extinct State concerning boundary lines, repairing of main roads, navigation on rivers, and the like, remain valid, and all rights and duties arising from such treaties of the extinct State devolve on the absorbing State.⁴

(c) *Fiscal Property and Debts*. There is also a genuine succession with regard to the fiscal property and the fiscal funds of the extinct State. They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State.⁵

¹ On the judicial tendency to secure a degree of continuity in this respect see Green in *Current Legal Problems*, 1933, pp. 291-296.

² See also, to the same effect, the decision of the German Supreme Court of August 13, 1936, with reference to the extradition treaties concluded by the German States prior to the German law of 1934 which transformed Germany into a unitary State (at least) in the field of foreign affairs: *A.J.*, 31 (1937), p. 739, and comment thereon by Riesenfeld, *ibid.*, p. 720.

³ On the whole question concerning the extinction of treaties in consequence of the absorption of a State by another see Moore, v. § 773; McNair,

Chapter 35 (1); Hyde in *A.J.*, 26 (1932), pp. 133-136; Chauley, *La nature juridique des traités internationaux* (1932), pp. 146-159; and below, § 548. See also Mervyn Jones in *B.I.* 24 (1947), pp. 360-375.

⁴ As to local debts not abolished by treaty see *Polish Mining Corporation v. District of Ratibor*, decided in 1933 by the German Supreme Court: *Annual Digest*, 1933-1934, Case No. 37.

⁵ See *Haile Selassie v. Cable and Wireless, Limited* (No. 2) [1939] Ch. 182. That case is also an authority for the rule that only the successor who is recognised *de jure* is entitled to the assets of the former sovereign: *The United States v. Prioleau*, 35

But the debts ¹ of the extinct State must, on the other hand, also be taken over by the absorbing State ² The private creditor of an extinct State certainly acquires no right directly available to him under International Law ³ against

L J Ch 7 See also *Land Oberoester reich v Gude* (1940) 100 F 2d, 635 where an American court laid down the rule that 'a right of action belonging to one sovereign will pass to its successor, if the successor has come to power in a manner acceptable to what our own government considers the principles of International Law

¹ See Moore, i § 97, and Appleton, *Des effets des annexions de territoires sur les dettes*, etc (1895) (On the nature of the public debt with regard to State Succession see Sack, cited above and in *New York University Law Quarterly Review*, 10 (1932 1933), pp 127 156, 341 359 As to the effects of changes of sovereignty on currency questions see Nolde in *Hague Recueil*, vol 27 (1929) (ii) pp 285 313 And see, in particular, the comprehensive works of Feilchenfeld and Sack, cited above at p 157

² This is almost generally recognised by writers on International Law and the practice of the States (See Huber, *op cit*, pp 156 and 282, note 149) The Report of the Transvaal Concessions Commission (see *Parl Papers*, South Africa, 1901, Cmd 623), although it declares (p 7) that 'it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist,' nevertheless agrees that 'the modern usage of nations has tended in the direction of the acknowledgment of such contracts It may, however, safely be maintained that not a usage, but a real rule of International Law, based on custom, is in existence with regard to this point See Hall, § 29 Westlake in *I Q R*, 27 (1901), pp 392 401, 21 (1905), pp 335 339, and Westlake pp 74 83 Cited in *Hague Recueil* 78 (1951) (i) pp 458 484; and O'Connell in *BY* 28 (1951) pp 204 219

³ This is the real portent of the judgment in the case of *Cook v Sprygg* [1899] A C 772, and in the case of *The West Rand Central*

Gold Mining Co v The King [1906] 2 K B 391 In so far as the latter judgment denies the existence of a rule of International Law that compels a subjugator to pay the debts of the subjugated State, its arguments are in no wise decisive, and it should be noted that the plaintiff being a British corporation the adverse judgment could not give rise to an international question An international court would recognise such a rule It will be noted that in *Cole v Sprygg* and in the decisions which followed it English Courts have not questioned the rule of International Law according to which a change of sovereignty as the result of cession does not affect private property The *ratio decidendi* in these cases has been the doctrine that acquisition of territory by cession or annexation being an 'act of State' (see p 346 n 1), municipal tribunals have no authority to give a remedy in respect of any actions arising therefrom See *Secretary of State for India v Sardar Rustam Khan*, *Law Reports, Indian Appeals*, vol 68 (1910 11) p 109 *Annual Digest*, 1911 1912 Case No 21 See also *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1911] A C 308 The recent practice of States particularly in view of the Peace Treaties concluded after the First World War tends to establish as a rule of International Law the duty of a successor State, whether the succession arises upon cession or annexation or dismemberment, to respect the acquired rights of private persons, whether proprietary contractual, or concessionary (See the Advisory Opinion of the Permanent Court on the *Settlers of German Origin in Territory ceded by Germany to Poland* Series B, No 6 particularly pp 35, 36, the Court held that the political origin attaching to the rights, and rendering them obnoxious to the successor State, does not relieve it of the duty to respect acquired rights of this character) As to the meaning of acquired rights see Decamps in *R G*,

the absorbing State. But if he is a foreigner, the right of protection possessed by his home State enables the latter to exercise pressure upon the absorbing State for the purpose of making it fulfil its international duty to take over the debts of the extinct State. Some jurists¹ go so far as to maintain that the succeeding State must take over the debts of the extinct State, even when they are higher than the value of the accrued fiscal property and fiscal funds. But it is doubtful whether in such cases the practice of the States would follow that opinion.²

(d) *Contracts*, apart from those resulting in financial indebtedness:—There is a considerable body of authority among text-writers in favour of the view that the absorbing State is bound by the contracts of the extinct State—for instance, a contract for the building of warships, or for coaling a fleet; but it is believed that no judicial authority is in existence. Where the contract can be said to have a local character, such as a scheme for irrigation or for the

15 (1908), pp. 385-400; Guggenbuhl, *op. cit.*, pp. 122-137; Sack, *op. cit.*, pp. 57-61; Hyde, i. §§ 132, 133; Kaeckonbeek in *B.Y.*, 17 (1936), pp. 1-18; Szaszzy in *R.I.*, 3rd ser., 17 (1936) pp. 106-120; Makar and others in *Annuaire*, 43 (1) (1950) pp. 208-294; 44 (1) (1952) pp. 181-196; and *Emir Kulu v. Roumania* before the Roumano-Hungarian Mixed Arbitral Tribunal: *Recueil P. I. M.* 7 (1927), p. 138; *Annual Digest* 1927-1928, Case No. 59. For an example of a restrictive interpretation of the obligation to respect private rights see *Niederlausitz v. Polish State*, decided in 1931 by the Upper Silesian Arbitral Tribunal: *Annual Digest*, 1931-1932, Case No. 33. The successor State cannot avoid its obligations by enacting legislation either of a discriminatory character or nominally affecting all the residents of the territory. See also an award of the same Tribunal in 1934 denying that the obligation to respect 'droits de toute nature' extended to an alleged acquired right of continued employment as a teacher: *Jaworski v. Polish State*, *ibid.*, 1933-1934, Case No. 40. The French Court of Cassation seems to have adopted a

different view: *In re Kremer*, *ibid.*, 1935-1937, Case No. 43. On the effect of changes of sovereignty upon neutrality see Jellinek, *Der automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge* (1951), and Graupner in *Grotius Society*, 32 (1946), pp. 135-153. See also below, § 240. And see generally on the effect of changes of sovereignty upon municipal law Rosenne in *B.Y.* 27 (1950) pp. 267-292.

¹ See Martens, i. § 67; Heffter, § 25; Huber, *op. cit.*, p. 158.

² In the third edition the author continued: 'On the other hand, a State which has subjugated another would be compelled to take over even such obligations as have been incurred by the annexed State for the immediate purpose of the war which led to its subjugation.' This opinion seems to be open to very grave doubt: see the Report of the Transvaal Concessions Commission, *supra*, at p. 9, and Westlake, i. p. 81, and Sack, *op. cit.*, pp. 115-182, who regards such a war debt as amongst 'dettes odieuses' not passing to the successor State. See to the same effect Kahn in *A.J.*, 44 (1950), pp. 477-487.

building of locks on a river, the case for continued survival is stronger than in the case of other contracts.

(e) *Concessionary Contracts* require special consideration—for instance, a State concession for the building and running of a railway or for the working of mines. They usually have a local character, and there is much to be said in favour of the view that, if before the extinction of the State which granted the concessions every act necessary for vesting them in the holder had been performed, they would survive the extinction and bind the absorbing State. But every case must be studied on its merits, and it is difficult to lay down a general principle.¹

(f) *Unliquidated Damages for Torts or Delicts*. There is good authority for saying that a State does not become liable for unliquidated damages for the torts or delicts of the extinct State which it has absorbed.² Where, however, the latter had acknowledged its liability and compensation had been agreed, a debt has arisen which, it is suggested, ought to survive the extinction of personality and be discharged by the absorbing State.

(g) *Unliquidated Damages for Breach of Contract*. It seems that the analogy of the absence of liability for unliquidated damages for a delict is applicable to the case of unliquidated damages for breach of a contract, so as to make them irrecoverable against a successor, for breach of contract is

¹ Protocol XII, annexed to the Treaty of Lausanne with Turkey in 1923 provided for the maintenance by succeeding States of pre-war concessions granted by Turkey, but that is a case of cession of territory and not of absorption of a State: see the *Marrommatus Jerusalem Concessions* case, Permanent Court, Series A, No. 6. See Westlake, i, pp. 82, 83; Moore, i, § 98; Gidel, *Des effets de l'annexion sur les concessions* (1904); Teyssaire in *P.A.*, 35 (1928), pp. 447-465; Schiffner in *Z.o.R.*, 9 (1929), pp. 161-181.

² *Brown's* claim, American and British Claims Arbitration Tribunal, November 1923, in *B.Y.*, 1924, pp. 210-221, and *A.J.*, 19 (1925), pp. 193-206; see also Hurst in *B.Y.*,

1924, pp. 103-178. The matter is exhaustively discussed in the British Answer in *Brown's* claim, pp. 6-17. The award in *Brown's* claim was followed by the same tribunal in No. 84 of the *Hawaiian Claims*: see *4 J.*, 20 (1926), pp. 381, 382. For a denial of the obligation to take over liquidated damages in respect of railway accidents see a decision of the Polish Supreme Court in *Dzierzbicki v. District Electrical Association of Czeszochora*, *Annual Digest*, 1933-1934, Case No. 38. See Mosler, *Wirtschafts konzessionen bei Änderung der Staats hoheit* (1918); O'Connell in *B.Y.*, 27 (1950), pp. 93-124. And see the decision of the Austrian Supreme Court in *Klehs v. Republic of Austria*, *Annual Digest*, 1948, Case No. 18.

also a wrongful act; but that, if compensation for breach had been agreed with the extinct State, the absorbing State ought to discharge that liability.

The case of a Federal State arising—like the German Empire in 1871—above a number of several hitherto full sovereign States also presents, with regard to many points, a case of State succession.¹ However, no hard and fast rules can be laid down concerning it, since everything depends upon the question whether the federal State is one which—like the United States of America—totally absorbs all international relations of the member-States, or whether—like Switzerland—it absorbs these relations to a greater extent only.²

§ 82a. It is also necessary to consider the position which arises when a revolt which got so far as the establishment of a rival Government is suppressed. Who is entitled to the property of the suppressed Government? In so far as it is situate within the territory of the parent State against which the revolt took place, no question of International Law arises. In so far as the property is situate in the territory of foreign States, a distinction must be made between, on the one hand, property which formerly belonged to the parent State and was seized by the rebel Government, and, on the other hand, property which had been acquired by the rebel Government, as the result of voluntary subscriptions, lawful seizures of prizes, and so forth. The former property can be recovered by the parent Government in a foreign court by title paramount; the latter is recoverable by virtue of its right as the successor of the rebel Government. These principles are illustrated by a group of decisions given by English courts after the end of the American Civil War.³

¹ See Huber, *op. cit.*, pp. 163-170; Keith, *op. cit.*, pp. 92-98; and Schoenborn, *op. cit.*, §§ 8 and 9.

² See below, § 89.

³ *United States of America v. Prioleau* (1865) 35 L.J. Ch. 7; *Yame v. McRae* (1869) L.R. 8 Eq. 60; see also *King of the Two Sicilies v. Wilcox* (1850) 1 Sim. N.S. 332. For litigation in the United States of America arising out of the civil war in Ireland in 1919-1921, and

concerning the former 'Irish Republic's' funds see Dickinson in *A.J.*, 21 (1927), pp. 747-753; Garner, *ibid.*, pp. 753-757, and *Annual Digest*, 1925-1926. See also *Republic of China v. Merchants' Fire Assurance Corporation of New York*, decided in 1931 by the United States Circuit Court of Appeals: 49 F. (2d) 862; *Annual Digest*, 1931-1932, Case No. 45. And see Smith, *l. cit.* pp. 405-416, and Uren in *Michigan Law Review*, 28 (1929-1930), pp. 149-162.

The case of liability for the debts and wrongful acts of the rebel Government is not so simple, but the Mixed Commission appointed by the Treaty of Washington, 1871, held that the United States of America were 'not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces.'¹

Succession in consequence of Dismemberment.

§ 83. When a State breaks up into fragments which themselves become States and International Persons, or which are annexed by surrounding States, it becomes extinct as an International Person, and the same rules are valid as regards the case of absorption of one State by another. A difficulty is, however, created when the territory of the extinct State is absorbed by several States.² Succession actually takes place here too, first, with regard to the international rights and duties locally connected³ with those parts of the territory which the respective States have absorbed. Suc-

¹ Moore, *Digest*, i. § 22, p. 60; and Moore, *International Arbitrations*, i. 694, 695; iii. 2900-2901, 2982-2987. But sometimes a State may agree to pay for the damage done by revolutionary forces, e.g. in a treaty between Great Britain and Mexico in 1926; Cmd. 2876. It will be noted in *United States of America v. McRae*, *supra*, where the defendant, a Confederate agent in England, claimed to set off certain sums alleged to be due to him by the former Confederate Government, that the Federal Government being unwilling to admit any liability for the acts of the Confederate Government declined to submit to an account being taken; accordingly they only recovered such property as was theirs by title paramount and appear to have abandoned their claim based on succession. *Quære*, was this because they did not wish to prejudice their case for a general exemption of liability for the debts and wrongs of the Confederate Government? See also *Hopkins'* claim before the American-Mexican Claims Commission in *A.J.* 21 (1927), pp. 160-167.

The distinction between *de facto* general and local Governments is relevant in this connection; the Confederate Government was only local. Where, however, the sup-

pressed *de facto* Government was general, the better opinion is that the State which suppresses it and succeeds to its property is responsible for its contracts and loans; see Award of the Permanent Court of Arbitration in the *French Claims against Peru* in *A.J.*, 16 (1922), at p. 482, Borchard, p. 206; Spiropoulos, *Die de facto-Regierung im Völkerrecht* (1926), pp. 92-98; and Kunz in *Strupp, Wort.*, ii. p. 612. But a distinction has been drawn between contracts of the suppressed *de facto* Government which are impersonal transactions of governmental routine and therefore bind the State, and contracts of a nature personal to the suppressed Government which therefore do not survive; instances of the former type are the purchase of postal money orders (*Hopkins'* claim before the American-Mexican Claims Commission in *A.J.*, 21 (1927), pp. 160-167, and in *Annual Digest*, 1925-1926, Case No. 170), or of motor ambulances (*Peerless Motor Car Co.'s* claim before the same Commission in *A.J.*, 22 (1928), pp. 180-182; *Annual Digest* 1927-1928, Case No. 163).

² See above, § 79 (n. 4), for a case of incomplete absorption of territory, e.g. Austria.

³ See Sack, *op. cit.*, pp. 205-218

cession takes place, secondly, with regard to the fiscal property and the fiscal funds which each of the several absorbing States finds on the part of the territory it absorbs. And the debts of the extinct State must be taken over. But the case is complicated through the fact that there are several successors to the fiscal property and funds, and the only rule which can be laid down is that proportionate parts of the debts must be taken over by the different successors.¹

When—as in the case of Sweden-Norway in 1905—a Real Union² is dissolved and the members become separate International Persons, a succession likewise takes place. All treaties concluded by the Union devolve upon the former members, except those which were concluded by the Union for one member only —e.g. by Sweden-Norway for Norway—and which, therefore, devolve upon that former member only, and, further, except those which concerned the Union itself and lose all meaning by its dissolution.

§ 84. When in consequence of war or otherwise one State cedes a part of its territory to another, or when a part of the territory of a State breaks off, and becomes a State and

Succession in case of Separation or Cession.

¹ See, however, the award in the *Ottoman Debt Arbitration* of 1925 in *Annual Digest*, 1925-1926, Case No. 57.

In the complicated case of the dismemberment of Austria-Hungary in 1918, when the Real Union see below, § 87 was dissolved, and the old State broke up into fragments, some of which became themselves States and International Persons, while others were annexed by surrounding States, the Treaties of Peace made express provision for the apportionment between the States concerned of the pre-war debt of Austria-Hungary, and defined the extent of the liability of Austria for the debt incurred by the dismembered Dual Monarchy in prosecuting the war. Thus the Treaty of Peace with Austria provided (Article 203) that each of the States to which territory of the former Austro-Hungarian monarchy was transferred, and each of the States arising from the dismemberment of that monarchy, including Austria, should assume responsibility for a portion of the

secured and unsecured bonded debt of the former Austro-Hungarian Government, as it stood before the outbreak of war. Machinery was provided for ascertaining that portion which each State was to assume. None of these States, other than Austria, were to bear any responsibility for the bonded war debt of the former Austro-Hungarian Government; but, on the other hand, they were to have no recourse against Austria in respect of war debt bonds which they or their nationals held (Article 205). For a scholarly and exhaustive treatment of the relevant provisions of the various Peace Treaties see Feilchenfeld, *Public Debt and State Succession* (1931), pp. 431-755. See also, as to the Italian Peace Treaty of 1947, Fitzmaurice in *Haague Recueil*, 73 (1931) (1), pp. 286-304.

For a detailed discussion of the principle of State succession as to the public debt on dismemberment and in other cases see Sack, *op. cit.*, particularly pp. 219-599.

² See below, § 87.

an International Person itself, succession takes place with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property¹ found on that part of the territory.² The successor is probably bound to take over a corresponding part of the debt of its predecessor. The numerous treaties³ which

¹ See *The United States v. Percheman* (1833) 7 Peters 51.

² The courts of law of most of the Succession States arising after the First World War have denied succession as to fiscal obligations except where it was stipulated for by treaty, as to Poland see Ehrlich, *Prawo narodów* (2nd ed., 1932), § 213. As to the practice of courts in Czechoslovakia, Austria, and Roumania see *Annual Digest*, 1925-1926, 1927-1928, and 1929-1930.

³ Thus, for instance, Articles 9, 33, and 42 of the Treaty of Berlin (see Martens, *N.R.G.*, 2nd ser., 3 p. 449) of 1878 stipulated that Bulgaria, Montenegro, and Serbia should take over part of the Turkish debt. Again, the Peace Treaty of Lausanne of 1912, by which Italy acquired Tripoli, stipulated that Italy should take over a part of the Turkish debt (Martens, *N.R.G.*, 3rd ser., 7 p. 7). Likewise the Treaty of Peace with Germany of 1919 provided that the Powers to which German territory had been ceded should assume responsibility for a portion of the pre-war debt of the German Empire, and also of the pre-war debt of the German State to which the ceded territory belonged. The Treaty of Peace with Italy of 1946 lays down that the Successor State shall be exempt from payment of the Italian public debt but that it shall assume the obligations of the Italian State towards holders who continue to reside in the ceded territory in so far as these obligations correspond to that of the debt which was issued prior to the entry of Italy into the war and is not attributable directly or indirectly to military purposes (Annex XIV (6)). For the *Ottoman Debt Arbitration* in 1925 see *Annual Digest*, 1925-1926, and note

by Brown in *A.J.*, 20 (1926), pp. 135-139. See also Alphand, *Le partage de la dette Ottomane* (1928). As, however, Germany in 1871 refused to undertake any part of the French debt, France was exempted by the Treaty of Peace from assuming any part of the German debt on account of the cession of Alsace-Lorraine (Article 255); and in the case of Poland, that part of the German debt which was attributable to measures for the German colonisation of Polish provinces was to be excluded from the apportionment (Article 255).

On the other hand, the United States refused, after the cession of Cuba in 1898, to take over from Spain the so called Cuban debt—that is, the debt which was settled by Spain on Cuba before the war (see Moore, 1, § 97, pp. 351-385). Spain argued that it was not intended to transfer to the United States a proportional part of the debt of Spain, but only such debt as attached individually to the island of Cuba. The United States, however, met this argument by the correct assertion that the debt concerned was not incurred by Cuba, but by Spain, and settled by her on Cuba. See Wilkinson, *The American Doctrine of State Succession* (1934). Similarly, by Articles 46-57 of the Treaty of Lausanne of 1923 between Turkey and the Allied and Associated Powers, provision was made for the distribution of the Ottoman Public Debt among the various States which succeeded to portions of the Ottoman Empire or were created in territories formerly forming part of it. On the refusal of Germany to take over the Austrian public debt after the annexation of Austria in 1938 see Garner in *A.J.*, 32 (1938), pp. 766-775; Brandt in *Z.S.V.*, 9 (1939), pp. 127-147.

stipulate a devolution of a part of the debt of the predecessor upon the successor must be regarded as declaratory of a rule of International Law to that effect.¹ An interesting question in connection with separation arises in the matter of membership of the United Nations. The question arose in the matter of the admission to the United Nations of some States previously forming part of India, which was one of the original signatories of the Charter. The General Assembly did not adopt the view of Pakistan that she was a 'co-successor' to India and as such entitled to automatic membership. It acted on the view that 'when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.'² However, while with regard to treaties generally the position is essentially similar to that obtaining in the case of absorption (§ 82 (a)) and cession (§ 84), there is room for the view that in case of separation resulting in the emergence of a new State the latter is bound by or at least entitled to accede to general treaties of a 'law-making' nature, especially those of a humanitarian character. Thus Pakistan and Burma, when accepting in 1949 the obligations of the Constitution of the International Labour Organisation, recognised as binding upon them the various international labour conventions which applied to their territories when forming part of India. Similarly Pakistan considered itself a party to the Convention of 1921 for the Suppression of Traffic in Women and Children by virtue of the fact that

¹ Many writers, however, maintain that there is such a rule of International Law. See Huber, *op. cit.*, §§ 125-135 and 205, where the treaties concerned are enumerated. See also Schmidt, *Der Uebertragung der Staatsschulden bei Gebietsabtretungen* (1913); Sibley in *J.C.L.*, 3rd ser., 7 (1925), pp. 22-39; and Jack, *op. cit.*, particularly pp. 52-90. In substance, recognition of the new State is sometimes made to depend

upon its undertaking a proper share of the obligations of the former State of which it formed part. See also Paenson, *Les conséquences financières de la succession des Etats* (1954).

² Pakistan and Burma were admitted in 1947 and 1948, respectively. Ceylon was not admitted owing to the opposition of Soviet Russia. See Laang in *A.J.*, 43 (1949), pp. 144-154, and Schachter in *B.J.*, 25 (1948), pp. 101-109.

India became a party to that Convention before the establishment of Pakistan as an independent State.¹

Succession in International Organisation.

§ 84a. The question of succession in the field of international organisation arises when a public international organ created for specified purposes is dissolved and another organisation is created by treaty for an identical or similar purpose. Questions of this nature arose after the Second World War when, for instance, the League of Nations² was replaced by the United Nations, the Permanent Court of International Justice by the International Court of Justice,³ the International Commission for Air Navigation by the International Civil Aviation Organisation, and the International Sanitary Bureau by the World Health Organisation. While as a rule the devolution of rights and competencies is governed either by the constituent instruments of the organisations in question or by special agreements or decisions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or indicated by the reasonably assumed intention of the parties as interpreted in the light of the purpose of the organisations in question.⁴

¹ See Schachter in *B Y* 25 (1948) p 107. For an elaboration of the view, substantiated to a limited extent by some recent practice that multilateral instruments of a legislative character should be treated upon the analogy of treaty provisions creating local obligations and that they are binding upon new States in the same way as rules of customary International Law see Jenks in *B Y*, 29 (1952) pp 105-144.

² With regard to the latter see below, § 168 n. See also the useful collection of documents relating to the transfer of League of Nations assets and functions to the United Nations and compiled by Aufricht in *Guide to the League of Nations Publications* (1951) pp. 595-659. See also *ibid* pp. 73-10, 130-133. And see the Dissenting Opinion of Judge Read in the case relating to the *Status of South-West Africa in I. C. J. Reports*, 1950, p 136.

³ See below, n. 1.

⁴ Thus the Statute of the Inter-

national Court of Justice provided expressly, in Article 36 (5) that acceptance of the compulsory jurisdiction of the Permanent Court of International Justice shall be deemed to apply to the International Court of Justice. Article 37 of the Statute provides for succession in the matter of the jurisdiction of the Permanent Court created by treaties generally. These express provisions do not rule out devolution of other functions of the Permanent Court. But see the different and probably questionable ruling of the Vice President of the International Court of Justice in the matter of the application of the Anglo-Iranian Oil Company in 1951 for the appointment of an arbitrator in its dispute with Persia. The Permanent Court had accepted that function in 1933 at the instance of the British and Persian Governments. The Vice-President of the International Court of Justice ruled that as that function had been conferred upon the Permanent Court of International Jus-

In the case concerning the *Status of South-West Africa* the International Court of Justice, in an Advisory Opinion given in 1950, applied in certain respects principles of succession to international organisations the objects and character of which exhibit a pronounced degree of similarity. Thus the Court found that the main supervisory functions of the League of Nations with respect to the mandated territories devolved upon the United Nations with the result that South Africa was under an obligation to furnish to the United Nations for examination reports on her administration of the territory held under a mandate from the League. The Court refused to admit that the obligation to submit to supervision had disappeared merely because the supervisory organ—namely, the Mandates Commission—had ceased to exist, for the United Nations possessed an international organ performing similar, though not identical, supervisory functions, namely, the Trusteeship Council. The conclusion that the United Nations succeeded to the supervisory functions of the League of Nations in the matter of mandated territories follows partly from the principle, adopted by the Court, that the régime established for the mandates was in the nature of an international status as distinguished from a purely contractual arrangement.¹

V

COMPOSITE INTERNATIONAL PERSONS

Pufendorf, vii. c. 5. Hall, § 4. Westlake, i. pp. 31-37—Phillimore, i. §§ 71-74, 102-121. Wheaton §§ 39-50. Hyde, i. §§ 30-32. Moore, i. §§ 6-11. Holtzendorff in *Holtzendorff* ii. pp. 118-149. Lasz, § 9. Fauchille §§ 165-174 (3). Prader Fodere, i. §§ 117-124. Menghue ii. pp. 1-12. Nys, i. pp. 392-400. Rivier, i. §§ 5-6. Calvo, i. §§ 14-61. Fiore, i. §§ 335-339 and *Code* §§ 101-109. Cavaglieri, pp. 135-143. Martens, i. §§ 56-59. De

lice the International Court of Justice was not entitled to exercise it. *Year Book of the International Court of Justice*, 1952-3, p. 45.

As to succession with regard to membership of the United Nations see above, p. 167. As to State succession with regard to some members of the British Commonwealth of Nations see

O'Connell in *B.Y.* 26 (1949), pp. 454-463.

¹ See below, p. 226. For a statement in the form of a legal principle governing succession between international organisations of the effect of this ruling see Fitzmaurice in *B.Y.*, 29 (1952), p. 8.

Louter, i. pp. 191-216—Keith's Wheaton, pp. 114-128—Balladore Pallieri, pp. 246-260—Anzilotti, pp. 153-159, 189-197—Scelle, i. pp. 187-225—Sibert, pp. 108-117—Jellinek, *Die Lehre von den Staatenverbindungen* (1882)—Borel, *Étude sur la souveraineté de l'état fédératif* (1886)—Brie, *Théorie der Staatenverbindungen* (1886)—Hart, *Introduction to the Study of Federal Government*, in *Harvard Historical Monographs* (1891) (including an excellent bibliography)—Le Fur, *État fédéral et confédération d'états* (1896)—Moll, *Der Bundesstaatsbegriff in den Vereinigten Staaten von America* (1905)—Ebers, *Die Lehre von dem Staatenbunde* (1910)—Dupuis, *Le droit des gens et les rapports des grandes puissances* (1920), pp. 133-170—Nawiasky, *Der Bundesstaat als Rechtsbegriff* (1920)—Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp. 274-314, and *Allgemeine Staatslehre* (1926), pp. 193-225—Lundborg, *Die gegenwärtigen Staatenverbindungen* (1921)—Newton, *Federal and Unified Constitutions* (1923)—Stoke, *The Foreign Relations of the Federal State* (1931)—Wheare, *Federal Government* (1946)—Verhove, pp. 99-111, and in *Z.I.*, 35 (1926), pp. 257-275—Kunz, *Staatenverbindungen* (1929), pp. 61-288, 404-713 (the leading treatise on the subject)—Pilotti in *Haque Recueil*, vol. 24 (1928) (iv.), pp. 415-514—Scelle, *ibid.*, vol. 46 (1933) (iv.), pp. 393-414—Raestad in *Nordisk T.A.*, *Acta Scandinavica* v (1934) pp. 3-28, 45-66.

Real and
apparent
com-
posite
inter-
national
Persons.

§ 85. International Persons are as a rule single sovereign States. In such single States there is one central political authority as Government, which represents the State, within its borders as well as without, in its international intercourse with other International Persons. Such single States may be called *simple* International Persons. And a State may remain a simple International Person, although it may grant so much internal independence to outlying parts of its territory that these parts become in a sense States themselves. Great Britain was before the First World War a simple International Person, although the Dominion of Canada, Newfoundland, the Commonwealth of Australia, New Zealand, and the Union of South Africa were States, because Great Britain was alone sovereign and represented exclusively the British Empire in the international sphere.¹

Historical events, however, have created, in addition to the simple International Persons, *composite* International Persons. A composite International Person is in existence when two or more sovereign States are linked together in such a way that they take up their position within the Family of Nations either exclusively or at least to a great

¹ For the present position see below, § 94b.

extent as one single International Person. History has produced two different kinds of such composite International Persons—namely, Real Unions and Federal States. In contradistinction to Real Unions and Federal States, a so-called Personal Union and a union of so-called Confederated States are not International Persons.

§ 86. A Personal Union is in existence when two sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as monarch.¹ Thus a Personal Union existed from 1714 to 1837 between Great Britain and Hanover, from 1815 to 1890 between the Netherlands and Luxemburg, and from 1885 to 1908 between Belgium and the former Congo Free State.² At present there is no Personal Union in existence.³ A Personal Union is not, and is in no point treated as though it were, an International Person, and its two sovereign member-States remain separate International Persons. Theoretically it is even possible for them to make war against each other, although in practice this will never occur. If, as sometimes happens, they are represented by one and the same individual as diplomatic envoy, such individual is the envoy of both States at the same time, but not the envoy of the Personal Union.

§ 87. A Real Union⁴ is in existence when two sovereign States are, by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person. A Real Union is not itself a State, but merely a union of two full sovereign States which together make one single but composite International Person. They form a compound Power, and are by the treaty of union prevented from making war against each other. On the other hand, they cannot make war separately against a foreign Power, nor can war be made against one of them separately. They can enter

¹ A fact which according to English law results in the subjects of the two countries owing a common allegiance and having a common nationality: *Calvin's Case* (1608) 7 Co. Rep. 1. and *Taqqson v. Durant* (1886) 71 Q.B.D. 54.

² See Thomson, *Fondation de l'État Indépendant du Congo* (1933).

³ See, however, below, § 87, p. 172 (n. 2), as to Denmark and Iceland.

⁴ See Blüthgen in *Z.V.*, 1 (1907), pp 237-263.

into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as separately they are not International Persons.¹ At present there is no Real Union in existence,² that of Sweden-Norway³ having been dissolved in 1905, and that of Austria-Hungary⁴ having come to an end by the

¹ See, however, as to Austria-Hungary, Advisory Opinion on the *Question of Jaworzina*, Series B, No 8, at p. 43, where the Permanent Court referred to Austria and Hungary before 1918 as 'distinct international units.' See also the decision of Judge Parker of May 26, 1927, with regard to the jurisdiction of the 'Tripartite Claims Commission: Annual Digest, 1927-1928, Case No. 54.

² It is probable that between 1918 and 1944 Denmark was a Real Union. In 1918 Denmark recognised Iceland as a sovereign State, but this was not followed by international recognition by other States. See, e.g. as to the United States, Hackworth, i. § 42. Clause 7 of the Danish Law of November 30, 1918, printed in *British and Foreign State Papers*, 111 (1917-1918), pp. 703-707, and in Martens, *N.R.G.*, 3rd ser., xii. p. 3, provided that 'Denmark shall attend on Iceland's behalf to foreign affairs.' This did not make Iceland a protectorate. The Union was probably Real rather than Personal, because it resulted from a constitutional arrangement intended to last at any rate until 1940, when it was to come up for reconsideration. In renewing in 1926 the Anglo-Danish Arbitration Convention of October 25, 1905, two separate Conventions were made by Great Britain, one with Denmark (Cmd. 2835) and the other with Iceland (Cmd. 2836). Iceland had an Envoy Extraordinary and Minister Plenipotentiary at Copenhagen (*Iceland Year Book*, 1927, p. 66), and Denmark had a representative of the same class in Iceland. See Lundberg, *Zwei umstrittene Staatenbildungen* (1918), *Die gegenwärtigen Staatenverbindungen* (1921), and *Inlands Völkerrechtliche Stellung* (1934); Remertz, *Die staatsrechtliche Stellung Islands* (1919); Gregerson, *L'Islande. Son statut à travers les âges* (1937); Berlin

in *Z.d.R.*, 15 (1935), pp. 572-599. See also Stefansson in *Foreign Affairs (U.S.A.)*, 7 (1929), pp. 270-281. Arnórsson in *Nordisk T.A.*, 2 (1931), pp. 63-78; Berlin, *ibid.*, *Acta Scandinavica*, pp. 95-100. In 1943 Iceland severed her constitutional relation with Denmark and declared herself an independent State. Her independence was recognised by Great Britain, the United States, Soviet Russia, and other States. She is a member of the United Nations.

³ Sweden-Norway (see Aall and Gjølsvik, *Die Norwegisch-Schwedische Union* (1912)) became a Real Union in 1814, but this was not universally recognised. Phillimore, i. § 74, maintains that there was a Personal Union between Sweden and Norway. The King could declare war, make peace, conclude alliances and other treaties, and send and receive the same diplomatic envoys for both States. The Foreign Secretary of Sweden managed at the same time the foreign affairs of Norway. Both States had, however, in spite of the fact that they made one and the same International Person, different commercial and naval flags. The Union was peacefully dissolved by the Treaty of Stockholm (Karlstad) of October 26, 1905. Norway became a separate kingdom, the independence and integrity of which was guaranteed by Great Britain, France, Germany, and Russia by the Treaty of Christiania of November 2, 1907 (see below, § 574).

⁴ Austria-Hungary became a Real Union in 1723. In 1849 Hungary was united with Austria, but in 1867 Hungary became again a separate sovereign State, and the Real Union was re-established. Their army, navy, and foreign ministry were united. The Emperor-King could declare war, make peace, conclude alliances and other treaties, and send

collapse of the Austro-Hungarian Empire in 1918, just before the close of the First World War

§ 88. Confederated States (*Staatenbund*) are a number of ^{ated}Confederated full sovereign States linked together for the maintenance of their external and internal independence by a recognised ^{States}international treaty into a union with organs of ^{(Staaten-}its own, ^{bund).} which are vested with a certain power over the member-States, but not over the citizens of these States. Such a union of confederated States is not any more itself a State than a Real Union is; it is merely an International Confederation of States, a society of an international character, since the member-States remain full sovereign States and separate International Persons. Consequently, a union of confederated States is not an International Person, although it is for some purposes so treated on account of its representing the compound power of the full sovereign member-States. The chief and sometimes the only organ of the union is a Diet, where the member-States are represented by diplomatic envoys. The power vested in the Diet is an international power which does not in the least affect the full sovereignty of the member-States. That power is essentially nothing else than the right of the body of the members to make war against such a member as will not submit to those commandments of the Diet which are in accordance with the Treaty of Confederation, war between the member-States being prohibited in all other cases.

History has shown that confederated States represent an organisation which in the long run gives very little satisfaction. It is for that reason that the three important unions of confederated States of modern times—namely, the United States of America, the German, and the Swiss Confederation turned into unions of federal States. Notable historic Confederations are those of the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Germany from 1815 to 1866, Switzerland from 1291 to 1798 and from 1815 to 1848, and the Confederation of

and receive the same diplomatic Empire in 1918, the Union came to
envoys for both States. With the an end.
downfall of the Austro-Hungarian

the Rhine (*Rheinbund*) from 1806 to 1813. At present there is no union of Confederated States. The last in existence, the major Republic of Central America,¹ which comprised the three fully sovereign States of Honduras, Nicaragua, and San Salvador, and was established in 1895, came to an end in 1898. *The Union of 1949 between Holland and Indonesia approached in some respects, especially with regard to the somewhat rudimentary common organs, a loose confederation.² Of a similarly indeterminate character are the Articles of the French Constitution of 1946 which provide for the creation of the French Union composed, on the one side, of France and, on the other side, of associated States and territories.³ Although the Constitution provides for common citizenship of the French Union, for certain matters of joint concern, including defence, and for joint organs (such as the Presidency, the High Council and the Assembly of the Union), these developments must still be regarded as being in the experimental stage. Some members of the Union, such as Vietnam, Cambodia and Laos, seem to have acquired a certain degree of independent international status, including the power to make treaties.⁴ In recognising in 1948 the independence of Vietnam, France declared that that independence has no other limits than that implied in Vietnam's associate membership of the French Union.⁵ Vietnam undertook to respect the rights and interests of French nationals, to ensure respect for the principles of democracy and to give preference to French advisers and experts.

¹ See Martens, *N.R.G.*, 2nd ser., 31, pp. 276-292.

² See Scheuner in *Archiv des Völkerrechts*, 3 (1951), pp. 44-67, and Von Asbeck in *Year Book of World Affairs* 1953, pp. 204-227. The Union was dissolved in 1954.

³ Articles 60-82. See Collard in *Etudes Georges Scelle* (1950), vol. II, pp. 653-686, and Van Asbeck in *Hague Recueil*, 71 (1947) (II), pp. 386-406.

⁴ Thus these three States were signatories of the Peace Treaty with Japan of September 8 1951. As such they signed, in 1942, declarations accepting the jurisdiction of the International Court of Justice in the matter of disputes arising out of that

Treaty (*Yearbook of the Court* 1952 53, p. 200). Vietnam is composed of the former French protectorates of Tongking and Annam and of the colony of Cochinchina.

⁵ The text of the declaration is printed in *Documents*, 1947-1948, p. 736. The declaration was confirmed by a French Law of February 2, 1950, which also covered the similar cases of Laos and Cambodia. See also *ibid.*, p. 737 for an exchange of notes between Laos and France on the same subject. The independence of these three States was recognised soon after by a number of other States, including the United States of America and the United Kingdom.

§ 89. A federal State is a perpetual union of several ^{Federal} sovereign States which has organs of its own and is invested ^{States} with power, not only over the member-States, but also over ^{(Bundes-} their citizens.¹ The union is based, first, on an international ^{staaten)} treaty of the member-States, and, secondly, on a subsequently accepted constitution of the federal State. A federal State is said to be a real State side by side with its member-States, because its organs have a direct power over the citizens of those member-States. This power was established by American² jurists of the eighteenth century as a characteristic distinction between a federal State and confederated States, and Kent as well as Story, the two later authorities on the Constitutional Law of the United States, adopted this distinction, which is indeed kept up until to-day by the majority of writers on politics. Now if a federal State is recognised as itself a State, side by side with its member-States, it is evident that sovereignty* must be divided between the federal State on the one hand, and, on the other, the member-States. This division is made in this way, that the competence over one part of the objects for which a State is in existence is handed over to the federal State, whereas the competence over the other part remains with the member-States. Within its competence the federal State can make laws which bind the citizens of the member-States directly without any interference by these member-States. On the other hand, the member-States are totally independent as far as *their* competence reaches.

For International Law this division of competence is only of interest in so far as it concerns competence in *international* matters.³ Since it is always the federal State which is

¹ See Mouskheli, *La théorie juridique de l'État fédéral* (1931); Kunz in *R.I.*, 3d ser., 11 (1930), pp. 835-877, and 12 (1931), pp. 131-149; Schlesinger in *Z.o.R.*, 16 (1930), pp. 87-103.

² See especially Nos. 15 and 16 of *The Federalist* (by Hamilton, Jay, and Madison), which establish the difference between confederated States and a federal State in the way

mentioned in the text above.

³ A federal Constitution gives rise to certain difficulties in foreign relations: for instance, (1) as to State Responsibility (see below, § 152), (2) as to signature and ratification by the federal Government of treaties regulating matters within the competence of the Governments of the member-States: see below, §§ 89a and 340f.

competent to declare war, make peace, conclude treaties of alliance and other political treaties, and send and receive diplomatic envoys, whereas no member-State can of itself declare war against a foreign State, make peace, conclude alliances or other political treaties, the federal State, if recognised, is certainly itself an International Person, with all the rights and duties of a sovereign State in International Law. On the other hand, the international position of the member-States is not so clear. It is frequently maintained that they are deprived of any status whatsoever within the Family of Nations. But there is no justification for that view. Thus, the member-States of the Federal State of Germany, under the German Constitution as it existed before the First World War, retained their competence to send and receive diplomatic envoys, not only in intercourse with one another, but also with foreign States.¹ The reigning monarchs of these member-States were still treated by the practice of States as heads of sovereign States, a fact without legal basis if these States had been no longer International Persons. Similarly, Article 32 of the Constitution of the German Federal Republic of 1949 provides that in so far as the member-States are competent to legislate they may, with the approval of the Federal Government, conclude treaties with foreign States.² Thirdly, the

¹ Article 45 of the Weimar Constitution of August 14, 1919, was as follows: 'The President of the Federation represents the Federation in its international relations. He concludes alliances and other treaties with foreign powers in the name of the Federation. He accredits and receives ambassadors. Declaration of war and conclusion of peace are effected by federal law. Alliances and such treaties with foreign States as refer to matters of federal legislation require the consent of the Reichstag.' Under Article 78, 'the administration of the relations with foreign States is the business of the Federation alone'; but Bavaria was allowed to maintain diplomatic intercourse with the Holy See (Oppenheimer, *The Constitution of the German Republic* (1923), p. 28). On the international position of Bavaria

prior to the changes effected by the National-Socialist regime in Germany see Thils, *Probleme der staats- und völkerrechtlichen Stellung Bayerns* (1930). On the Weimar Constitution see Stier-Somlo, *Die Verfassung des deutschen Reichs* (1920); Giese, same title (1921); Anschütz, same title (1926); Brunet, *La Constitution allemande* (1921). By a Law of January 30, 1934, the sovereign rights of the member-States were transferred to the Reich: German *Reichsgesetzblatt*, 1934, I p. 75. The effect of that Law as well as of a subsequent Decree of February 2, 1934 (*ibid.*, p. 81) was to abolish the right of the States to make international agreements. As to Soviet Russia see below, p. 178, n.5.

² See Kraus in *Archiv des Völkerrechts*, 3 (1952), pp. 414-427.

member-States of Germany, as well as of Switzerland, retained the right to conclude treaties between themselves without the consent of the federal States as well as the right to conclude treaties with foreign States as regards matters of minor interest. Fourthly, in the judicial settlement of disputes which have arisen from time to time among them the municipal courts in question have had recourse to rules of International Law whenever applicable.¹ In view of this, it must be acknowledged that the member-States of a federal State can be International Persons in a degree. Full subjects of International Law - International Persons with all the rights and duties regularly connected with international personality they certainly cannot be. Their position, if any, within this circle is overshadowed by their federal State; they are part sovereign States, and they are, consequently, International Persons for some purposes only.²

But it happens frequently that a federal State assumes

¹ See, for clear pronouncements to that effect, *Bremen v. Prussia*, decided by the German *Staatsgerichtshof* in 1925. *Annual Digest*, 1925-1926, Case No. 266; and *ibid.*, 1927-1928, Case No. 289. (*Canton of Thurgau v. Canton of St. Gallen* decided in 1925 by the Swiss Federal Court; and Case No. 86, *Württemberg v. Baden*, decided in 1927 by the German *Staatsgerichtshof*). The application of rules of International Law to disputes between States members of the American Union has also been a constant feature of the work of the Supreme Court of the United States. See *Judicial Settlement of Controversies between States of the American Union*, edited by J. B. Scott, 2 vols. (1918) and *Analysis thereof*, by the same (1919). See also Lauterpacht, *The Function of Law* pp. 439-452. Harrison Moore in *J.C.L.*, 3rd ser., 17 (1935), pp. 163-200, and Cowles in *Hague Recueil*, 74 (1940), (1), pp. 659-754.

² See Stoke, *The Foreign Relations of the Federal State* (1931). On the position of the German States in the past see Riese, *Auswärtige Hoheitsrechte der deutschen Einzelstaaten*

(1905), and Windisch, *Die völkerrechtliche Stellung der deutschen Einzelstaaten* (1913). As to Switzerland see His in *R.I.*, 3rd ser., 10 (1929), pp. 454-479. On the application by a State member of extradition treaties concluded by Federal States see Hudson in *A.J.*, 29 (1934), pp. 286-292. It has been held that State members of federal States cannot invoke the jurisdiction or immunities enjoyed by sovereign States. See *State of Ceará v. D'Archer de Montgascon*, *Annual Digest*, 1931-1932, Case No. 84, but see *Sullivan v. State of São Paulo* (1941) 122 Fed. (2nd Series) 355, *Annual Digest*, 1941-1942, Case No. 50, *État de Ceará v. Dorr*, 60 *Clunet* (1933), p. 644. A member-State may, by virtue of the Federal Constitution, enjoy immunity from suit within the Federation in question, as *e.g.* the position in the United States. see *The Principality of Monaco v. The State of Mississippi* (1933) 291 U.S. 643, and 292 U.S. 313; *Annual Digest*, 1933-1934, Case No. 61; *A.J.*, 28 (1934), p. 676. And see for comment thereon Reeves, *ibid.*, pp. 739-742. See also McGrane, *Foreign Bondholders and American State Debts* (1935).

in every way the external representation of its member-States, so that, so far as international relations are concerned, the member-States do not make an appearance at all. This is the case with the United States of America and all those other American federal States whose Constitution is formed according to the model of that of the United States. Here the member-States are sovereign too, but only with regard to *internal*¹ affairs. All their external sovereignty being absorbed by the federal State, it is certainly a fact that they are not International Persons at all so long as this condition of things lasts.

The principal federal States in existence² are the following: The United States of America since 1787, Switzerland since 1848, Mexico since 1857, Argentina since 1860, Canada since 1867, Germany since 1871,³ Brazil since 1891, Venezuela since 1893, Australia since 1901,⁴ the Union of Socialist Soviet Republics of Russia since 1918, and Pakistan, India and Indonesia since 1949.⁵

¹ The courts of the United States of America have always upheld the theory that the Federal Government is sovereign as to all powers of government actually surrendered, whereas each member-State is sovereign as to all powers reserved. See Merriam, *History of the Theory of Sovereignty since Rousseau* (1900), p. 163. And see Mitchell, *State Interests in American Treaties* (1936) and Levitan in *Yale Law Journal*, 55 (1946), pp. 167-197.

² Colombia was a federal State until 1886: see Fauchille, § 172 (1).

³ But see above, p. 176, n. 1.

⁴ It will be noted that neither Canada in 1867 nor Australia in 1901 was at that time a State in the international sense.

⁵ For the modifications of the Constitution since 1918 see a memorandum on Soviet Russia and a translation of its Constitution published by the British Foreign Office in 1924; Bach, *Le droit et les institutions de la Russie soviétique* (1923); Yanoff, *La constitution de l'Union des Républiques socialistes Soviétiques* (1926); Taracouzio, *The Soviet Union and International Law* (1935), pp. 26-122, and, in particular, pp. 237-239; Pilonco in *B.G.*, 30 (1923), pp.

223-241, and Timashev in *Archiv des öffentlichen Rechts*, 52 (1927), pp. 1-21. According to Article 14 of the Constitution of December 1936, the representation of the Union in international affairs, the conclusion and ratification of treaties, and questions of war and peace are within the jurisdiction of the Union. The Constitution is printed in *International Conciliation* (Pamphlet No. 327, 1937), pp. 135-163. For comment thereon see Dobrin in *Grotius Society*, 22 (1936), pp. 90-116, Verdross in *O.Zo.R.*, 1 (1944), pp. 212-218. On February 1, 1944, Soviet Russia adopted an amendment to her Constitution by virtue of which each Republic of the Union acquired 'the right to enter into direct relations with States, to conclude agreements with them, and to exchange diplomatic representatives with them' (Law on the Granting to Union Republics of Authority in the Sphere of Foreign Relations). See Dobrin in *Grotius Society*, 30 (1944), pp. 200-283, and Aufricht in *A.J.* 13 (1949), pp. 695-698. In May 1945 the Republics of Ukraine and White Russia were separately invited to the San Francisco Conference. They are separate

§ 89a. The rise in the number of States, comprising about one-half of the population of the world, which have adopted the federal structure of government has brought into prominence the question as to the effect of the federal system upon the capacity of federal States to contract and give effect to international obligations and to contribute, by their effective participation, to the development of International Law in matters requiring concurrent action of States. According to the Constitutions of most, if not all, federal States, the legislative power over many matters of importance is reserved to the member-States of the Federation either expressly or as the result of the principle that powers not specifically entrusted to the Federation remain with the member States. In consequence of that constitutional position federal States may often find themselves in the position that they are either unable to conclude treaties relating to matters falling within the legislative competence members of the United Nations.

On monetary unions see Nolde in *Hague Recueil*, vol. 27 (1929) (ii), pp. 364-388. On the proposed European Customs Union see Truchy in *Hague Recueil*, vol. 45 (1934) (ii), pp. 575-626. On the Customs Unions between Belgium and Luxemburg by the Treaty of July 25, 1921, and between Switzerland and Liechtenstein of March 29, 1923, see Pilotti in *Hague Recueil*, vol. 24 (1929) (iv), pp. 463, 464. See also Spillmann *Die rechtliche und politische Lage des Fürstentums Liechtenstein nach dem Weltkrieg* (1933). As the result of the Customs Union Treaty with Switzerland some of the economic measures applied by Switzerland against Italy in 1935 were equally and without further formality operative in the territory of the Principality. *Off. J.*, Special Suppl. No. 147, p. 43. While Liechtenstein entrusted Switzerland with her representation abroad, this was subject to the retention in principle of her sovereign rights including the right to appoint her own representatives. Although Liechtenstein is not a member of the United Nations, she was admitted in 1940 as a party to the Statute of the International Court of Justice. In that capacity she is entitled to take part

in the elections of the Judges of the Court and to institute proceedings before it. She did so in 1951 when she invoked the provisions of the Optional Clu against Guatemala: see *I. J. Reports* 1953 p. 111. On the proposals for a European Union before the Second World War see *Documents* 1930, pp. 61-79; League Doc. A 46 1930, VII.; Toynbee *Survey* 1930, pp. 131-142; Mikhaïlovitch and Scelle *L'Union européenne* (1931), collection of documents; Léonard, *Vers une organisation politique et juridique de l'Europe* (1935); *Round Table* xx. (1929-1930), pp. 79-99; *International Conciliation* (Pamphlet No. 265, December 1930), Lambert in *R.G.*, 36 (1929), pp. 397-416; Politis in *R.I. (Genève)*, 8 (1930), pp. 201-211; Barthelemy in *R.I. (Paris)*, 5 (1930), pp. 420-440; Le Fur, *ibid.*, 6 (1930), pp. 71-96; Pusta, *ibid.*, pp. 97-122, 506-516; De la Brière in *R.I.*, 3rd ser., 12 (1931), pp. 5-36; Scelle in *R.G.*, 38 (1931), pp. 521-563; Cordier in *Genera Special Studies*, ii. No. 6 (1931); Deak in *American Political Science Quarterly*, 46 (1931), pp. 424-433. For some governmental replies see *R.I. (Paris)*, 6 (1930), pp. 280-325. See also *ibid.*, 9 (1932), pp. 617-646.

of the member-States or that, after having validly concluded such treaties, they are unable to give effect to them.¹ In some federal States, such as Australia² or India,³ the Constitution seems to give some powers to the Federation to legislate in matters covered by treaties concluded by the Federation. In the United States, in the case of *Missouri v. Holland*, the Supreme Court decided to the same effect by reference to the Article of the Constitution which provides that treaties concluded by the United States shall be the supreme law of the land alongside the Constitution.⁴ Moreover, the highest tribunal of that country has given a number of decisions affirming in some other spheres, because of exigencies of international intercourse, the competence and rights of the federal State and restricting to that extent the powers and the operation of the laws of the sovereign member-States of the Union.⁵

¹ See *Attorney General for Canada v. Attorney General for Ontario* [1937] A.C. 326, *Annual Digest*, 1935-1937 Case No. 48, to the effect that an Act of the Canadian Parliament passed for the purpose of giving effect to certain International Labour Conventions ratified by Canada was *ultra vires* the Canadian Legislature. See also above, p. 40, and below, p. 726, for the literature on the subject.

² *The King v. Burgess, ex parte Henry* [1936] 55 C.L.R. 608, *Annual Digest*, 1935-1937, Case No. 19.

³ Article 253 of the Constitution of India. And see Alexandrowicz in *I.L.Q.*, 4 (1952), p. 295. This is also the position in Germany and Austria.

⁴ (1920) 252 U.S. 416, *Annual Digest*, 1919-1922, Case No. 1. And see above, p. 42, and below p. 889, on some aspects of the treaty making power of the United States. And see in particular Preuss in *Michigan Law Review*, 51 (1953), pp. 1117-1142 in connection with an amendment to the Constitution, proposed in 1953, to the effect: (a) that a provision of a treaty which conflicts with the Constitution shall possess no legal force (apparently only so far as United States courts are concerned), and (b) a treaty shall become effective as internal law in the United States only through legislation which would be valid in the

absence of a treaty, a provision seemingly intended to make impossible decisions such as that in *Missouri v. Holland* holding that a statute which would otherwise be unconstitutional as impairing the competence of the member States was constitutional if enacted in pursuance of a treaty. The amendment was not adopted. See also Wright in *A.S. Proceedings* 1952, pp. 48-57, Perlman in *Columbia Law Review*, 52 (1952) p. 525, Chafetz in *Louisiana Law Review*, 12 (1947), p. 345; Sutherland in *ILLR* 65 (1952), p. 1305. See also as bearing on the problem of the conduct of foreign relations in Federal States, Fisher in *A.S. Proceedings* 1951, pp. 2-10, Martin, *ibid*, pp. 10-20, Bishop in *Minnesota Law Review* 36 (1952), p. 299.

⁵ *United States v. Curtiss Wright Export Corporation* (1936), 299 U.S. 304 (on the comprehensive scope of the right of the legislature to delegate powers to the Executive in matters relating to foreign relations); *Hines v. Davidowitz* (1941) 312 U.S. 52 (declaring the power to register aliens to vest exclusively with the Union); *United States v. Pink* (1942) 316 U.S. 203 (affirming the overriding effect of agreements partaking of the nature of a treaty—though not constituting treaties—to override the law and

However, both in the United States and in some other countries the Constitutions of which do not allow for effective federal legislation in matters covered by treaties, there has been a tendency, in the sphere of treaties, to insist on the so-called 'Federal Clause' the result of which is, in effect, to relieve the federal State of the obligations of the treaty in matters which fall within the competence of the members of the Federation and which in many cases are co-extensive with the scope of the treaty.¹ The Constitution of the International Labour Organisation has accepted, in a different way, the same principle.² Such practice, necessitating, as it does, the concurrent action of a large number of member-States, must be deemed contrary both to the requirement of reciprocity in treaties and to the effectiveness of a substantial part of International Law in matters of general interest. An improvement in the existing position may come by way of the growing realisation of the fact that, in this sphere as in others, the authority and development of International Law depend upon the willingness to yield rights of sovereignty on the part not only of the federal State but also of its component units linked together in a Federation. The sovereignty of the member-States is no more absolute and incapable of modification than that of the federal State itself. As a matter of Municipal Law, means may be found, by way of judicial review by municipal courts and otherwise, for preventing the federal legislature from abusing the treaty-making power as a device for encroaching upon the legitimate legislative domain of the member-States reserved to them by the Constitution. As a matter of International Law the problem still awaits a solution, in

notions of public policy of the States); *United States v. California* (1947) 33 U.S. 10; *Annual Digest* 1947 Case No. 20 (declaring the rights over the subsoil of territorial waters to belong to the Union on account of the international responsibilities involved).

¹ See Sørensen in *A.J.*, 46 (1952) pp. 196-218, for a lucid account of the problem.

² See Article 19 (7) which, in effect, limits the obligations of the federal States which are members of the

Organisation, in the matter of conventions and recommendations accepted by the Organisation, to the obligation to submit them to the member States or provinces. The resulting situation explains to some extent why up to March 1951 out of 98 International Labour Conventions the United States had ratified only six five concerned with maritime matters and the sixth being of a purely formal nature (see Sørensen, *op. cit.*, p. 231).

relation to some federal States, which will make it possible to realise in the international sphere the essential feature of the federal idea, which consists in a combination of the need for both self-government and order.

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§ 89b. As shown above (§§ 88 and 89), the notions of Confederation and Federation are by no means rigid and the border-line between them is somewhat elastic. Thus, while in a Confederation the members retain their international personality and while in Federation it is only the latter which is the normal subject of International Law, in the American Confederation the member-States possessed neither the right of diplomatic representation nor the right to conclude treaties; but the latter may occasionally be enjoyed by the member-States of the Federation. It is this elasticity as well as the potentialities inherent in the federal system, based as it is on the recognition of an authority superior to the member-States, which explain its attraction in connection with the efforts made after the Second World War for a regional or general integration of States. While some of the relevant treaties creating associations of States provide for no more than what is in effect machinery for consultation and voluntary collaboration, others incorporate some typical features of the federal structure. Of these possible variations some of the treaties concluded or proposed in connection with the closer integration of Western Europe provide instructive examples:

(1) The Customs Union (Convention of September 5, 1944, between Belgium, Holland and Luxembourg, which came into force in 1948, was limited to the provision of an uniform tariff on goods imported from other countries and to the suppression of existing duties on goods passing from Holland to the Belgo-Luxembourg Customs Union created in 1921 (see above, p. 179, n.). However, the Convention provides also for permanent councils for ensuring unification of legislation concerning import duties and for co-ordination of commercial policies and commercial agreements.¹

(2) The Brussels Treaty of Economic, Social and Cultural

¹ See Van Houtte in *R.G.*, 53 (1949), 709, and Vuer, *The Customs Union* pp. 387-408. See also Sibert, pp. 700-1000 (1950).

Collaboration and Collective Self-defence of March 17, 1948,¹ between the United Kingdom, France, Holland, Belgium and Luxembourg, while mainly in the nature of a military alliance,² subsequently equipped with a council of defence ministers supplemented by a chiefs of staffs committee and permanent military committee, brought about a number of commissions and treaties on social security, public health, exchange and permission of employment for students, regulation of wages and conditions of frontier workers, and many other matters.³

(3) The object of the Convention of April 16, 1948, for European Economic Co-operation concluded between sixteen European States, was stated to be the achievement of a sound European economy and ensuring the success of the European programme of recovery.⁴ The Convention created an Organisation composed of the parties thereto and possessing a Council, an Executive Committee and a Secretariat. The Organisation was endowed, within the territory of its members, with a legal personality necessary for the fulfilment of its functions. It was laid down that the Organisation shall establish the necessary relations with the United Nations and other international bodies. There was no supra-national element involved in the Convention, which provides that, unless otherwise agreed, decisions shall be taken by mutual agreement.

(4) The same applies to the Statute of the Council of Europe of May 5, 1949, created for 'the maintenance and further realisation' of the ideals of 'individual freedom, political liberty and the rule of law' as well as in the interest of economic and social progress among European States.⁵

¹ For the text see 1 J. 43 (1949) Suppl., p. 59.

² See below, § 570. And see *ibid.* as to the North Atlantic Treaty of April 4, 1949.

³ See e.g. Convention of April 17, 1950 between the United Kingdom, Belgium, France, Luxembourg and the Netherlands concerning Frontier Workers: Treaty Series No. 24 (1952), Cmd. 8540. Convention of April 17, 1950 between these States concerning student employees, in which the parties undertake to author-

ise employment of students coming from the territory of the other contracting parties. Treaty Series No. 8 (1952) Cmd. 8478.

⁴ Article 11. For the text of the Convention see Treaty Series No. 59 (1949), Cmd. 7796. See also Huët in *Cronet* 50 (1953), pp. 236-285. On European economic co-operation in the sphere of the law of international payments see Hug in *Hugue Recueil*, 70 (1951) (n.), pp. 515-712.

For the text see Treaty Series, No. 51 (1949), Cmd. 7687; *A.J.*, 43

According to the Statute, the resolutions of the principal organ of the Council, namely, the Committee of Ministers composed of the Foreign Ministers of the member-States, require the unanimity, on all matters of importance as defined in the Statute, of all representatives who cast a vote and, in any case, of a majority of the representatives entitled to vote. The Consultative Assembly is merely a deliberative body. It may make recommendations to the Committee of Ministers, but only in matters referred to it by the General Assembly. That aspect of the federal State which originally underlay some of the plans for a Western European Federation¹ and which consists in the direct representation of the population as distinguished from Governments, found some rudimentary expression in the provisions relating to the composition of the Consultative Assembly. These lay down that the method of selection shall be at the discretion of each Government. The elasticity of that provision has enabled Governments and may do so increasingly in the future to dispense with purely governmental representation in connection with the Consultative Assembly and to advance some distance in the direction of the federal principle according to which the central legislative bodies are chosen by the people or its elected representatives.² This factor, as well as the method of composition of the two principal organs—the Committee of Ministers and the Consultative Assembly—one of which is based on the equal representation of all members while the other is set up in some proportion to the numbers of the population, provide an approximation to the traditional federal form of association. In this respect the Council of Europe is probably a type of association of States more

(1949), Suppl., p. 162. The original parties to the Statute were: Belgium (6), Denmark (4), France (18), the Irish Republic (4), Italy (18), Luxembourg (3), the Netherlands (6), Norway (4), Sweden (6) and the United Kingdom (18). Turkey, Greece and Iceland were subsequently admitted as members, and the Saar and Western Germany as associate members.

The figures in brackets indicate the number of seats allotted in the Statute

to representatives in the Consultative Assembly.

¹ See above, p. 179, n.

² The representation of the United Kingdom is chosen by the Government from members of both Houses of Parliament who belong either to the Government Party or to the Opposition. In France some delegates are chosen by the National Assembly, some by the Council of the Republic, and some by the French Government.

organic and containing more distinct possibilities of fuller integration than the Organisation of American States as it has developed in the first half of the twentieth century.¹

¹ For a comparison of the two Organisations with special reference to the Bogota Charter of the Organisation of American States see Margaret Ballin *B J* 26 (1949) pp 150-176. Although unlike in the Council of Europe questions of defence and pacific settlement of disputes are within the competence of the Organisation of American States no effective and permanent organs of a political nature endowed with powers of decision have been created for that purpose. There is no provision for the exercise of political functions by the numerous organs of the Organisation. These are the Inter American Conference, the Meeting of Consultation of Ministers of Foreign Affairs, the Council of the Pan American Union (a highly developed body), the Specialised Conferences and the Specialised Organisations. The constitutional practice of the Organisation of American States has shown a distinct disinclination to entrust its organs with political powers of either decision or with regard to the settlement of disputes or recommendation. On the other hand, the Organisation includes a large number of specialised bodies and institutes in the field of economic humanitarian cultural and judicial co-operation. Thus the Charter provides for the establishment of an Inter American Committee of Jurists to serve as an advisory body on juridical matters to promote the codification of International Law and to study any desirable measures for securing uniformity in the sphere of legislation. For the Bogota Charter of 1948 of the Organisation of American States see 4 *J* 46 (1952) Suppl. p 43. For comment thereon see Fenwick in *A J* 42 (1948) pp 568-589. Until the Sixth Pan American Conference in 1928 the Organisation of American States was not based on any particular treaty. At the Sixth Conference a formal convention was adopted as the basis of the Union (see Scott in *A.J.*, 22 (1928) p 154). See Barrett *The Pan American Union* (1911); Fried *Pan America* (2nd ed.

1918) Dupuis *Le droit des gens et les rapports des grandes puissances etc* (1921) pp 389-409, Urrutia *Los confederaciones pan americanas* (1923), Robertson *Hispanic American Relations with the United States* (1923) pp 378-416, Buell *International Relations* (1925) pp 235-240, Pénfield in *I J* 20 (1926) pp 257-262 (as to its legal status), Numeyr in *Strupp Wort* iii pp 228-231 (with a bibliography). As to the activities of the Union in connection with the codification of International Law see above p 63, n 2. See also Foxnbee *Survey* 1927 pp 400-441. Hudson *Legislation* iv p 2420, Rowe *Organization and the Functions of the Pan American Union* (Report to the Governing Board 1928) Manger in *I J* 22 (1928) p 764, Sibert in *R G* 36 (1929) pp 27-72. And see the Regulations of the Pan American Union adopted on May 2 1928. Hudson *Legislation* iv p 2428. And see generally on the Pan American Movement and the Pan American Union Bustamante pp 301-333, Letter *The World of Nations* (1929) pp 274-289, Yepes *El Panamericano y la Unificación Internacional* (1930) *La Internacional Conference for American States* 1889-1928 (19) with an introduction by J B Scott and *First Supplement* (1919-1940) (with an introduction by Finch 1940), Erwin *The Pan American Union* (1934), Schmeckebier *International Organizations in which the United States Participates* (1935) pp 75-112, Fleming *The United States and World Organization* 1920-1933 (1938), (Cruchaga in *R G* 36 (1929) pp 88-107. See also Kelchner *Latin American Relations with the League of Nations* (1929), Yepes in *His. Revue* vol 47 (1934) (1) pp 115-137, the same in *R I F* 1 (1936) pp 14-28 2 (1936) pp 18-31 20 and in *R I (Paris)* 18 (1936) pp 40-80. And see Ruth Myster *Handbook of International Organizations in the Americas* (1945), and especially pp 32-348 on the Pan American Union, Planas Suarez *La solidaridad americana* (1945), Yepes,

On the other hand, the absence of any element of supra-national authority and of a separate international personality of the Council of Europe, as well as the requirement of unanimity for the validity of the decisions of its principal executive organ, render its federal characteristics potential rather than actual. The circumstance that questions of defence are outside its competence, adds emphasis to this aspect of the situation.¹

(5) In comparison, the Treaty of April 18, 1951, between France, Germany, Italy, Belgium, the Netherlands and Luxembourg, establishing the European Coal and Steel Community, exhibits in some respects distinct features of the federal system. The functions of the Community, as described in Article 2 of the Treaty (often referred to as the Schuman Plan), are to contribute to the establishment of a single market in coal and steel, to promote economic expansion and full employment and to improve the standard of living in the participating countries. These objects are to be achieved by the prohibition: (a) of import and export duties and quantitative restrictions on the production of coal and steel; (b) of discriminatory practices among producers, buyers and consumers; (c) of subsidies and State assistance; (d) and of restrictive practices aiming at the division of markets and the exploitation of the consumer. The Treaty provides for five organs: a High Authority

Philosophie du Panaméricanisme et Organisation de la paix (1945); the same in *R.G.* 50 (1946) pp. 79-111.

¹ On the other hand, the Statute makes wide provision for the exercise of activities in the social, economic and cultural spheres. It does not exclude consideration of political matters. Thus in 1949 the Consultative Assembly included in its agenda the consideration of any necessary changes in the political structure of Europe to achieve a greater political unity between the members of the Council of Europe. In 1953 the Consultative Assembly took a prominent part in the preparation of the Draft Treaty setting up a European Political Community (see below, p. 188). The Secretariat of the Council is

located at Strassbourg. It publishes, among numerous other reports, the minutes of the Annual Sessions of the Consultative Assembly. On the Council of Europe see Sibert pp. 144-151, Powell in *I.L.Q.*, 3 (1950) pp. 164-186, Mosler in *Z.a.u.R.I.* 14 (1951) pp. 145, Sørensen in *Year Book of World Affairs*, 1952 pp. 75-97, and in *Haag Recueil*, 81 (1952) (n.), pp. 121-200. On Western European Federation generally see Kunz in *A.J.* 12 (1948) pp. 868-877, and, in particular, Bindschedler, *Rechtsfragen der europäischen Einigung* (1954). And see above p. 179, n.6, as to the proposals prior to the Second World War. As to the European Convention on Human Rights adopted within the framework of the Council of Europe see below § 340b.

assisted by a Consultative Committee, a Common Assembly, a Special Council of Ministers and a Court of Justice. The distinctive feature of the Organisation and one which introduces a prominent feature of the federal system— is the binding effect of the decisions of the High Authority¹ not only upon the Governments concerned but also upon the subjects and individual undertakings within the territories of the Parties. These powers include the imposition of sanctions by way of fines and penalties. Thus the community exercises within a limited—functional—field some of the powers wielded by a federal State (while the member-States retain, also within that field, the residuary competence not transferred to the High Authority). However, in the external sphere, *i.e.* in relation to other States, the federal element is substantially lacking inasmuch as the Parties retain their international personality also within the limited functional sphere which is within the competence of the High Authority (though for some purposes the latter is authorised to act in the international arena).² The detailed scheme, as provided in the Treaty, for reciprocal checks and counter-checks upon the activities of the High Authority and the other organs, are reminiscent of the various systems of constitutional safeguards within federal States.³

(6) Other proposed associations of a supra-national character. The European Defence Community intended to be established by the Draft Treaty of May 27, 1952, between

¹ This is composed of nine members, eight of whom are elected by common consent and the ninth co-opted by the members already appointed. Decisions of the High Authority are not governed by the principle of unanimity. The Council of Ministers represents the Governments. The Assembly consists of 78 members of Parliament of the six Parties to the Treaty—18 each from France, the German Federal Republic and Italy, 10 each from Belgium and the Netherlands; and 4 from Luxembourg.

² For an interesting instance see the joint meeting of the Consultative Assembly of the Council of Europe and of the Common Assembly of the Coal and Steel Community in June 1953.

³ For the text of the Treaty Con-

stituting the European Coal and Steel Community see *A.J.*, 46 (1952), Suppl., p. 104. See Reuter *La communauté européenne du charbon et de l'acier* (1953); Strange in *Year Book of World Affairs* 1951, pp. 109-130; Green in *Current Legal Problems* 5 (1952) pp. 274-294; Schöckhauer in *Archiv des Völkerrechts*, 3 (1952), pp. 385-414; Raalte in *I.C.L.Q.*, 1 (1952), pp. 73-85; Kaackenbeek in *Grotius Society*, 37 (1952), pp. 4-13; Parker in *International Organization*, 6 (1952), pp. 381-395; Vernon in *A.J.*, 47 (1953), pp. 183-202; Heydte in *Laun Festschrift* (1953), pp. 111-121; Münch, *ibid.*, pp. 122-144; Antoine in *R.G.*, 57 (1953) pp. 210-261; Morell in *Rivista*, 37 (1954), pp. 3-18.

France, Germany, Italy, Belgium, Holland and Luxembourg, is similar in its structure and in the element of functional federation to the Coal and Steel Community.¹ The proposed Treaty setting up the European Political Community is intended, according to Article 1 of the Draft Treaty as formulated in 1953, to be 'of a supra-national character.' It lays down that the Community established by it shall constitute, together with the Coal and Steel Community and the Defence Community, a single legal entity. By providing for the European Executive Council to act as the common representative of member-States by unanimous decision of the Council of National Ministers the Treaty combines some of the characteristics of the federal system with what is no more than an inter-governmental arrangement.²

VI

VASSAL STATES

Hall, § 4—Westlake, i. pp. 25-27—Lawrence, § 39—Phillimore, i. §§ 85-99—Twiss, i. §§ 22-30, 61-73—Wheaton, § 37—Moore, i. § 13—Hyde, i. §§ 17, 18—Bluntschli, §§ 76, 77—Hackworth, i. § 16—Heffter, §§ 19 and 22—Holtzendorff in *Holtzendorff*, ii. pp. 98-117—Lazat, § 10—Fauchille, §§ 188-190—Sibert, pp. 177-184—Mérignac, i. pp. 201-210—Fraser-Foderé, i. §§ 109-112—Nys, i. pp. 382-390—Rivier, i. § 4—Calvo, i. §§ 66-72—Fiore, i. § 341, and *Code*, §§ 110-115—Martens, i. §§ 60-61—De Loutet, i. pp. 177-183—Cruchaga, i. §§ 163-166—Holland, *Lectures*, pp. 74-80—Anzilotti, pp. 202-217—Scelle, i. pp. 134-141—Stubbs, *Suzerainty* (1882)—Baty, *International Law in South Africa* (1900), pp. 48-68—Boghitchévitch, *Halbsouveränität* (1903)—Sereni, *La rappresentanza nel diritto internazionale* (1936), pp. 304 *et seq.*—Rutherford in *A.J.*, 20 (1926), pp. 300-325.

The
Union
between
Suzerain
and
Vassal
State.

§ 90. Suzerainty is a term which was originally used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal, and at that time suzerainty was a term of Constitutional Law only. With the disappearance of the feudal system, suzerainty of this kind likewise disappeared. Modern suzerainty involves only

¹ In this case however, the powers of the Board of Commissioners which corresponds to the High Authority in the Coal and Steel Community—are more circumscribed, as on a number of important questions it can act only with the agreement of an unanimous Council of Ministers. On the Treaty itself see Nash in *A.S.*,

Proceedings, 1952, pp. 126-142; Baxter in *B.Y.*, 29 (1952), pp. 321-344; Tremont in *I.C.L.Q.*, 1 (1953), pp. 519-538; Kunz in *A.J.*, 47 (1953), pp. 275-281. By 1954 it had become improbable that the Treaty would be ratified.

² See Robertson in *B.Y.*, 29 (1952), pp. 383-401, and Kunz in *A.J.*, 46 (1952), pp. 690-698.

a few rights of the suzerain State over the vassal State which can be called constitutional rights. The rights of the suzerain State over the vassal are principally international rights. Suzerainty is by no means sovereignty. It is a kind of international guardianship, since the vassal State is either absolutely or mainly represented internationally by the suzerain State. The subject is now of mere historical importance as there are no longer any vassal States in existence. Egypt, which was for a time a vassal State of Turkey, provided the best example of this kind of protectorate.¹

¹ See Holland, *The European Concert in the Eastern Question* (1885), pp. 80-206; Hesse, *Die staatsrechtlichen Beziehungen Ägyptens zur hohen Pforte* (1897); Grunau, *Die staats- und volkerrechtliche Stellung Ägyptens* (1903); Cocheris, *Situation internationale de l'Égypte et du Soudan* (1903); Freycinet, *La Question d'Égypte* (1905); Dungen, *Das Staatsrecht Ägyptens* (1911); Mayer, *Die volkerrechtliche Stellung Ägyptens* (1914); Moret in *R.G.*, 14 (1907), pp. 405-417; Lamba, *ibid.*, 17 (1910), pp. 36-53; Sayur in *Z.V.*, 3 (1909), pp. 561-617. Turkey having entered the First World War against the Allied Powers in October 1914, Great Britain, by a unilateral declaration dated December 18, 1914, terminated Turkish suzerainty and declared a protectorate over Egypt. On February 28, 1922, Great Britain by a unilateral declaration terminated the Protectorate and declared Egypt to be an independent sovereign State, reserving, however, to the discretion of the British Government the following matters: (a) the security of the communications of the British Empire in Egypt; (b) the defence of Egypt against all foreign aggression or interference; (c) the protection of foreign interests in Egypt and the protection of minorities; (d) the Sudan. See Egypt, No. 1 (1922), Cmd. 1592, pp. 29, 30. And see, for the British announcement to the foreign Powers, Egypt, No. 2 (1922), Cmd. 1617; Martens, *N.R.G.*, 3rd ser., pp. 489-490; *A.J.*, 17 (1923), Suppl., pp. 30, 31. For a detailed bibliography as to the position prior to 1922 see former editions of this

work, §§ 91 and 93. By the Treaty of Lausanne, 1923, Turkey renounced all her rights and titles over Egypt and the Sudan as from November 6, 1914: Article 17. As to the Anglo-Egyptian Sudan see below, § 171 (1). See also Headlam Morley, *Studies in Diplomatic History* (1930), pp. 51-104; Tadros, *La Souveraineté égyptienne et la Déclaration du 28 février, 1922* (1934); O'Rourke, *The Juristic Status of Egypt and the Sudan* (1935); Ried, *La nationalité égyptienne* (1937); Ruzé in *R.I.*, 3rd ser., 3 (1922), pp. 385-423, and 4 (1923), pp. 67-95; Brinton in *I.J.*, 34 (1940), pp. 208-219. The relations between Great Britain and Egypt were placed on a new basis as the result of the Treaty of Friendship and Alliance signed in London on August 26, 1936, and formally terminating the occupation of Egypt by British forces. The Treaty, which is to be replaced by virtue of agreements reached in 1954, provided for a permanent alliance between the two countries, which bound themselves not to adopt an attitude with regard to foreign Powers or to conclude treaties which are inconsistent with the terms of the alliance. It laid down, secondly, the duty of consultation in case of a dispute with a third Power involving a risk of war. Thirdly, it stipulated for mutual support in case of war, subject to the obligations of the Covenant of the League of Nations Treaty Series, No. 6 (1937) (Cmd. 5360). See also *R.V.*, 18 (1937), pp. 79-96. And see below § 206 as to the stationing of British forces in Egypt, § 318 as to capitulations, § 171 as to the Sudan, and § 539 as to revision clauses.

Inter-
national
Position
of Vassal
States

§ 91. The fact that the relation between the suzerain and the vassal always depends upon the special case, excludes the possibility of laying down a general rule as to the international position of vassal States. The vassal State has no relations with other States since the suzerain absorbs these relations entirely; yet the vassal remains nevertheless a half-sovereign State on account of its internal independence. This was the position of the Indian vassal States of Great Britain, which had no international relations¹ whatever either between themselves or with foreign States.² Yet instances can be given which demonstrate that vassal States can have some subordinate international position.³

¹ See Hall, p. 28, Westlake, i pp. 41-43, and *Papers* pp. 211-219, 620-632, and Lindley, pp. 195-201. See also Lee Warner, *The Native States of India* (1910), pp. 254-270, Stummel in *Strupp, Wort*, iii pp. 3-13, and Fitzgerald (as to Berar) in *I Q R*, 42 (1926), pp. 514-520. Not to be confused with the position of the Indian vassal State is the position of India. See below, § 94b.

² The rulers of these States have successfully claimed the privileges which according to International Law are due to heads of States abroad. See *Statham v. Statham and the Gaekwar of Baroda* [1912] P. 42. And see *Sayce v. Meher of Bahawalpur State* [1952] 1 All E.R. 326 where the Court treated as entitled to immunity the Ruler of the State of Bahawalpur which until 1947 was under British suzerainty and which subsequently acceded to the Federation of Pakistan. The Commonwealth Relations Office associated itself with the view expressed by the Government of Pakistan to the effect that the Ameir was a sovereign Ruler. See also [1952] 2 All E.R. 64 for the decision of the Court of Appeal in the same case pointing to the distinct measure of artificiality inherent in the grant of immunity in cases of this description. The Ceylon Supreme Court held in 1942 that the State of Mysore was not an independent sovereign State and that it was not therefore entitled to jurisdictional immunities. *The Superintendent Government Soap Factory, Bangalore v. Commissioner of Income*

Tax. Annual Digest 1941-1942 Case No. 10. The High Court of Allahabad gave a similar decision in 1942 with regard to the Maharaja of Benares. *Bishwanath Singh v. Commissioner of Income Tax* (ibid. Case No. 11). But see for an affirmation of the immunity of the sovereigns of the Indian States *Sirkar v. Suben naa Iyen* decided in 1946 by the High Court of Fyzabad in India. Annual Digest 1946 Case No. 9.

³ Thus Egypt, while she was still a vassal State of Turkey, could conclude commercial and postal treaties with foreign States without the consent of the suzerain and Bulgaria could, while she was under Turkish suzerainty, conclude treaties regarding railways, post, and the like. Thus, further, Egypt and Bulgaria while they were Turkish vassal States were permitted to send and receive consuls as diplomatic agents. Thus, thirdly, the former South African Republic, although in the opinion of Great Britain under her suzerainty, could conclude all kinds of treaties with other States, provided Great Britain did not interpose a veto within six months after receiving a copy of the draft treaty, and was absolutely independent in concluding treaties with the neighbouring Orange Free State. Again, Egypt acquired in 1898, when she was still a Turkish vassal State, *condominium* (see below § 171), together with Great Britain, over the Sudan, which meant that they exercised conjointly sovereignty over this territory. Although vassal

However, even if the vassal State has a certain international position it is considered a mere portion of the suzerain State. Thus all international treaties concluded by the suzerain State are *ipso facto* concluded for the vassal if an exception is not expressly mentioned or is not self-evident. Thus, again, war of the suzerain is *ipso facto* war of the vassal.¹ Thus, thirdly, the suzerain bears within certain limits a responsibility for the actions of the vassal State.²

VII

STATES UNDER PROTECTORATE

Hall §§ 4 and 38* Westlake i pp 22 24 Phillimore i 75 82 Landley, pp 181 206 304 306 Twiss i §§ 22 36 Wheaton §§ 34 36 Moore i § 14 Hyde i §§ 13 16 19 25 Bluntschli § 78 Hickworth, i § 17 Hoffer §§ 19 and 22 Liszt § 10 Fauchille §§ 176 187 (10) Menghinac, ii pp 180 226 Pradier-Fodere i §§ 94 108 Nys i pp 390 392 Rivier i § 4 Calvo i §§ 62 65 Thore i § 341 and *Code* §§ 116 123 Martens i §§ 60 61 De Loutch i pp 183 189 Gemma pp 80 88 Cavaglieri pp 152 164 Cruchaga i §§ 154 162 Keiths Wheaton pp 79 104—Smith i pp 67 70 Anzilotti pp 220 238 Scelle i pp 145 167 Sibert pp 156 177 Pillet in *RG* 2 (1895) pp 583 608 Heilborn *Das völkerrechtliche Protectorat* (1891) and in *Z* 1 8 (1914) pp 217 232 and in Strupp *Wort* ii pp 324 329 Engelhardt *Les Protectorats* etc (1896) Guiral *Le Protectorat international* (1896) Despagnet *Essai sur les Protectorats* (1896) Boghitchewitch *Half-sovereignty* (1903) Dupuis *Le droit des gens et les rapports des grandes puissances* (1920) pp 233 269 Kunz *Staatenverbindungen* (1929) pp 163 193 288 350—Sorel *La représentation et l'acte interne* (1936) pp 304 311 and in *Haque Recueil* 73 (1948) (ii) pp 73 159 Venturini *Il protettorato internazionale* (1939) Rutherford in *I J* 20 (1926) pp 300 325

States have not the right to make war independently of their suzerain, Bulgaria, at the time a vassal State nevertheless fought a war against the full sovereign Serbia in 1885, and Egypt conquered the Sudan conjointly with Great Britain in 1898.

¹ Yet when Turkey entered the First World War against the Allied Powers in 1914, it was not considered that thereby a state of war existed between them and Egypt, presumably because the Turkish suzerainty was then of so nominal a character. In

July 1920, the Greco-Bulgarian Mixed Arbitral Tribunal held in *Kaistrakow v. Bulgarian State* that the Island of Simos, which in 1832 was established as a tributary principality of the Porte, was neutral in wars in which Turkey was a belligerent. *Annual Digest*, 1925-1926, Case No. 27.

² As regards the position of Bulgaria while she was a vassal State under Turkish suzerainty see Holland, *The European Concert and the Eastern Question* (1885), pp 277-307, and Nedjmin, *Völkerrechtliche Entwicklung Bulgariens* (1906).

Concep-
tion of
Protec-
torate.

§ 92. The relation of protectorate between two States differs in some respects from that of suzerainty. A protectorate arises when a weak State surrenders itself by treaty¹ to the protection of a strong State in such a way that it transfers the management² of all its more important³ international affairs to the protecting State. Through such a treaty an international union is called into existence between the two States, and the relation between them is called protectorate. The protecting State is internationally the superior of the protected State; the latter has with the loss of the management of its more important international affairs lost its full sovereignty, and is henceforth only a half sovereign State. Protectorate is, however, a conception which, like suzerainty, lacks exact legal precision, as its real meaning depends very much upon the special case. Generally speaking, protectorate may, again like suzerainty be called a *kind of international guardianship*.

Inter-
national
Position
of States
under
Protec-
torate.

§ 93. The position of a State under protectorate within the Family of Nations cannot be defined by a general rule, since it is the treaty of protectorate which indirectly defines it by enumerating the reciprocal rights and duties of the protecting and the protected States. Each case must therefore be treated according to its own merits. Thus the question whether the protected State can conclude certain international treaties and can send and receive diplomatic envoys, as well as other questions, must be decided according to the terms of the particular treaty of protectorate. In any case, recognition of the protectorate on the part of third States is necessary to enable the superior State to represent the protected State internationally. But it is characteristic of a protectorate, in contradistinction to suzerainty, that the protected State always has, and retains, for some pur-

¹ This is the rule, but in the case of Egypt—see p. 189, n. 1—the protectorate was based upon a unilateral declaration on the part of Great Britain.

² A treaty of protectorate must not be confused with a treaty of protection, in which one or more strong States promise to protect a weak State without absorbing the

international relations of the latter.

³ That the admission of consuls belongs to these affairs became apparent in 1906, when Russia, after some hesitation, finally assented to Japan, and not Korea, granting the exequatur to the consul-general appointed by Russia for Korea, which was then a State under Japanese protectorate. See below, § 427.

poses, a position of its own as an International Person and a subject of International Law.¹ Heads of State and Governments of Protectorates enjoy the usual jurisdictional immunities in the courts of the protecting State² and, probably, in those of other States. The protectorate is not considered a mere portion of the protecting State.³ It is, therefore, not necessarily a party in a war⁴ waged by the superior State against a third State, and treaties concluded by the superior State are not *ipso facto* concluded for the protected State. And, lastly, it can at the same time be under the protectorate of two different States, which, of course, must exercise the protectorate conjointly.

In Europe there is at present⁵ one protectorate, namely,

¹ It seems to have been assumed without argument, by the International Court of Justice that Morocco, even under the Protectorate, retained its personality as a State in International Law. *Rights of United States Nationals in Morocco*: I C J Reports, 1952, p. 185. See also I C J Q. 2 (1953) p. 378.

² *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149; *Duff Development Company v. Government of Kelantan* [1924] A.C. 797; *Government of Morocco v. Laurens*: *Annual Digest*, 1929-1930, Case No. 75; *Sultan of Johore v. Abubakar* [1952] 1 All F.R. 1261.

³ See Advisory Opinion of the Permanent Court on the *Nationality Decrees in Tunis and Morocco*, Series B, No. 4; Cmd. 1899 of 1923 (exchange of notes between France and Great Britain on this question subsequent to the Opinion of the Court), and Lindley, pp. 304-306.

⁴ See the case of *The Ionian Ships*, 2 Spinks 212, Phillimore, ¶ 77, Scott, Cases, p. 21, and Pitt Cobbett, *Leading Cases on International Law* (5th ed.), ii. (1931) p. 50; and see Lindley, p. 306. In *H. C. van Hoogstraten v. Low Lum Seng* the Supreme Court of the Federated Malay States held, in October 1939, that the latter were at war with Germany in view of the unequivocal acts of the British High Commissioner placing them in a state of war: *Annual Digest*, 1938-1940, Case No. 16.

⁵ Of former protectorates in

Europe the following may be mentioned. The Principality of Monaco, which was under the protectorate of Spain from 1523 to 1641, afterwards of France until 1814, and then of Sardinia, became through *desuetudo* a full sovereign State, since Italy never exercised the protectorate. The present status of Monaco is not easy to classify. By a treaty of July 17, 1918, between France and Monaco, France 'assure à la principauté de Monaco la défense de son indépendance et de sa souveraineté et garantit l'intégrité de son territoire' (see Fauchille, § 178 (with bibliography); Monchasseville in *R.G.*, 27 (1920), pp. 217-232, Ruzé in *R.I.*, 3rd ser., 2 (1921), p. 330-346 (including text of treaty of July 17, 1918), Roussel Desperieres in *R.I.* (Paris), 6 (1930), pp. 531-543). Monaco agreed that her international relations should always be the object 'd'une entente préalable' between the two Governments, and that in the event of a vacancy in the Crown of Monaco 'notamment faute d'héritier direct ou adoptif' the territory of Monaco would form, under the protectorate of France, an autonomous State (This treaty is recognised by the parties to the Treaty of Peace with Germany of 1919: see Article 436.) Until that event happens, it seems preferable to regard Monaco as an independent State in close alliance with France. The Ionian Islands, which were under British protectorate

the Republic of Andorra, which is under the joint protectorate of France and Spain.¹

Non-European
Protectorates

§ 94. Outside Europe² there are numerous States under

from 1815, merged into the Kingdom of Greece in 1863. The Free State of Cracow, which was created in 1815 by the Vienna Congress, and put under the joint protectorate of Austria, Russia, and Prussia, was annexed by Austria in 1846.

The Free City of Danzig was created a separate State by Articles 100-108 of the Treaty of Peace with Germany in 1919 and 'placed under the protection of the League of Nations,' which was represented at Danzig by a High Commissioner. The constitution, that is, the political organisation, of the Free City was placed under the guarantee of the League. A treaty of November 9, 1920, between the Free City and Poland regulated the relations between them upon a number of points and provides that the Polish Government shall undertake the conduct of the foreign relations of the Free City as well as the diplomatic protection of its citizens when abroad. Thus Poland exercised on behalf of the League this very important aspect of the protectorate, and all disputes between the Free City and Poland arising out of this matter or any other matter under the Treaty of Versailles 'or any arrangements or agreements made thereunder' are decided in the first instance by the High Commissioner of the League, subject to an appeal by either party to the Council of the League. For an instance of such an appeal, upon which the Council took the Advisory Opinion of the Permanent Court, see the *Polish Postal Service in Danzig*, Series B No. 11. In addition, the Permanent Court of International Justice had occasion to pronounce on a number of other questions relating to the status of Danzig and its relations with Poland: see fifth edition of this Volume, p. 171, n. 2. As part of the territorial settlement, not yet finalised following upon the Second World War, Danzig was incorporated in Poland.

For the extensive literature as to the status of the Free City of Danzig while under Polish protectorate before

the Second World War see the seventh edition p. 176, n.

¹ This protectorate is exercised for Spain by the Bishop of Urgel. As regards the international position of Andorra see Vilar, *L'Andorre* (1905), Fauchille, § 177 (2), Goulé in *Répertoire*, i pp. 562-566. And see the decision of the French Court of Cassation of December 1, 1933, in *Re Société de Asckel*, Sirey, 1935, 3, 1, with a note by Rousseau, *Annual Digest* 1933-1934 (case No. 21). In *Mussey v. Cruzel*, Sirey 1952 ii 151 the Tribunal de Perpignan (France) held that Andorra was neither a foreign State in relation to France nor a sovereign State and that an Andorran subject was therefore not bound to deposit security for costs. San Marino was described in the previous editions as a protectorate of Italy. See, e.g. Fauchille, § 181. However see Sottili, *La République de Saint Marin* (1924). It seems that San Marino concludes treaties in her own name. See e.g. the Exchange of Notes of September 12, 1949 between the United Kingdom and San Marino on the abolition of visas. Treaty Series No. 70 (1949) (cmd. 7825).

On the American continent the United States established for a time a relationship with Cuba, Panama, the Dominican Republic, Haiti and Nicaragua which, while implying the right of intervention on the part of the United States in certain cases (see below, § 136) and important restrictions on the freedom of foreign policy, did not exhibit the characteristics of a protectorate as described above. See Hyde, § 119 (2), and Kunz, *op. cit.*, pp. 301-304, who regards the relation as one of 'quasi protectorate'. See also the United States Act to provide for the complete independence of the Philippine Islands of March 24, 1934 (48 Stat. at L. 456), which provides in Section 2 (a), para. 10, that in the transitional period limited to ten years, foreign affairs shall be under the direct supervision and control of the United States. See Toynbee, *Survey*, 1983, pp. 544-574;

the protectorate of European States. As the protectorate over them is recognised by third States, the latter are legally prevented from exercising any political influence in these protected States. Examples of such protectorates outside Europe are the French over Tunis and Morocco,¹ and the Spanish over Morocco.² Great Britain exercises a protectorate over a number of 'protected States' in Asia, but their international status is not clear.³ They must be distinguished in any case

Documents, 1934, pp. 419-447; Gilmore in *Iowa Law Review*, 16 (1930), pp. 1-19; Friede in *Z.o.V.*, 5 (1935) pp. 172-188; Hayden in *Foreign Affairs (U.S.A.)*, 11 (1935), pp. 639-653; Harrington in *International Affairs*, 15 (1936), pp. 265-288. It was held in 1938, in *Bradford v. Chase National Bank of New York*, that the Philippine Commonwealth was a sovereign State and that its property was, therefore, immune from the jurisdiction of the courts of the United States: 24 F. Suppl. 28; *Annual Digest*, 1938-1940, Case No. 17. See also *ibid.*, Case No. 18, where, in *Suspense et Al. v. Compania Transatlantica Centroamericana*, it was held that citizens of the Philippines were subject to the United States neutrality legislation. The Philippine Commonwealth was invited to the San Francisco Conference in 1945 and is now a member of the United Nations.

¹ As to Morocco see Articles 141-146 of the Treaty of Versailles, and Rouard de Card, *Le Traité de Versailles et le Protectorat de la France au Maroc* (1923). As to Tunis and Morocco see the Advisory Opinion cited above, p. 193, n. 3, and Winkler, *La nationalité dans les protectorats de Tunisie et du Maroc* (1926), pp. 17-52. See also *In re Société des Phosphates Tunisiens* decided on November 20, 1929, by the French Conseil d'Etat: *Annual Digest*, 1929-1930, Case No. 12 and Note. On the recognition by the United States of the French Protectorate over Morocco see Rouard de Card, *Les États-Unis d'Amérique et le protectorat de la France en Maroc* (1930). And see Fitoussi and Bénaret, *L'État tunisien et le protectorat français* (2 vols., 1931). See also Marrero, *Les rapports des droits publics entre la Métropole et les Colonies, Dominions*

et autres territoires d'outremer (1937); and De Laubadère in *Etudes Georges Sclée* (1959) vol. 1., pp. 315-348. The Tangier zone (see below, § 95) is a curious specimen of a protectorate. It is administered by an international body under powers delegated by the Sultan of Morocco, which in turn is a French protectorate. According to the Treaty of 1923 (see below, p. 243, n. 1) the protection in foreign countries of Moroccan subjects of the Tangier Zone is entrusted to France (Article 6). On the other hand, treaties concluded by Morocco (i.e. by France on behalf of Morocco) extend to Tangier only with the consent of the international legislative assembly of the Zone. Treaties to which all the Powers signatories of the Act of Algiers are parties apply automatically to the Zone (Article 8). On June 14, 1940, Spanish troops invaded the Zone and on November 4 the Spanish army of occupation terminated the activities of the administration under the Treaty. Great Britain and a number of other signatories of the Treaty protested. As the result of a Conference held in Paris in 1945 the position as it existed before 1940 was restored: Cmd. 6678 (1945). See Delors in *A.J.*, 35 (1941), pp. 140-145.

² See, for various questions of State responsibility and others connected with that Protectorate, the award of Huber in the *Spanish Zone of Morocco Claims* case between Great Britain and Spain decided on December 29, 1924, and reported in various parts of *Annual Digest*, 1923-1924.

³ The British Protectorates, Protected States, and Protected Persons Order in Council, 1949 (No. 140) enumerates the Protectorates and British Protected States. The following are Protectorates: Aden, Bechuanaland, British Solomon Islands

from the protectorates over African tribes, acquired through a treaty with the chiefs of these tribes.¹ These 'protectorates' possess no international status whatsoever.

Gambia, Kenya, Nigeria, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone, Somaliland, Swaziland, Uganda, Zanzibar. The following are Protected States: The Malay States (namely, Johore, Pahang, Negri Sembilan, Selangor, Perak, Kedah, Perlis, Kelantan, Trengganu), Brunei, Tonga, The Maldive Islands, The Persian Gulf States (namely, Kuwait, Bahrain, Qatar) and The Trucial Sheikdoms of Oman (namely, Abu Dhabi, Ajman, Dubai, Kalba, Ras al Khaimah, Sharjah, Umm al Qaiwain). The position in the various protected States differs according to the agreements concluded with the British Government and it must be ascertained, in each case, by reference to the relevant agreement. By way of example reference may be made to the position of the State of Johore, which is one of the States of the Federation of Malay, as it results from the Agreement made in 1948 (the Agreements with Johore and the Federation of Malay) and previous Agreements of 1895 and 1914. Under the Agreement of 1948 Great Britain has complete control, including powers of legislation, of the defence and external affairs of the Federation and of Johore. Great Britain undertook to protect Johore against external attack while the Ruler of Johore undertook that, without the knowledge and consent of the British Government, he will not enter into treaties, have international intercourse with, or send diplomatic representatives to, any foreign State. While the independence of Johore and the sovereignty of its Ruler are thus recognised, this is subject to the above-mentioned Agreements and to the position of Johore as a member of the Federation of Malay. In the internal sphere, by virtue of these Agreements, legislative powers over a wide field of subjects are conferred upon a Federal legislature consisting of a High Commissioner appointed by the British Government and the * Rulers of the member-States, including the Sultan of Johore, acting with

the advice and consent of a Federal Legislative Council. The executive authority of the Federation is vested mainly in the High Commissioner, who also appoints the Judges. The Agreement of 1948 provides for federal citizenship, but it also recognises the continuance of the status of subjects of the Ruler of any of the States. Within Johore the Ruler undertook to accept the advice of a British Adviser on all matters connected with the government of the State other than the Muslim religion and the customs of Malay. The immunity of the Sultan of Johore from suit was recognised both before and since the Agreements of 1948. See above, p. 193 n. 2

¹ E.g. the British colonial protectorates, which probably are covered by a British declaration of war. They are primarily administered under the Foreign Jurisdiction Act, 1890, but their constitutional position is not always free of doubt. See e.g. *Sobhuza II v. Miller*, decided in 1925, where the Privy Council held, in effect, that the Swaziland Protectorate was foreign territory and its inhabitants aliens: [1926] A.C. 518; *Annual Digest*, 1925-1926, Case No. 28 and Note. As to the British Protectorates of Swaziland and Bechuanaland and their proposed union with South Africa see *Round Table*, 24 (1934), pp. 785-802, and 25 (1935), pp. 318-323. As to the proposed Central African Federation of the self-governing colony of Southern Rhodesia and the protectorates of Northern Rhodesia and Nyasaland see Bentwich in *Current Legal Problems*, 6 (1953) pp. 39-62. See also Smith in *Year Book of World Affairs* (1953), pp. 170-203. And see Cmd. 5949 and 8233. On the Aden Protectorate as distinguished from the Aden colony see Robinson in *A.J.*, 33 (1939), pp. 700-715. For a comparative study of the relations of metropolitan and overseas territory generally see Marsico in *Haque Recueil*, vol. 55 (1936)(i.), pp. 513-590, and Van Asbeck, *ibid.*, 71 (1947)(ii.), pp. 349-472.

VIII

THE BRITISH COMMONWEALTH OF NATIONS

- Fauchille, §§ 159 (5) and 174 (2) -Keith & Wheaton, pp. 129-134 -Smith, i. pp. 46-67 -Anzilotti, pp. 217-226 -Scelle, i. pp. 225-246 -Keith, *Responsible Government in the Dominions* (2nd ed., 1928), pp. 840-926, 1233-1238, *Imperial Unity and the Dominions* (1916), *War Government of the Dominions* (1921), and *Dominion Home Rule in Practice* (1921) -Zimmern, *The Third British Empire* (2nd ed., 1927) -Hatschek, *Britisches und Römischer Weltreich* (1921) -Duncan Hall, *The British Commonwealth of Nations* (1920), and Lowell and Duncan Hall, same title (1927) (World Peace Foundation Pamphlet) -Hurst in *Great Britain and the Dominions* (University of Chicago Press, 1927) -Rebskloß, *La théorie de la Société des Nations* (1917), pp. 279-318 -Buchet, *Le 'status' des dominions britanniques* (1928) -Toynbee, *Conduct of British Empire Foreign Relations since the Peace Settlement* (1926) -Baker, *The Present Juridical Status of the British Dominions in International Law* (1929) -Kunz, *Staatenverbindungen* (1929), pp. 713-818 -Lewey, *Dominions and Diplomacy* (2 vols., 1929) -Keith, *The Sovereignty of the British Dominions* (1929) -the same, *Speeches and Documents on the British Constitution, 1918-1931* (1932 edition) -the same, *The Constitutional Laws of the British Dominions* (1933), pp. 388-431 -the same, *The Governments of the British Empire* (1935), pp. 18-178 -the same, *The Dominions as Sovereign States* (1934) -Chevallier, *L'évolution de l'Empire britannique* (2 vols., 1930) -Borner, *L'Empire britannique* (1930) -Elliott, *The New British Empire* (1932) -Gemma, *L'Impero Britannico* (1933) -Apelt, *Das Britische Reich als völkerrechtsverbundene Staatengemeinschaft* (1934) -*Consultation and Co-operation in the British Commonwealth* (compiled by Palmer, 1934) -Dawson, *The Evolution of Dominion Status* (1900-1935) (1937) *Survey of British Commonwealth Affairs*, vol. 1 -Nationality (1937), by Hancock (with a legal chapter by Latham) *The British Empire*, a Report by a Study Group of Members of the Royal Institute of International Affairs (1937) -Stewart, *Treaty Relations of the British Commonwealth of Nations* (1939) -Wheare, *The Statute of Westminster and Dominion Status* (2nd ed., 1942) -Duncan Hall, *The British Commonwealth of Nations in War and Peace* (in *The British Commonwealth at War* ed. by Elliott and Duncan Hall, 1943) -Mauersberg, *Documents and Speeches on British Commonwealth Affairs, 1931-1952*, 2 vols. (1953) -Noel-Baker and Fawcett, *The British Commonwealth in International Law* (1955) -Nathan in *Grotius Society*, 8 (1923), pp. 117-132 -Lewis in *B.Y.*, 1922-1923 pp. 21-41, and *ibid.*, 1925, pp. 31-43 -Ewart in *A.J.* 7 (1913), pp. 268-284 -Scott, *ibid.*, 21 (1927), pp. 95-101 -Johnston *ibid.*, 21 (1927) pp. 481-489 -Kenny in *Cambridge Law Journal* 1926 pp. 297-311 -Jenks, *ibid.*, 1927, pp. 13-23 -Rolin in *R.I.*, 3rd ser., 4 (1923), pp. 195-226 -Löwenstein in *Jahrbuch des öffentlichen Rechts*, 13 (1925), pp. 404-497, and in *Archiv des öffentlichen Rechts*, New Ser., 12 (1927), pp. 256-272 -H. A. Smith in *Cornell Law Quarterly*, December 1926, pp. 1-12 -Dunn in *Virginia Law Review*, March 1927, pp. 354-379 -Jennings in *R.I.*, 3rd ser.,

8 (1927), pp. 397-437, and *ibid.*, 9 (1928), pp. 438-493—Lavoie in *R.G.*, 36 (1927), pp. 171-209 (Canada)—Anderson in *Canadian Bar Review*, 8 (1930), pp. 32, 112, 196—Chevallier in *R.J. (Paris)*, 7 (1931), pp. 147-251; ⁴*ibid.*, 15 (1935), pp. 347-387; in *R.G.*, 39 (1932), pp. 458-497, and in *Hague Recueil*, vol. 64 (1938) (ii.), pp. 237-340—Menzel in *Z.o.R.*, 12 (1932), pp. 736-774—MacKenzie in *A.J.*, 28 (1934), pp. 559-662—Kaufmann in *Hague Recueil*, vol. 55 (1935) (iv.), pp. 341-348—Lundborg in *Z.V.*, 19 (1935), pp. 147-174—Corbett in *University of Toronto Law Journal*, 3 (1940), pp. 348 *et seq.* Scott in *A.J.*, 38 (1944), pp. 34-49—Chevallier in *Etudes Georges Scelle* (1950), vol. 1., pp. 179-194—Jennings in *B.Y.*, 30 (1953), pp. 320-351.

Position
of Self-
Governing
Dominions be-
fore the
First
World
War.

§ 94a. Prior to the First World War the position of self-governing Dominions, such as Canada, Australia, New Zealand, and South Africa, did not present any difficulties in International Law. They had no international position whatever, because they were, from the point of view of International Law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada and Australia, flew as their own flag, the modified flag of the mother country, or that they had their own coinage, their own postage stamps, and the like. Nor did they become subjects of International Law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to administrative unions, such as the Universal Postal Union. Even when they were empowered¹ by the mother country to enter into certain treaty arrangements of minor importance with foreign States, they still did not thereby become subjects of International Law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them. Since then the position has undergone a radical change. With regard to the treaty-making power and other aspects of international intercourse, there is now no doubt as to the full independence in the international sphere of the members of the British Commonwealth of Nations. The present Chapter is devoted mainly to an account of the legal developments which have led to that change as well as of some questions of International Law arising out of the mutual relationships of the members of the Commonwealth.

¹ See below, § 496a.

§ 94b. Between the First and Second World Wars there took place a pronounced change in the status of the self-governing Dominions. That change was in the direction of full statehood in International Law. The following salient historical facts may be conveniently referred to as marking important stages in that development.

Progress
towards
Inde-
pendent
State-
hood.

I. As the result of intimate participation in the First World War, not merely in the field but also in the counsels of the British Empire by the presence of the Dominion Prime Ministers in the Imperial War Cabinet, we find the Dominions (and India) in 1919 separately represented within the British Empire delegation at the Peace Conference,¹ separately signing the Peace Treaties 'for the Dominion of Canada' and so forth, and separately (except Newfoundland) scheduled to the Covenant as original members of the League and ultimately acquiring separate membership in it.²

II. The abortive Franco-British Defence of France treaty of June 28, 1919, included a clause providing that the Treaty 'shall impose no obligations upon any of the Dominions . . . unless and until it is approved by the Parliament [sic] of the Dominions concerned,' a provision which reappears in the Locarno Treaty of Mutual Guarantee³ of 1925 (Article 9), with the substitution (as a concession to the less democratic atmosphere then prevailing) of the word 'Government' for 'Parliament.'

III. Australia, New Zealand, and South Africa were allotted mandates directly from the League and were responsible to the League for their performance. The mandate was 'conferred upon His Britannic Majesty for and on behalf of' the Government of the particular Dominion.⁴

¹ See Glazebrook, *Canada at the Peace Conference* (1942).

² On the position of the Dominions in the League see Manning, *The Policies of the British Dominions in the League of Nations* (1932); Duncan Hall, *op. cit.* (1943), pp. 14-19; Baker, *op. cit.*, pp. 64-129; Harrison Moore in *International Affairs*, 10 (1931), pp. 372-391; Schücking and Wehberg (3rd ed., 1931), pp. 257-265. As to Canada: Roward in *International*

Conclusion (Pamphlet No. 283, October 1932).

³ Treaty Series, No. 26 (1926), Cmd. 2764; see below, § 577a.

⁴ As to British Dominions as Mandatories see Evatt, *The British Dominions as Mandatories* (1934), and in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp. 27-54. See *Tagalao v. Inspector of Police*, where the

IV. We find the Imperial Government at the request of the Irish Free State (which became a self-governing Dominion 'on the Canadian model' in March 1922¹ and a member of the League in 1923) accrediting in 1924 a Minister Plenipotentiary to the United States of America for 'the handling of matters at Washington exclusively relating to the Irish Free State.'² Canada, to whom a similar right had been conceded in 1920, exercised it in 1926.

V. Another landmark was reached in March 1923 when the Halibut Fisheries Treaty, which, as had happened in the case of other treaties, had been negotiated directly between Canada and the United States of America, was signed by a Canadian minister holding 'full powers' from the Crown and without the association of a minister or diplomatic representative of the Imperial Government, a new practice which was confirmed by a resolution of the Imperial Conference³ later in the same year. In 1925 this

Supreme Court of New Zealand held on October 21, 1927, that New Zealand's authority to administer Western Samoa was given to her directly by the League of Nations as a member of the League and that it was not therefore dependent on the New Zealand Constitution Act of 1852; *Annual Digest*, 1927-1928, Case No. 31. See also *In re Tamasee* (1929), *New Zealand Law Reports*, 209; *Annual Digest*, 1933-1934, Case No. 16; *Nelson v. Braisby* (1934), *New Zealand Law Reports*, 559; *Annual Digest*, 1933-1934, Case No. 15; *Jolly v. Mainka* (1933), 49 C.L.R. 242; *Annual Digest*, 1933-1934, Case No. 17; *Frost v. Stevenson*, decided in 1937 by the High Court of Australia: [1937] 58 C.L.R. 528; *Annual Digest*, 1935-1937, Case No. 29. See also *Rex v. Offen*, a South African case, *ibid.*, Case No. 20. See below, p. 203, on *R. v. Christian*. And see Sandhaus, *Les Mandats Cédés: l'Empire Britannique* (1931). See also *Winter v. Minister of Defence and Others*, *Annual Digest*, 1938-1940, Case No. 20, where the Supreme Court of South Africa held that an internment order issued by the Government at the outbreak of the war in pursuance of emergency regula-

tions was not inconsistent with the provisions of the Mandate.

¹ By the Irish Free State Agreement Act, 1922. As to the new Royal title proclaimed on May 13 1927, see the *Royal and Parliamentary Titles Act*, 1927, and Hudson in *I.J.*, 22 (1928), pp. 116-150.

² Cmd. 2202.

³ Cmd. 1987, pp. 13-15. The Halibut Fisheries Treaty incident may be studied in comments by Lewis in *B.Y.*, 1923-1924, pp. 168-169, and *ibid.*, 1925, pp. 31-43; by Keith in *J.C.L.*, 5 (1923), pp. 166, 167, and *ibid.*, 6 (1924), pp. 135, 136; by Harrison Moore, *ibid.*, 8 (1926), pp. 21-37; and by Mackenzie in *B.Y.*, 1925, pp. 191, 192, and in *A.J.*, 19 (1925), pp. 489-504. The Resolutions of the 1923 Conference provide that Full Powers 'should indicate the part of the Empire in respect of which the obligations are to be undertaken,' and those of the 1926 Conference provide that Full Powers should be 'issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire' concerned. On the Treaty-making power of the Dominions generally see Stewart, *Treaty Relations of the British Com-*

treaty was communicated direct by the Canadian Government to the Secretariat of the League for registration.

VI. The Imperial Conference of 1926¹ adopted the important Report of its Inter-Imperial Relations Committee, presided over by Earl Balfour, which contains² the following definition of 'the group of self-governing Communities composed of Great Britain and the Dominions':

They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

The same Report recommended a number of changes both in inter-imperial relations and in relations with foreign countries, particularly as to the making of treaties³ (of which a specimen form is submitted in the Report), representation at international conferences, the general conduct of foreign policy, the issue of exequaturs to foreign consuls in the Dominions,⁴ and the channels of communication between Dominion Governments and foreign Governments, and also between Dominion Governments and His Majesty's Government in Great Britain.⁵ An Imperial Conference has no executive or legislative power, and the changes recommended in 1926 as the result of the adoption of this Report were gradually translated into fact by

Commonwealth of Nations (1939); McNair, *The Law of Treaties* (1938), pp. 67-76; Chevallier in *RI (Paris)*, 4 (1929), pp. 67-134; Baker, *op. cit.*, pp. 164-202. And see below, § 496a.

¹ In 1925 a Dominions Office, subsequently named Office of Commonwealth Relations, was established in London which is distinct from the Colonial Office.

² Cmd. 2768, at p. 14.

³ See below, § 496a.

⁴ See below, § 427.

⁵ In accordance with the Report, the Governor-General of a Dominion is His Majesty's personal representative in that Dominion and not the representative or agent there of His Majesty's Government in Great

Britain, who is represented in each Dominion by a semi-diplomatic agent having the title of 'High Commissioner in (Canada, etc.) for His Majesty's Government in Great Britain.' Communication between the Government of the United Kingdom and each Commonwealth Government is direct and not through the Governor-General. As to the status of the High Commissioners of the Dominions in London, and of the representatives of Great Britain in Dominion capitals, see Murville, *Le Gouverneur dans les Dominions britanniques* (1929), and, in particular, Evatt, *The King and his Dominion Governors* (1936), and below, p. 204, n. (in fine) as to the Diplomatic Immunities Act of 1952, and § 361.

executive action and legislation in Great Britain and in the Dominions.

VII. The Imperial Conference of 1930¹ amplified in detail the principles of the Conference of 1926. In particular it recommended the procedure to be followed in cases in which the existing diplomatic channels continue to be used as between the Dominion Governments which have not appointed diplomatic representatives of their own and foreign Governments. It was agreed that in all matters other than those of general and political concern the necessary communications should pass directly between the Dominion Government concerned and the British diplomatic representative in question. With regard to negotiation of treaties and the conduct of foreign affairs generally, it was recommended that any of His Majesty's Governments conducting negotiations with a foreign Power should inform the other Commonwealth Governments and give them an opportunity of expressing their views if they think that their interests may be affected. It was laid down that none of the Commonwealth Governments may take steps which might involve the other Governments in any active obligations without their definite consent². At the Imperial Conference of 1937 it was formally put on record that each Member of the Commonwealth takes part in multilateral treaties as an individual entity, and that, unless the Treaty expressly provides to the contrary, no Member of the Commonwealth is in any way responsible for the obligations undertaken by any other Member.³

VIII. The Statute of Westminster, 1931,⁴ gave expression to the principle of equality of status and the fully autonom-

¹ (1930) Cmd. 3717 and 3718.

² See Jennings in *R.I.*, 3rd ser., 12 (1931), pp. 181-219, *Lavoie in R.I.*, 39 (1932), pp. 776-828. As to a Commonwealth Tribunal and the cautious recommendations of the Conference of 1930 see Lauterpacht, *The Function of Law*, pp. 449-450, MacKay in *Canadian Bar Review*, 10 (1932), pp. 338-348; *Round Table*, 23 (1932-1933), pp. 742-756;

The British Empire (Report of the Study Group of the Royal Institute of International Affairs, 1937), pp. 267-275. See also Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (1931).

³ *Summary of Proceedings*, Cmd. 5482 (1937), p. 27.

⁴ 22 Geo. 5, c. 4.

ous statehood of the Dominions by removing any lingering remnants of their formal dependence upon the Imperial Parliament. That Statute was enacted in pursuance of the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation of 1929¹ which, in turn, was summoned in accordance with a resolution of the Conference of 1926. The Statute of Westminster lays down, in particular, that in the future no law or provision made by a Dominion Parliament shall be void or inoperative on the ground of repugnancy to the law of England or an Act of the Imperial Parliament, that a Dominion Parliament shall have power to repeal Imperial legislation in so far as it is in force in the Dominion concerned,² and that in the future no Act of Parliament of the United Kingdom shall extend to a Dominion or a part thereof unless the Dominion has requested and consented to its enactment.³

§ 94ba. The Dominions availed themselves in varying degrees of the emancipating provisions of the Statute of Westminster.⁴ The cumulative result of the successive States as Sovereign

¹ (1929) Cmd. 3479.

² In *Moore and Others v. Attorney-General for the Irish Free State and Others* [1935] A.C. 484; *Annual Digest*, 1935-1937, Case No. 22, the Judicial Committee of the Privy Council held that, in view of the Statute of Westminster, the legislature of the Irish Free State was competent to enact legislation abrogating the Anglo-Irish Treaty of 1921 (which had been incorporated in an Imperial Act of Parliament). No opinion was expressed on the conformity of such action with the 'contractual' obligations of the Irish Free State. See also *British Coal Corporation v. The King* [1935] A.C. 500; *Annual Digest*, 1935-1937, Case No. 21, affirming the right of Canada under the provisions of the Statute of Westminster, to abolish appeals to the Judicial Committee of the Privy Council in criminal matters. See Jennings in *L.Q.R.*, 52 (1936), pp. 173-188. And see below, p. 205 n. 4 as to appeals to the Judicial Committee.

³ See Mahaffy, *The Statute of Westminster*, 1931 (1932); Wheare, *The Statute of Westminster and Dominion Status* (2nd ed., 1942); Kennedy in *L.Q.R.*, 48 (1932), pp. 191-216; Ewart in *Canadian Bar Review*, 10 (1932), pp. 111-122; Hudson in *Harvard Law Review*, 46 (1932-1933), pp. 261-289; Loren in *J.t.L.*, 3rd ser., 15 (1933), pp. 47-53; Chevallier in *R.I. (Paris)*, 17 (1936), pp. 413-441. See also the British Commonwealth Merchant Shipping Agreement of December 10, 1931—(1932) Cmd. 3994—removing the restrictions on the Dominions with regard to merchant shipping and recognising their full legislative authority over all ships within their territorial waters or engaged in their coasting trade. The Agreement was subsequently registered by the Union of South Africa under Article 18 of the Covenant on May 10, 1932, No. 2960.

⁴ According to Section 10 of the Statute of Westminster, its principal provisions were not applicable to Australia and New Zealand until

landmarks, as outlined above, in the development of the internal and external independence of what are usually

adopted by the Parliaments of those Dominions. Australia adopted the Statute of Westminster only in 1942 and New Zealand in 1947. This explains why in 1939 it was necessary for the Imperial Parliament to enact legislation designed, *inter alia*, to give Australian and New Zealand statutes extra-territorial operation for certain purposes. In 1934 South Africa re-enacted the Statute of Westminster so as to make it also a South African statute and to make South Africa, according to her law, fully independent of the Imperial Parliament (Status of the Union Act, 1934). The same Act proclaimed the status of South Africa as a 'sovereign independent State.' The Irish Free State went much further. The Constitution Act, 1936, removed the Crown from all the internal activities of the Free State. The Executive Authority (External Relations) Act, 1936, in empowering the Executive Council to appoint diplomatic and consular representatives and to conclude international agreements, 'authorised' the King to act on behalf of Ireland in these matters as and when advised by the Executive Council to do so. The Constitution of 1937 described Ireland as a sovereign and independent State. In 1948 Eire, in proclaiming the Republic of Ireland Act, became a Republic; she considered herself and was considered as having seceded from the Commonwealth. Nevertheless, the United Kingdom took the position that, in view of the actual ties between the two countries, it would not regard the new Irish legislation as placing Eire in the category of foreign countries or Eire citizens in the category of foreigners. These two principles were embodied in the Ireland Act, 1949, which recognised and declared that Eire had ceased to be part of His Majesty's Dominions (12 & 13 Geo. 6, c. 41). The British Nationality Act of 1948 gave effect to the latter principle. Thus as the result of s. 3 (2) of that Act an Eire citizen in the United Kingdom would receive the same treatment under existing law as if he were a British

subject. If resident in the United Kingdom he could vote. He would also be liable to military service, but only if he resided in Great Britain for at least two years; if unwilling to perform military service, he would be given the opportunity to return to Eire. Moreover, s. 2 (1) enabled an Eire citizen to receive, on application, the status of a British subject (as distinguished from treatment as such); and s. 6 enabled him to become registered, on application, as a 'citizen of the United Kingdom and Colonies' (see below, § 298a). Some other members of the Commonwealth adopted the same attitude. Thus, for instance, the New Zealand Republic of Ireland Act (1950) declared: (1) that notwithstanding that the Republic of Ireland is not part of His Majesty's Dominions, that Republic is not a foreign country for the purpose of any New Zealand law; (2) that New Zealand law, including the British Nationality and New Zealand Citizenship Act 1948, shall not be affected by the circumstance that the Republic of Ireland had ceased to be part of His Majesty's dominions. As to the status of Ireland prior to these developments see Fauchon, *Le statut de l'Etat Libre d'Irlande* (1929); Rynne, *Die völkerrechtliche Stellung Irlands* (1930); Kohn, *The Constitution of the Irish Free State* (1932); Phelan, *The British Empire and the World Community* (1932); Williams, 'Great Britain and the Irish Free State,' *Foreign Policy Reports*, 8 (1932); Jacquemard in *R.I. (Paris)*, 6 (1930), pp. 204-224; Jennings in *R.I.*, 3rd ser., 13 (1932), pp. 473-523; *Round Table*, 25 (1934-1935), pp. 21-43. See also below, p. 206, n. 3.

As an instance of the view that the Republic of Ireland is not a foreign country in relation to the United Kingdom see the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, which confers upon the ambassadors of the members of the Commonwealth and of the Republic of Ireland immunities enjoyed by foreign ambassadors.

described as the Dominions¹ has been to make their status indistinguishable from that of full international personality. Although the equality of status in relation to the mother country has not been followed in all respects by an equality of function²—in particular in the field of diplomatic and consular intercourse³—the resulting inequality, if any, is not such as to impair the full international personality of the other members of the Commonwealth. Their legal right to all the external⁴ attributes of sovereignty is undisputed. It is now an acknowledged principle that in the field of their external affairs—including the declaration of war—the King acts on the advice of the Commonwealth Government concerned. Their full independence is qualified, though not in a way amounting to a legal limitation of full international

¹ It will be noted that the term 'Dominion' does not appear in the official title of Australia which is a 'Commonwealth,' or of South Africa, which is a 'Union.' However, it is convenient, in accordance with the accepted usage, to refer in this Section to Canada, Australia, New Zealand, South Africa and Ceylon but not to India and Pakistan, which have become Republics (see below, § 94bb) as Dominions.

² The distinction between equality of function and equality of status, although of great usefulness in this connection, is not of legal relevance. See on that distinction Earl Balfour in *Journal of the Royal Institute of International Affairs*, 6 (1927), p. 212, and Cmd. 2768, at p. 14. The inequality of function expresses itself mainly in the fact that the Dominions still avail themselves in many cases of the services and organs of Great Britain, in particular for the protection of their citizens abroad and for the obtaining of information as to conditions in foreign countries.

³ By 1945 Canada, Australia, New Zealand, South Africa and Ireland were all sending diplomatic and, some of them, consular representatives to various countries.

⁴ In the internal sphere the Statute of Westminster did not do away altogether with the right of and necessity

for Imperial legislation. Thus legislation by Parliament at Westminster is still necessary for any amendment of the Constitutions of Canada and, probably, of some parts of the Constitutions of Australia and New Zealand. As to Canada see, for instance *British North America (No. 2) Act, 1949*. As to the position in South Africa in connection with the amendment of the Entrenchment Clauses in the South Africa Act see the Judgment of the Supreme Court of South Africa on the Validity of the Separate Representation of Voters Act (1951) in *South African Law Reports*, 2, p. 428 and Mansergh *op. cit.* vol. i, p. 97. Since the Statute of Westminster (Canada barred, in 1933) appeals to the Judicial Committee of the Privy Council in criminal cases; in 1949 she abolished altogether appeals to the Judicial Committee. Previously, in *Attorney-General of Ontario v. Attorney-General of Canada* [1947] A.C. 127 it was held that having regard to the Statute of Westminster, she was entitled to do so. India passed in 1949 the Abolition of Privy Council Jurisdiction Act and conferred the corresponding jurisdiction upon the Federal Court of India. Pakistan and South Africa abolished in 1950 appeals to the Judicial Committee. The relevant Acts and some official comments thereon, are reproduced in Mansergh *op. cit.*, vol. i, pp. 36-68.

capacity, by the agreement, expressed in detail in the recommendations of the Imperial Conference of 1930, that there shall be mutual consultation in vital political matters affecting peace and war.¹ Some of them, by acquiring the Great Seal² and thus making it possible to dispense with the Royal signature, have secured machinery for the more expeditious exercise of their undisputed power of concluding treaties. Their independence is not decisively or even seriously impaired by the fact that, according to the view held by some of the members of the Commonwealth,³ one

¹ See Cmd. 3717 (1930).

² Canada and South Africa secured a Great Seal in 1932; Australia did the same, though for more limited purposes, in 1939.

³ Members of the Canadian Government frequently expressed the view that Canada had no legal power to remain neutral when Great Britain was at war. See Scott in *A.J.*, 38 (1944), pp. 41, 42. This opinion is also held, even more emphatically, by Australia and New Zealand. See Duncan Hall in *The British Commonwealth at War* (1943, as cited above at p. 197), pp. 20-22. See also Clokie in *American Political Science Review*, 34 (1940), pp. 737-750. In announcing, on September 3, 1939, the British declaration of war on Germany the Australian Prime Minister said: 'Great Britain has declared war, and, as a result, Australia is also at war' (Duncan Hall, *op cit.* p. 20). See also *ibid.*, p. 22, for divergent expressions of opinion by South African statesmen. As to Canada see Murphy in *Canadian Bar Review*, 30 (1952) pp. 791-806. The Irish Free State was the only Dominion which in 1939 declared its neutrality. In *Murray v. Parkes* it was held that a citizen of the Irish Free State who was ordinarily resident in Great Britain when the National Service (Armed Forces) Act, 1939, was passed was liable to be called up under that Act: [1942] 2 K.B. 123. The Court held that Irish citizenship was supplementary to, and not inconsistent with, the wider British nationality. Similarly it was held in *Brocknell v. Broxnan* [1952] 1 All E.R. 1126 that

under the National Service Act 1948 Irish citizens are to be treated, with regard to military service, exactly in the same way as British subjects. However this applies only to Irish citizens 'ordinarily resident' (i.e. for a period longer than two years) in the United Kingdom. See also *Hume Pipe & Concrete Construction Co. Ltd v. Moracret Ltd* [1942] 1 K.B. 189.

The paramount consideration weighing with the members of the Commonwealth adhering to the doctrine of 'automatic belligerency' seems to be that the King, the common allegiance to whom is the acknowledged ~~basic~~ factor of the Commonwealth association, cannot logically be at peace with a foreign State in respect of some of his Dominions and at war in respect of others. It is true that in some matters, such as conclusion of treaties, recognition, and diplomatic representation, the King may act differently in respect of his several Governments. Such apparent divergency of action is fully consistent with the elastic nature of the Commonwealth, but the line—which is a pragmatic and not necessarily a logical one—must on that view be drawn somewhere. Unity of legal status and joint defence at a time of supreme trial would seem to constitute the irreducible minimum. Undue importance need not be attached to the suggestion that it would be difficult for the King to act personally in declaring neutrality for one of the members of the Commonwealth when another is involved in a war (see Keith, *Speeches and Documents on the British Dominions, 1918-1931* (1932), p. 29). No such personal action seems

member of the Commonwealth cannot remain neutral while the others are at war. A limitation of this nature is not inconsistent with full sovereignty. It would follow, for instance, from participation in a system of collective security in which the members of the organisation have divested themselves of the right to remain neutral in certain contingencies. However, with the passing of the doctrines of the indivisibility of the Crown¹ and of common allegiance,² it is doubtful whether there is any longer room for the view that a declaration of war by any of the members of the Commonwealth would involve in war all other members of the Commonwealth, including Great Britain. At the commencement and in the course of the Second World War the various Dominions exercised, in principle, their right to declare war separately from the action taken by Great Britain.³ It is probable that the importance attached to the independent exercise of that weighty prerogative of statehood was due

necessary. This seems to be the effect of the South African Status of the Union Act, 1934, according to which the Governor General of South Africa, acting on the advice of his Ministers in South Africa, is empowered to exercise the external prerogatives of the Crown. And see below, n. 1 as to Australia. See vol. II p. 189, n. 1. See also, in addition to Scott and Duncan Hall, referred to above, p. 199, n. 2, Baker, *op cit.*, pp. 330-342. Ewart in *Canadian Bar Review*, 10 (1932), pp. 495-506. Scott in *Foreign Affairs*, 10 (1931-1932), pp. 617-631.

¹ See Communiqué of the Commonwealth Relations Office of November 12, 1952, on the Queen's Style and Titles (Mansergh, *op cit.* vol. II p. 1293). And see Royal Titles Act, 1953 (1 & 2 Eliz. 2, cap. 9), de Smith in *I.C.L.Q.*, 4th series, vol. 2 (1953) pp. 263-274.

² Since the British Nationality Act of 1948 allegiance is no longer a source of British nationality but rather a consequence thereof. Although according to that Act citizenship in any other part of the Commonwealth entails British nationality this is not necessarily according to the laws of some other members of the Commonwealth. Moreover, there can be no

question of allegiance to the Crown with regard to persons who are only citizens of those members of the Commonwealth which are Republics.

³ In 1939 Australia and New Zealand did not declare war separately on Germany. But in 1941 and 1942 Australia declared war separately on Finland, Roumania, Hungary and Japan. Thus the state of war against Japan was declared on January 9, 1941, by the Governor General of Australia to whom the King, acting on the direct advice of the Australian Government, assigned the power to declare war. In establishing this precedent importance was attached to acting on the practice that in all matters affecting Australia the King and his representative act exclusively on the advice of the Government of Australia. It appears that Canada and South Africa declared war separately in all cases. The United States Neutrality Act of September 5, 1939, was not made applicable to South Africa and Canada till September 8 and 10, respectively, after they had declared war on Germany. For a detailed account see Mansergh *Survey of British Commonwealth Affairs: Problems of External Policy, 1931-1939* (1952) pp. 365-414.

primarily not to doubts as to the operation of what has been termed 'automatic belligerency,' but to the assertion of the principle that in matters of peace and war alike any action of the Crown legally affecting the foreign relations of the members of the Commonwealth takes place in pursuance and on the advice of their Governments responsible to their own Parliaments.

The full international personality of the members of the Commonwealth is not inconsistent with the fact that their relations *inter se* are not, in some respects, primarily international in character. Thus while the members of the Commonwealth send to and receive from other members of the Commonwealth representatives designated as High Commissioners, these representatives, though enjoying immunity from taxation and customs and though entitled to diplomatic immunities¹ do not appear in the diplomatic list and are not regarded as representatives of foreign States. When accepting the obligations of the Optional Clause of the Statute of the Permanent Court of International Justice the members of the Commonwealth, with the exception of Ireland, reserved from its operation disputes which might arise among them.² Although the conception of common British nationality³ does not carry with it the full implications of equality of status in all the territories of the Com-

¹ Under an Act passed in 1952 the Commonwealth High Commissioners and the Ambassador of the Republic of Ireland, their families and official and domestic staffs enjoy immunity from legal process and inviolability of premises and archives similar to that which under International Law is enjoyed by foreign ambassadors, their families and staffs. 15 & 16 Geo. 6 1 Eliz. 2 c. 18. Power is given in the Act to confer on the consular officials of these countries the same immunity from suit and inviolability of archives as is enjoyed by consular officials of other countries.

² See vol. II p. 60. See also Jennings in *B.Y.*, 20 (1953), pp. 326-330.

³ The British Nationality Acts, beginning with the Act of 1914, and the corresponding Acts passed in the

Dominions recognise a common status of British subjects throughout the Empire. See below § 298a. The Irish Nationality and Citizenship Act of 1935 abolished for its citizens the status of British subject (s. 33 (3))—a provision contrary to the British Nationality and Status of Aliens Act. While it is now clearly established that since the Statute of Westminster a Dominion is for the purposes of its own law entitled to pass Acts repugnant to an Imperial Act—*Murrell and Others v. Attorney General of the Irish Free State* [1935] A.C. 184—it has been judicially stated with regard to the above mentioned provision of the Irish Act of 1935 that such an Act is not necessarily operative outside the Dominion enacting it: *Murray v. Parkes* [1942] 2 K.B. 123. And see above, p. 204, n.

monwealth,¹ it is not without significance or direct practical application.

§ 946b. While it is clear that Australia,² Canada,³ New Zealand, South Africa, India,⁴ Pakistan⁵ and Ceylon,⁶ are

The Legal Nature of the Commonwealth.

¹ It appears that only in the United Kingdom are British subjects, in the wider sense, from other parts of the Commonwealth treated on a similar, though not the same, footing as persons born in the United Kingdom. Other members of the Commonwealth do not, in most cases, admit equality of treatment in such matters as immigration and political franchise (though, for instance, in New Zealand the franchise is granted to all British subjects irrespective of race). The laws of all the Dominions provide for the deportation of British subjects from the territories of the other members of the Commonwealth in certain circumstances. For the affirmation of the rule that a British subject does not, as such, have the right to enter or stay in any part of the British Commonwealth of Nations see *De Merigny v. Langlais*, decided by the Supreme Court of Canada: *Annual Digest*, 1947, Case No. 63.

² See Latham, *Australia and the British Commonwealth* (1920).

³ Corbett and Smith, *Canada and World Politics* (1928); Olivier, *Problems of Canadian Sovereignty* (1945); Ewart in *Canadian Historical Review*, 9 (1928), pp. 194-205; Russell in *A.S. Proceedings*, 1928, pp. 19-26; Rowell in *Canadian Bar Review*, 8 (1930), pp. 570-586; *Round Table*, 25 (1934-1935), pp. 100-112; Scott in *Foreign Affairs (U.S.A.)*, April 1937, pp. 420-442; Elkin in *R.G.*, 45 (1938), pp. 658-693. On Canada's power to perform treaty obligations see MacDonald in *Canadian Bar Review*, 11 (1933), pp. 681-690, 664-680.

⁴ The position of India as a subject of International Law was for a time anomalous. She became a member of the League of Nations; she was invited to the San Francisco Conference of the United Nations in April 1945; she exercised the treaty-making power in her own right. However, so long as the control of her internal and external relations rested ultimately with the British Govern-

ment and Parliament, she could not be regarded as a sovereign State and as a normal subject of International Law. In 1947 she became a fully self-governing Dominion and an independent State. As to her position prior to that date see Sen, *The Indian States, their Status, Rights, and Obligations* (1930); Palmer, *Sovereignty and Paramountcy in India* (1930); Holdsworth, *The Indian States and India* (1930); Jennings in *R.L.*, 3rd ser., 10 (1929), pp. 480-491; Sundaram in *International Affairs*, 9 (1930), pp. 452-466, and in *Grotius Society*, 17 (1931), pp. 35-51; Sethi in *Canadian Bar Review*, 14 (1936), pp. 36-49; *The British Empire* (as cited above) pp. 108-132. In 1947 the Indian Independence Act (10 & 11 Geo. 6, c. 30) was passed. This very comprehensive enactment provided for the setting up of 'two independent Dominions . . . to be known respectively as India and Pakistan.' When in 1949 India, while remaining a member of the Commonwealth, became a Republic, the India (Consequential Provisions) Act, 1949, was passed to cover the resulting situation. When her new Constitution came into force on January 26, 1950, India became a 'sovereign democratic Republic.' The Government of India had previously informed other countries of the Commonwealth of the impending change. The meeting of the Commonwealth Prime Ministers in April 1949 took note of the proposed new Constitution of India. At the same time the Government of India 'declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth.' The Governments of the other countries of the Commonwealth accepted and recognised the continued membership of India in accordance with the terms of the above declaration. At the same

fully sovereign States in International Law, the question as to the particular category of International Persons in which the Empire regarded as a unit should be placed is more difficult to answer.¹ It is apparently *sui generis* and defies classification. It is not a Federal State because there is no organ which has power both over the member-States and their citizens. It is not a Confederation because there is no treaty which unites the member-States and no organ which in fact and, for all material purposes, in law has power over them. It is unrewarding to enquire whether the Commonwealth resembles a Real or Personal Union since

time they affirmed that the basis of their own membership, namely the common allegiance to the Crown, had not changed as the result: Final communiqué of the Meeting of the Commonwealth Ministers, April 27 1949 (as printed in Mansergh, *op. cit.*, vol. ii., p. 846). With regard to Ceylon, the Ceylon Independence Act, 1947 (11 Geo. 6, c. 7) provided that as from the appointed day—subsequently fixed by Order in Council as February 4, 1948—'His Majesty's Government in the United Kingdom shall have no responsibility for the Government of Ceylon.' On October 22, 1948, representatives of all other Commonwealth Governments represented at the meeting of the Commonwealth Prime Ministers placed on record 'their recognition of Ceylon's independence and affirmed that 'Ceylon enjoys the same sovereign independent status as the other self-governing countries of the Commonwealth which are members of the United Nations' (see Mansergh, *op. cit.*, vol. ii., p. 759). Burma never became a Dominion. In the Treaty of October 17, 1947, between the Government of the United Kingdom and the Provisional Government of Burma the former agreed to recognise the Republic of the Union of Burma as a fully independent State (Cmd. 7360). The Burma Independence Act, 1947, was passed in December of that year. It provided that 'on the appointed day, Burma shall become an independent country, neither forming part of His Majesty's dominions nor entitled to His Majesty's protection.' As to the States which arose on what was

formerly Indian territory see O'Connell in *B. Y.*, 26 (1949), pp. 454-463. As to State succession within the Commonwealth after the Second World War see Fifield in *A.J.*, 46 (1952) pp. 450-463, and O'Connell in *B. Y.*, 26 (1949), pp. 454-463.

Newfoundland was not a separate member of the League and her international status was not as advanced as that of other Dominions. In 1933 the British Parliament passed the Newfoundland Act (24 Geo. 5, c. 2) suspending the Constitution of Newfoundland and providing for the administration of the Dominion by a Governor acting on the advice of a Commission of Government. In 1948, as the result of a referendum to that effect in Newfoundland an agreement was concluded between the two countries according to which Newfoundland united with Canada and became a province in the Canadian Federation. The terms of the Agreement are annexed to the British North America Act, 1949 (12 & 13 Geo. 6, c. 22) which confirmed and gave effect to the Terms of Union.

¹ Pakistan became a Republic in 1953. And see above, n. 4

² See above, n. 4.

³ A foreign observer described it in 1927 as 'a true League of Nations of sovereign States of British race': Löwenstein in *Archiv des öffentlichen Rechts*, New Ser., 12 (1927), at p. 272. Kunz, *Staatenverbindungen* (1929), pp. 796 *et seq.*, regarded it as a quasi composite State approximating most nearly to a Real Union. And see for a full discussion Baker, *op. cit.*, pp. 130, 208, 247-372.

although the Crown is accepted by all members of the Commonwealth as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth,¹ the latter is not, as such,² based on the conception of a common allegiance to the Crown. On the other hand, there must be taken into consideration the legally relevant fact of Commonwealth citizenship and the circumstance that the countries of the Commonwealth do not consider each other as foreign countries.³ Moreover, account must be taken of the flexible but regular and effective machinery of consultation and exchange of information.⁴ The Commonwealth is a community of States in which the absence of a rigid legal basis of association is compensated by the bonds of common origin, history, legal tradition and solidarity of interests. For this reason there is a distinct element of irrelevance in the contention, occasionally advanced, that the British Commonwealth of Nations provides an instructive example to be followed for the purposes of a more general or even universal association of States. Any such association, implying as it must do a surrender of residuary powers of sovereignty to a supra-national authority, is bound to exhibit some of the typical features of the federal structure of government. The fact that at any given period international society may be far removed from

¹ See also p. 209.

² See also p. 207.

³ See e.g. the Indian Constitutional Order, No. 2, 1950, issued in connection with Part II of the Constitution of 1949 relating to Citizenship and laying down that 'every country within the Commonwealth is hereby declared not to be a foreign state for the purposes of the Constitution'. But it may be noted that Eire, which is not a member of the Commonwealth, is also regarded by most of its members as not being a foreign country (see above, p. 204). In general, the international implications of the statement that a country is not regarded as a foreign country are not clear. This applies in particular to the operation of most-favoured-nation clause treaties.

⁴ In 1946 the meeting of the Com-

monwealth Prime Ministers put on record their conviction that the existing methods were 'preferable to any existing arbitral machinery' which 'would not facilitate, and might even hamper, the combination of autonomy and unity which is characteristic of the British Commonwealth and is one of their great achievements.' And see House of Lords Debates, vol. 153, cols. 1154-8 (February 17, 1948). See Harvey, *Consultation and Co-operation in the Commonwealth* (1952). See also the same author in *International Conciliation*, Pamphlet No. 487 (1953). As to the members of the Commonwealth in the United Nations see Carter in *International Organization*, 4 (1950), pp. 247-260. As to the results of the Commonwealth Conference of 1949 see Ivor Jennings in *B.Y.*, 25 (1948), pp. 414-420.

that consummation does not diminish its value as an object of rational endeavour in the sphere of political integration of mankind. It is for these reasons that the existence and development of the British Commonwealth of Nations, significant as they are as a matter of Constitutional and International Law, are not necessarily instructive for other purposes.

IX

MANDATED AREAS

Hyde, i. § 26—Fauchille, §§ 192 (i.) 200 (3), 580-595—Scelle, i. pp. 169-186—Schucking und Wehberg, pp. 688-711—Hackworth, i. §§ 21-24—Redslob, *Théorie de la Société des Nations* (1927), pp. 175-216—Sibert, pp. 898-923—Lauterpacht, *Analogies*, §§ 84-86—Milot, *Les mandats internationaux* (1924)—Diena, same title (1925), and in *Hague Recueil*, 1924 (iv.), pp. 215-263—Stoyanovsky, *La théorie générale des mandats internationaux* (1925)—Schneider, *Das völkerrechtliche Mandat* (1926)—Vallini, *I mandati internazionali* (1923)—Balladore Pallieri, *I mandati della Società delle Nazioni* (1928)—Gsell-Trumpf, *Zur rechtlichen Natur der Völkerbundsmandate* (1928)—Van Rees, *Les mandats internationaux*, vol. 1. (*Le contrôle international*, 1927), vol. ii. (*Les principes généraux*, 1928)—Van Maanen Helmer, *The Mandates System in Relation to Africa and the Pacific Islands* (1929)—Wright, *Mandates under the League of Nations* (1930) (a leading treatise)—Margolish, *The International Mandates* (1930)—Bentwich, *The Mandates System* (1930), and in *Hague Recueil*, vol. 29 (1929) (iv.), pp. 119-182—Pic, *Le régime du mandat* (1932)—Pelichet, *La personnalité internationale distincte des collectivités sous mandat* (1932)—Cometti, *Mandats et Souveraineté* (1934)—Monarca, *L'appartenenza della sovranità sui territori sotto mandato* (1936)—Duncan Hall, *Mandates, Dependence and Trusteeships* (1948)—Rolin in *R.I.*, 3rd ser., 1 (1920), pp. 329-363—Lewis in *L.Q.R.*, 39 (1923), pp. 458-475—Baty in *B.F.*, 1921-1922, pp. 100-121—Corbett, *ibid.*, 1924, pp. 128-136—Wright in *A.J.*, 17 (1923), pp. 691-703; 18 (1924), pp. 306-315, 20 (1926), pp. 768-772—Bileski in *Z.V.*, 12 (1923), pp. 65-85, and 13 (1924), pp. 77-102, and in *Z.o.R.*, 13 (1933), pp. 8-67—Lee in *Grotius Society*, 12 (1927), pp. 31-48—Buza in *Z.o.R.*, 6 (1926), pp. 235-245—Rolin in *Annuaire* 34 (1928), pp. 33-58—Tachi in *R.I. (Paris)*, 14 (1934), pp. 337-360—Bentwich in *Z.d.V.*, 4 (1934), pp. 277-295—Hales in *Grotius Society*, 23 (1937), pp. 85-126, 25 (1939), pp. 185-284; and 26 (1940), pp. 153-210—Haas in *International Organization*, 6 (1952), pp. 521-526.

The
General
Features
of the
Mandate
System.

§ 94c. The method adopted at the end of the First World War for dealing with the colonies and territories of Germany and Turkey which it was decided to detach from them¹ is

¹ The German case against the taking away of her overseas possessions and the mandate system will

be found in Schnee, *German Colonization, Past and Future* (1926).

known as the mandate system. It was embodied in Article 22 of the Covenant of the League of Nations, which was an integral part of the treaties of peace with Germany, Austria, Bulgaria, and Hungary.¹ Under this system these detached territories were not in the ownership of any State, but were entrusted to certain States called 'Mandatory States,' to administer on behalf of the League upon the conditions laid down in written agreements, called mandates, between the League and each mandatory. In conformity with the Charter of the United Nations the system of mandates has been replaced by the international trusteeship system, the details of which are set out below.² However, it is considered necessary to retain here an abridged account of the nature and working of the system of mandates. As the basic idea of the two systems is the same, an account of the mandate system is bound to be of assistance for the understanding of the system of trusteeship.

The main differences between the mandate system and annexation were as follows: From the point of view of the mandatory and of the inhabitants of the mandated area, there was a substantial difference from annexation, as the mandatory was precluded by the terms of the mandate from doing a number of things which an owner of territory can lawfully do. That Germany and Turkey divested themselves of all rights of ownership in the mandated areas was clear.³ That the mandatories had not acquired all of those rights was equally clear; for (i) by the terms of the mandates they agreed to exercise their mandates on behalf of the League, and the mandates, at any rate, contained no cession of the territory to the mandatory.⁴ This was so even in the class of mandates most closely associated with the territory of the mandatory. Thus in the case concerning the *Status of South-West Africa* the International Court of Justice held that the conferment of the mandate over that territory upon South Africa did

¹ As regards Turkey see Article 16 of the Treaty of Lausanne, 1923.

² §§ 94g-94o.

³ See below, § 94f, Note on Sovereignty in Relation to the Mandates

⁴ French Courts have held in a

series of cases that French civil servants by accepting office in a French mandated territory sever all connection with the French civil service: Rousseau in *R.G.*, 43 (1936), pp. 496 *et seq.*

not involve any cession or transfer of territory to the Union of South Africa¹; (ii) the mandatory had no power without the consent of the Council of the League to annex, cede,² or otherwise to dispose of the mandated territory; (iii) he was subject to varying restrictions as to the recruiting and training of the inhabitants, so that, for instance, in the case of the 'B' and 'C' mandates, the mandatory had no right to train the natives except for the purpose of internal police and local defence,³ or to establish military or naval bases⁴; (iv) the inhabitants did not *ipso facto* acquire the nationality of the mandatory⁵; (v) economically, he was under an obligation, at any rate in the case of the 'A' and 'B' mandates, to adopt the policy of the 'open door,' that is, he was bound to ensure to the nationals of all States members of the League the same rights in respect of commerce and trade as were open to the nationals of the mandatory.⁶

Secondly, the dominant element was that of trusteeship for the inhabitants of the mandated area, 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world.' In the words of the International Court of Justice in the case concerning the *Status of South-West Africa*: 'the Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object

¹ I C J Reports 1950 p 132

² See, for instance, the transfer from the British mandate to the Belgian mandate of a portion of Ruanda in East Africa at the instance of the Council of the League: *Off. J.*, November 1923, p. 1273. It is difficult to admit that in concluding on June 23, 1939, the agreement with Turkey in which she ceded the Sanjak of Alexandretta, France remained within the limits of her powers as mandatory. See report of the Mandates Commission to the Council, Minutes of the 36th Session (1939), p. 278. See also Toynbee, *Survey*, 1936, pp. 767-782; *Documents*, 1937, pp. 465-515; 1938 (i.), p. 479-492; Sperduti, *Aspetti giuridici del Sangiacato di Alessandretta* (1939); Scupin in *Z.V.*, 24 (1940),

pp 130, Khaduri in *A J*, 39 (1945), pp 406-425.

³ Note that Article 3 of the French mandates for the Cameroons and Togoland contained a clause concerning native troops which did not appear in the corresponding British mandates for the Cameroons and Togoland.

⁴ As to the position of mandated territories in time of war see vol. II § 71a.

⁵ See below, § 94e, as to Nationality.

⁶ See Gerig, *The Open Door and the Mandates System* (1930); Yapou, *De la non-discrimination en matière économique, notamment en pays de protectorat et sous mandat* (1935); Bileski in *Z.o.R.*, 16 (1936), pp. 214-264.

—a sacred trust of civilisation. . . . The international rules regulating the Mandate constituted an international status for the Territory. . . .¹ For that reason, amongst others, the principal obligations of the mandatory, including those relating to international supervision, were held not to have been abrogated by the dissolution of the League of Nations.²

Thirdly, the mandate system was under the supervision of the Council of the League, advised and assisted by the Permanent Mandates Commission.³ This Commission consisted of ten ordinary members and one extraordinary member. The majority of the members were to be nationals of States which were not mandatories. The annual reports which the mandatories were bound to make upon their administration were examined by this Commission in the presence of a representative of the mandatory State, who answered questions and supplemented the information contained in the report. The right of the inhabitants of a mandated area to petition the League was recognised. Their petition had to be forwarded through the Government of the mandatory State in order to enable it to attach its own comments before the petition is examined by the Commission. Petitions from other sources were communicated to the mandatory State for the same purpose.⁴ The Commission reported to the Council of the League, with whom rested the main responsibility for the working of the system, but the Assembly was also free to discuss questions arising out of it.

§ 94d. The following clauses of Article 22 of the Covenant The indicated, in descending order of political individuality, the Different Types of Mandate.
three types of mandate :

¹ *I.C.J. Reports*, 1950 p. 132. And see, in particular the Separate Opinion of Judge McNair *ibid.*, pp. 153-157.

² See above, p. 214.

³ See Van Roes, *op. cit.*, pp. 56-111, Toynbee, *Survey*, 1928, pp. 115-135, Berthoud in *Friedenswarte*, 47 (1947), pp. 233-254.

⁴ On the jurisdiction of the Permanent Court of International Justice in the matter of mandates see Feinberg,

La juridiction de la Cour Permanente dans le système des mandats (1930) and in *Hague Recuei*, vol. 59 (1937) (1), pp. 596-632, 692-702. All the mandates contained a clause providing that any dispute between a mandatory and a member of the League which cannot be settled by negotiation may be referred by either party to the Permanent Court. See the *Marrommatis Palestine Concessions Case*, P.C.I.J., Series A, No. 2.

Type A—

'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.'

The 'A' mandates were distributed,¹ and accepted by the mandatories, as follows :

Iraq—Great Britain ; Palestine (and Transjordan)—Great Britain ; Syria and Lebanon—France.

The development of each of these territories from the mandated status to political independence was determined by its special conditions and the terms of the particular mandate

(a) *Iraq*.—In 1930 Great Britain and Iraq concluded a Treaty of Alliance, which was to come into force when Iraq was admitted to the League of Nations.² In 1931 the Council adopted a resolution to the effect that the degree of maturity of mandated territories which it may in future be proposed to emancipate shall be decided, having regard to the circumstances of each particular case, in the light of principles laid down by the Mandates Commission in June

¹ The distribution of the mandates ('A,' 'B,' and 'C') was effected by decisions of the Principal Allied Powers which were communicated to the Council of the League and are recorded in the preambles of the mandates.

² For the Treaty of June 30, 1930, see (1930) Cmd. 3627 and Treaty Series, No. 15 (1931), Cmd. 3797, for the Financial Agreement of August 19, 1930, (1930) Cmd. 3675 ; and for the Judicial Agreement of March 4, 1931, providing for a uniform system of justice for foreigners and Iraqis, (1931) Cmd. 3538. See also *Documents*, 1930, p. 132. The Treaty of Alliance provides for consultation on matters of common policy affecting both Parties and for the mutual

obligation not to take up in foreign countries an attitude inconsistent with the Alliance or likely to create difficulties for the other Party (Article 1). Iraq recognises that the permanent maintenance and protection in all circumstances of the essential British communications is in the common interest of the two countries and agreed to grant to Great Britain for that purpose certain sites for air bases and the right to maintain forces in the localities in question in accordance with the provisions of a special Annex (Article 5). The Treaty was to last for twenty-five years. At the end of that period any disagreement as to a new treaty was to be submitted to the Council of the League (Article 11).

1931.¹ In 1932 the Council declared in favour of the termination of the mandate subject to certain guarantees to be given by Iraq on such matters as protection of minorities and respect of acquired rights.² The Thirtieth Assembly thereupon admitted Iraq to membership of the League.³

(b) *Syria and Lebanon*.—Owing to various circumstances the development of these communities to independent statehood did not proceed as rapidly as in the case of Iraq. Following the abortive Treaty of November 1933,⁴ France and Syria signed on September 9, 1936, a Treaty of Alliance and Friendship which provided for the cessation of the mandate and for steps to be taken for the admission of Syria to the League of Nations within three years after the ratification of the Treaty. A similar treaty was concluded with Lebanon on November 13, 1936.⁵ These treaties were still unratified when the Second World War broke out. During the War France declared her willingness to recognise the full independence of Syria and Lebanon, subject to agreement in the matter of French rights in these countries.⁶ In 1944 Great Britain, the United States, and some other States recognised the full independence of Syria and Lebanon. Both States were invited to the San Francisco Conference in 1945 and both became original members of the United Nations.

(c) *Palestine*.—The legal position of that mandated territory was governed, in addition to the general principles of Article 22, by the obligation of the mandatory Power, laid

¹ *Off. J.*, 1931, p. 2055. For the relevant portion of the Report of the Mandates Commission see *A.J.*, 28 (1932), p. 749, and Minutes of the 20th Session of the Commission, p. 228.

² *Ibid.*, 1932, pp. 474, 1213, 1347, 1483.

³ See League Doc. A. 42 1932. VII. On the Iraq mandate, its history, and especially on its termination, see bibliography on p. 190, n. 4, of the previous edition.

⁴ For an analysis of that Treaty see Toynbee, *Survey*, 1934, pp. 284-301. On the termination of mandates generally see Hales in *R.J.*, 3rd ser., 19 (1938), pp. 550-592.

⁵ For the text of the Franco-Syrian Treaty of September 9, 1936, see *R.I.* (Paris), 18 (1936), pp. 767-780; and see *ibid.*, pp. 781-784, for the text of the Treaty of November 13, 1936, between France and Lebanon; for both texts see also *Documents*, 1937, pp. 445-464. And see Pic, *op. cit.*; Joffe, *Le mandat de la France dans la Syrie et le Grand Liban* (1925); Lapiere, *Le mandat français en Syrie* (1936); Morgan Jones, *Le fin du mandat français en Syrie et en Liban* (1938); Wright in *A.J.*, 20 (1926), pp. 263-280; Cardahi in *Hague Recueil* vol. 43 (1933) (i.), pp. 663-788.

⁶ See Khaduri in *A.J.*, 38 (1944), pp. 601-620.

down in the mandate for Palestine, to put into effect a declaration made by Great Britain in November 1917 (the so-called Balfour Declaration), and accepted by the other Principal Allied Powers in favour of the establishment in Palestine of a national home for the Jewish people consistently with the civil and religious rights of existing non-Jewish communities in Palestine.¹ It followed from this dual character of the Palestine mandate that, so long as the mandate had not been revised,² independent statehood of that country and its membership of the League were possible only subject to the fulfilment or safeguarding of these principal obligations of the mandate.³ In 1948, in pursuance

¹ See Scelle, 1. pp. 307-312, Stoyanovsky, *The Mandate for Palestine* (1928) (the leading monograph on the subject); Schwarzenberger *Das Völkerbündensmandat für Palästina* (1929); Marcus, *Palästina - ein werdender Staat* (1929); Baumkoller, *Le mandat sur la Palestine* (1931); Rentwich, *England in Palestine* (1931); the same in *B Y* 10 (1929), pp. 137-143, and in *Z.o.V.*, 1 (1929), pp. 212-222; Feinberg, *Some Problems of the Palestine Mandate* (1936); Bileski in *Z.o.R.*, 13 (1933), pp. 53-55. In *Nheriff Es Shanti v. Attorney General for Palestine* the Palestine Court of Appeal held in 1937 that the juridical position of Palestine was that of a dependency of the Crown in which the sovereign has full power to legislate by means of Orders in Council which are unchallengeable in the Courts even though their provisions go beyond the powers recognised by the Mandate: *Annual Digest*, 1935-1937, Case No. 31.

² In view of the difficulty experienced by the Government of Palestine in reconciling the claims of the Arabs and the Jews, Great Britain, following upon the recommendations of a Royal Commission in July 1937, submitted for consideration by the Mandates Commission a scheme for the division of Palestine into an independent Jewish State, an independent Arab State united with Transjordan (see below, n. 3), and a small section including places of general religious interest under a British mandate.

See Blue Book, Cmd. 5479 (1937). In 1938 the British Government discarded, as being impracticable, the proposal for partition (Cmd. 5893 (1939)). In May 1939 it published a White Paper (Cmd. 6019) the essence of which, in addition to drastic restrictions upon acquisition of land by Jews, was that after five years the growth of the Jewish National Home by immigration would be brought to an end (except with the consent of the Arab population). In the same year, the Mandates Commission declared that the policy set out in the White Paper was not in accordance with the interpretation which the Commission had placed upon the Palestine Mandate (Minutes of the Thirty-Sixth Session, p. 276). For a detailed account see Toynbee, *Surrey*, 1938 (1), pp. 114-179.

³ The relations between Great Britain and Transjordan were governed until 1946 by the Agreement of February 20, 1928, between the two countries. (1928) Cmd. 3069; Treaty Series, No. 7 (1930), Cmd. 3488. Transjordan was originally included in the Palestine mandate, Article 25 of which gave the Mandatory the right, with the consent of the Council, to postpone or to withhold the application of such provisions of the mandate as he may consider inapplicable to local conditions. In 1946 Great Britain concluded with Transjordan a Treaty of Alliance in which she recognised the latter as a fully independent State: Cmd. 6779.

of a decision of the General Assembly of the United Nations,¹ there was formed on part of the territory of Palestine the independent State of Israel. The remainder was subsequently incorporated in the adjoining State of Jordan (see above, p. 218, n. 3).

Type B—

'Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases, and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.'

The 'B' mandates were distributed, and accepted by the mandatories, as follows:

British Cameroons—Great Britain; French Cameroons—France; British Togoland—Great Britain; French Togoland—France; Tanganyika—Great Britain; Ruanda Urundi—Belgium.

¹ In 1945 Great Britain and the United States jointly appointed a commission, composed in equal numbers of their nationals, to make recommendations for the settlement of the Palestine question. The Commission, in its Report, recommended *inter alia*, the cessation of the policy inaugurated in the White Paper of 1939: Cmd. 6808 (1946). Great Britain was unable to accept the principal recommendations of the Commission and, in April 1947, submitted the entire question of Palestine to the United Nations. A special session of the General Assembly, which met from 28th April to 15th May 1947, set up a Commission to investigate and report on the solution of the problem (see Robinson, *Palestine and the United Nations* (1947)). The Commission recommended the partition of Palestine into two independent States—Arab and Jewish—and a zone comprising the City of Jerusalem and surrounding localities to be administered by the United Nations under the

system of trusteeship. In November 1947 the Second General Assembly, by a two thirds majority, approved these proposals and appointed a Commission charged with the task of assisting in putting into effect the recommendations of the Assembly. For an analysis of the action taken by the General Assembly see Akzin in *Jewish Yearbook of International Law*, 1948, pp. 87-114. As to the recognition of Israel see Marshall Brown in *J. L.*, 12 (1948), pp. 620-627.

² See Lugard, *The Dual Mandate in British Tropical Africa* (4th ed., 1929); Rouard de Card, *Les Mandats français sur le Togoland et le Cameroun* (1924); Abendroth, *Die völkerrechtliche Stellung der B.- und C.-Mandate* (1936). And see the extensive bibliography in Wright, *op. cit.* (at p. 192), pp. 660-665. See also Bottner, *Das Völkerbundmandat für Tanganyika* (1931); Thoss, *Die Selbständigkeit der B.-Mandate* (1933); Makowski in *R.G.*, 40 (1933), pp. 374-390.

Type C¹—

'There are territories such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.'

The 'C' mandates were distributed, and accepted by the mandatories, as follows :

South-West Africa—Union of South Africa ; Samoa—New Zealand ; Nauru—British Empire (Great Britain, Australia, and New Zealand jointly) ; other Pacific Islands south of the Equator—Australia ; Pacific Islands north of the Equator—Japan.²

National
Status of
the
Inhabi-
tants.

§ 94c. Article 22 of the Covenant did not directly touch on the question of the national status of the inhabitants, but it was inevitable that this question should arise. The two relevant questions were : (1) Did the inhabitants lose their former German or Turkish nationality ? (2) If so, did they acquire any new nationality ?

(1) The normal effect of cession is twofold, namely, to divest the subjects of the ceding State of their nationality (at any rate when domiciled within the territory ceded), and to invest them with the nationality of the new sovereign.³

¹ Toynbee, *Surrey*, 1929, pp. 238-286 (South African Mandate); *ibid.*, pp. 373-404 (Samoa); Clyde, *Japan's Pacific Mandate* (1935); Abendroth, *op. cit.*; Gregory in *A.J.*, 15 (1921), pp. 419-427; Charteris in *B.Y.*, 1923-1924, pp. 137-152; Matthews in *J.C.L.*, 3rd ser., 8 (1926), pp. 161-183; Moncharville in *R.O.*, 36 (1929), pp. 623-645 (Japanese 'C' Mandate).

² The withdrawal of Japan from the League in 1935 did not have the effect of terminating Japan's mandate. She continued to send the annual report and, for a time, to be represented on the Mandates Commission. In 1938, in pursuance of her decision to discontinue her co-operation with the organs of the League, Japan declined to send a repre-

sentative. The Commission, not without some doubt, decided to proceed with the examination of the Japanese report. For details see Wright in *A.J.*, 33 (1939), pp. 347-349. On the termination of mandates, especially in connection with a mandatory's withdrawal from the League, see Evans in *A.J.*, 26 (1932), pp. 735-758, 27 (1933), pp. 140-142; Wright in *B.Y.*, 16 (1935), pp. 104-113; Miele in *Revista*, 28 (1936), pp. 219-235. On the termination of the mandates on account of the dissolution of the League of Nations see above, §§ 94c and 94d. On the transfer of Mandates see Hong in *J.C.L.*, 3rd ser., 18 (1936), pp. 204-211.

³ See Hall, §§ 205, 206.

But the clauses of the treaties already quoted, whereby Germany and Turkey renounced their rights in respect of the territories now under mandate, suggested a dereliction rather than a cession¹: and it seems that the effect of these clauses was to divest the inhabitants of these territories (apart from the special case of the German subjects of European origin²) of their former German or Turkish nationality and not to invest them automatically with any new nationality. In April 1923 the Council of the League adopted certain resolutions³ with regard to the national status of the inhabitants of 'B' and 'C' mandated areas, the substance of which was that they had a distinct status from that of the mandatory's nationals and, while not disabled from obtaining individual naturalisation from the mandatory, did not automatically become invested with its nationality. In the case of the 'C' mandated area of South-West Africa, the mandatory, with the consent of the Council of the League and with the assent of the German Government, passed legislation offering collective naturalisation to all persons of German origin, subject to the right of any of them to decline the British nationality offered to them.⁴

(2) In the case of all the 'A' mandates the inhabitants of the mandated areas acquired a new nationality. In Iraq (which was then a mandated territory), as the result of the

¹ See *R. v. Jacobus Christian* in the Appellate Division of the Supreme Court of South Africa in 1923, summarised in Mackenzie in *B.Y.*, 1925, pp. 211-219, and in *Annual Digest*, 1923-1924, Case No. 12; Matthews in *J.C.L.*, 3rd ser., 6 (1924), pp. 245-254; and Emmett, *ibid.*, 9 (1927), p. 117. As to the bearing of this decision on the question of sovereignty see below, § 94f, Note on Sovereignty.

² Article 122 of the Treaty of Peace with Germany appeared to assume the continuance of the German nationality of German subjects of European origin in mandated areas—a view which finds support in the minutes of the Permanent Mandates Commission, Second Session (cited by Wright in *A.J.*, 18 (1924),

at p. 313), and was assumed to be correct in the negotiations between the Governments of the Union of South Africa and of Germany preceding the automatic and collective naturalisation Act of 1924 (see Emmett, *supra*, pp. 111-122, and *B.Y.*, 1925, pp. 188-191).

³ *Off. J.*, 1923, p. 604. See also *The King v. Ketter* where it was held that the appellant, a resident of Palestine, who had been issued with a passport entitled 'British Passport, Palestine' was not a British subject: [1940] 1 K.B. 787; *Annual Digest*, 1938-1940, Case No. 21.

⁴ Act 30 of 1924: see Emmett, *op. cit.*, and *B.Y.*, 1925, pp. 188-191, and Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), pp. 177-201.

Iraq Law of October 9, 1924; in Palestine, where by a British Order in Council of July 24, 1925, Palestinian 'citizenship'¹ was created²; and in Syria and Lebanon, in which case the existence of a distinct nationality was recognised by Article 3 of the mandate, and was established by decrees of the French High Commissioner.³ On the other hand, the 'B' and 'C' mandated areas did not mint a nationality of their own.⁴

'Third States' and the Mandate System.

§ 94f. The expression 'third States' denotes in this connection States other than the mandatory. It was mainly with the United States of America that questions upon the relationship of States not members of the League to the mandate system arose. That country entered into a number of treaties with the mandatory States securing for herself and her nationals the same rights in the mandated areas as those of States members of the League and their nationals⁵

¹ Which is equivalent to nationality: see Bentwich, *B.Y.*, 1926, at p. 102. See also Feinberg in *Z.o.V.*, 1 (1929), pp. 200-211.

² But as to Transjordan see Bentwich, *op. cit.*, at p. 106.

³ For details in all three cases see Bentwich, *op. cit.*, at p. 106, and, as to Palestine, Stoyanovsky, *The Mandate for Palestine* (1928), Bentwich in *B.Y.*, 13 (1932), pp. 132, 133, and, as to Syria and Lebanon, Nicolas in *Revue de droit international privé*, etc., 21 (1926), pp. 481-503.

⁴ See *Ming Man On v. Commonwealth of Australia* [1952] *Argus L.R.* 513, where it was held that a person born in a 'C' mandate did not become a national of the mandatory Power.

⁵ For instance, with Great Britain: Palestine, Treaty Series, No. 54 of 1925, *A.J.*, 20 (1926), Suppl., pp. 65-72; East Africa, Cameroons, Togoland, Treaty Series, Nos. 22, 23, 24 (1926); *A.J.*, 20 (1926), Suppl., pp. 166-167. In the Treaty of January 9, 1930, between the United States and Iraq the latter agreed to grant to the United States and its nationals the rights and benefits enjoyed by other States in their capacity as members of the League; Treaty Series, No. 19 (1931), Cmd. 3833.

Note upon Sovereignty in Relation to the Mandates.—Widely differing views

were held upon the question, Where does sovereignty in respect of the mandated areas lie? The following are among the numerous answers that were given—(1) *In the mandatory*: see Rolin, *op. cit.*, Landley, pp. 263, 267, and *R. v. Jacobus (Christian)* (*Annual Dig.*, 1923-1924, Case No. 12) where the Appellate Division of the Supreme Court of South Africa held that the mandatory (Government—that is, the Government of the Union of South Africa) had sufficient internal *majestas* to support a conviction of one of the inhabitants of the 'C' mandated area of South-West Africa for high treason under Roman-Dutch common law. That sufficed to uphold the conviction, but the judgments are also cited in support of the theory of full sovereignty in the mandatory. With reference to the claim of General Hertzog, Prime Minister of the Union of South Africa, for full sovereignty in respect of the mandated area of South-West Africa 'subject to the terms of the mandate' see the *London Times* newspaper of June 9 and August 13, 1927, the Minutes and Report of the Tenth Session (1928) of the Permanent Mandates Commission, pp. 82-86; 182, of the Eleventh Session (1927), Minutes of the Council meetings of March and September 1927, *Off. J.*, 8 (1927),

IXA

TERRITORIES UNDER THE SYSTEM OF TRUSTEESHIP

Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948), and in *B.Y.*, 24 (1947), pp. 33-71 Goodrich and Hambro (*Charter of the United Nations* (1946), pp. 418 465 Sibert, pp. 923 937 Kelsen, *The Law of the United Nations* (1950), 566 695—Schwarzenberger, *Power Politics* (2nd ed., 1951), pp. 600 691 Muthiot in *R.G.*, 50 (1946), pp. 159-209—Armstrong and Cargo in *Department of State Bulletin*, 16 (1947), pp. 511-519—Wellons and Yeomans *ibid.* pp. 1086 1098 Berthoud in *Friedensarte*, 47 (1947), pp. 233-254 Sayre in *I.J.* 42 (1948), pp. 263 298 Parry in *B.Y.*, 27 (1950), pp. 161 185 Johnson in *Year Book of World Affairs*, 1951, pp. 220-243

§ 94g. At the end of the Second World War it was felt in General
generally that the basic principles of the mandates system had stood the test of experience, that they were fully in conformity with the great humanitarian objects which official declarations and public opinion included among the major purposes of the War, and that they ought to be made an integral part of the new international organisation of the United Nations. Having regard to the organic association of the mandates system with the League of Nations, the replacement of which by the United Nations had been decided, it was considered necessary to substitute for the mandates system a new machinery with a different name—that of trusteeship.¹ There is no reason for assuming that

pp. 347 and 1118 1120, and *Round Table*, December 1927, pp. 217 222. (ii) *In the mandatory*, 'acting with the consent of the Council of the League' see Wright in *A.J.*, 17 (1923), pp. 691-703; *ibid.*, 18 (1924), pp. 306 318; *ibid.*, 20 (1926), pp. 768 772 (iii) *In the Principal Allied Powers* (iv) *In the League* (see Lauterpacht, § 86, while admitting that the exercise of sovereignty rests with the mandatory); see *In re Ezra (Goralski)*, mentioned in *A.J.*, 20 (1926), p. 771, Redlob, *op. cit.*, pp. 190, 197; Chubbett in *B.Y.*, 1924, p. 134, Bentwich, *The Mandates System* (1930), p. 19, Koelle, i, pp. 170, 171. (v) *In the inhabitants of the mandated area, but temporarily in suspension* (see Stoyanovsky, *La théorie générale des mandats*

internationaux (1925), Pelichet, *op. cit.* at p. 183, Pic in *R.G.*, 30 (1923), pp. 321 371 In the Resolution adopted by the Institute of International Law in 1931 the communities under mandate are described as subjects of International Law, see *A.J.*, 26 (1932), p. 91)

¹ The system of trusteeship was agreed upon in principle in February 1945 at the Conference at Yalta between the Heads of the British, Russian and United States Governments. For the general history of the adoption of the proposal see the Official American Commentary on the Charter, *Hearings before the Senate Foreign Relations Committee*, pp. 112-118, and Haas in *International Organization*, 7 (1953) pp. 1 21.

the change of name and of machinery were intended as a limitation of the purpose or, except with regard to territories which were to be granted independence, of the territorial scope ¹ of the system as adopted in Article 22 of the Covenant of the League of Nations.

Terri-
tories
under the
Trustee-
ship
System.

§ 94h. Article 75 of the Charter lays down that the United Nations shall establish under its authority an international trusteeship system for the administration and supervision of trust territories. It is provided that 'the trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements' (Article 77): (a) Territories previously held under a mandate in conformity with Article 22 of the Covenant ²; (b) territories detached from the defeated States as a result of the Second World War; (c) other territories voluntarily placed under the trusteeship system by States hitherto exercising exclusive sovereignty over them (Article 77). It is further provided, in Article 79, that the terms of trusteeship for each territory placed under the system shall be agreed upon by the States directly concerned and approved either by the Security Council in the case of so-called strategic areas (Article 83) ³ or by the General Assembly in the case of other trust territories (Article 85).

Although, according to its wording, the Charter imposes no clear legal obligation upon States which were mandatories by virtue of Article 22 of the Covenant to place the territories in question under the system of trusteeship, it is clear that an obligation to this effect, closely approaching a legal duty, follows from the principles of the Charter.⁴ At the first Assembly of the United Nations in 1946 Great Britain, Australia, New Zealand, Belgium, and, with some

¹ See below, n. 4

² But Article 78 lays down expressly that the trusteeship shall not apply to territories which have become members of the United Nations (i.e. to Syria and Lebanon see above § 94d)

³ See below, § 94k.

⁴ Except with regard to mandated territories to be transformed into independent States. Reference may be

made here to Article 80 of the Charter which lays down that, until the individual trusteeship agreements have been concluded, 'nothing in this Charter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.'

qualifications, France,¹ made declarations announcing their intention to place their mandated territories under the trusteeship system. South Africa invoked the special position of her mandated territory as a reason for making it part of her territory, subject to the proposed consultation of its inhabitants.² There was no disposition on the part of the members of the Assembly to acknowledge such right of incorporation.³ When in 1950 the International Court of

¹ See for these declarations *Records of the First Assembly*, 1st Session, 1946, pp. 176, 234, 248, 253 and 264. See also *ibid.*, pp. 482-489. The British declaration included an announcement of the intention to recognise the independence of Transjordan. See also Duncan Hall in *International Affairs*, 22 (1946), pp. 199-213.

² *Ibid.*, p. 193.

³ It appears from an authoritative statement made in the Fourth Committee of the First Assembly that the Trusteeship Committee at the San Francisco Conference agreed, subject to an implied reservation by South Africa, that the mandatory Powers should, in the first instance, recognise the authority of the Trusteeship Council of the United Nations (*ibid.*, No. 11, Suppl., No. 4, p. 4, see also *ibid.*, Nos. 12 and 13, Suppl., No. 4). In a unanimous Resolution the First Assembly invited 'the States administering territories now held under mandate to undertake practical steps . . . for the implementation of Article 79 of the Charter' *Records of the First Assembly*, First Session, p. 685. In 1946 the First General Assembly declined to accede to the request of the Union of South Africa that the mandated territory of South-West Africa should be incorporated in the Union. The request followed upon a vote of the inhabitants of the territory expressing their desire for incorporation. The decision of the General Assembly was based on the view that the inhabitants of South-West Africa had not yet reached a stage of political development 'enabling them to express a considered opinion which the Assembly could recognise on such an important question as incorporation of their territory.' The Assembly recommended that the territory be

placed under the system of trusteeship and invited the Union to submit a trusteeship agreement for the territory (*U.N. Journal*, No. 63/A, p. 679; see also *ibid.*, Nos. 30 and 33, for the discussion on the subject). While refusing to accept this recommendation, the Union expressed its intention to continue to administer the territory as an integral part of the Union in accordance with the principles laid down in the mandate and to submit regularly to the Secretary-General of the United Nations, in accordance with Article 73 (e) of the Charter, 'for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to the economic, social and educational conditions of South-West Africa.' The Second General Assembly maintained its previous recommendation that South-West Africa be placed under the trusteeship system: Doc. A/422. For a presentation of the South African view see Gey van Pittius in *International Affairs*, 23 (1947), pp. 202-209. See also Wright, *ibid.*, pp. 209-212. And see above, as to the Advisory Opinion of the International Court of Justice rendered in 1950. In 1948 and in subsequent years the General Assembly reiterated its previous recommendations that South-West Africa be placed under the trusteeship system and recommended that South Africa should continue to supply annual information on its administration of the country. It also re-affirmed, on repeated occasions, its view that the placing of the territory under the trusteeship system by means of a Trusteeship Agreement was the proper way of modifying its status (see e.g. Resolutions 370 A and B (VI) of 1951).

Justice found by a majority, in its Advisory Opinion on the *Status of South-West Africa*,¹ that there was no legal obligation² upon South Africa to conclude a Trusteeship Agreement in respect of the territory held by her under a League of Nations mandate, it affirmed at the same time, by an unanimous vote, that the Union of South Africa, acting alone, had no competence to modify the international status of that territory and that the competence to determine and modify that status rested with the Union of South Africa acting with the consent of the United Nations. The Court also held that the Union continued to be bound by the international obligations laid down in Article 22 of the Covenant of the League of Nations and in the mandate for South-West Africa as well as by the obligation to transmit petitions from the inhabitants of that territory, the supervisory functions connected therewith to be exercised by the United Nations.³

The
Objects
of the
Trustee-
ship
System

§ 94i. The objects of the trusteeship system are set out in some detail in Article 76 of the Charter. It is a primary purpose of the system 'to promote the political, economic, social and educational advancement of the inhabitants of the trust territories.' This is the paramount obligation of the trustee Powers. In contrast to the corresponding provisions of the Covenant, the duty of ensuring equal treatment for all members of the United Nations and their nationals in social and economic matters⁴ is made subject to the obligation to safeguard the interests of the inhabitants. To that

¹ *I.L.J. Reports* 1950 p 113

² While the Court was of the opinion that 'it was expected that the mandatory State would follow the normal course indicated by the Charter namely conclude Trusteeship Agreements, it was unable to deduce from these general considerations any legal obligation' (*ibid.*, p. 40). It declined to pronounce on the moral or political duties involved in these considerations.

³ Although two Judges dissented from this part of the Opinion, the Court was unanimous in holding that the judicial supervision continued and that, having regard to Article 7 of the Mandate and Article 37 of the Statute

of the Court, the reference to the Permanent Court of International Justice was to be replaced by a reference to the International Court of Justice. It follows that at least those members of the United Nations who were members of the League of Nations are entitled to bring before the International Court of Justice any dispute relating to the interpretation or the application of the provisions of the Mandate. See above, p 215, n. 4

⁴ Article 76 (d). It will be noted that, unlike in the Covenant, the principle of equality of opportunity is not limited to certain categories of trust territories.

extent the Charter has adopted a limitation upon the principle of the 'open door.'¹ The idea, which runs throughout the Charter, of encouraging 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,' is expressly adopted as one of the objects of the trusteeship system.² These fundamental human freedoms include the eventual right of every human being to a share in the political independence of his country, and Article 76 of the Charter therefore recognises, in language of some elasticity, as one of the objectives of the trusteeship system the promotion of the progressive development of the trust territories 'towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned and as may be provided by the terms of each trusteeship agreement.'³

Finally-- a provision which appears first in the enumeration of the aims of the system-- the Charter lays down that the object of trusteeship is 'to further international peace and security.' This somewhat general statement signifies the intention to abandon the drastic limitations which the Covenant imposed upon the mandatory in respect of recruitment in and fortification of the mandated territories. Assuming that the general policy of the trustee Powers is in accordance with the purposes of the Charter in the matter of international peace and security, the provision in question cannot be regarded as a retrogressive step from the point of view of the interests of the inhabitants of the trust territories and of the purpose of the trusteeship system.⁴

¹ See above, p. 214

² Article 76 (c).

³ The manner in which this provision is qualified is expressive of the inherent complexities of the problem. It appears that while some Governments at San Francisco favoured express reference in the Charter to eventual political independence of trust territories, others considered the 'development of self-government' to be an adequate formulation of the purpose of the Charter. See *Canadian Commentary on the Charter*. Department

of External Affairs, Conference Series, 1945, No. 2, p. 50.

⁴ Nevertheless the placing of the furtherance of 'international peace and security' as the first object of the trusteeship system probably betrays a certain lack of proportion-- unless, perhaps, the intention was to give expression to the view that the object of the principle of trusteeship is to limit colonial imperialism which is widely considered as inimical to international peace. Article 84 of the Charter reiterates that it is the

The
Trustee-
ship
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ments.

§ 94j. As in the corresponding case of the mandates, the provisions of the Charter with regard to the system of trusteeship are of a general character. The terms of the administration of the trust territories 'shall be agreed upon by the States directly concerned'¹—a phrase of obvious elasticity—subject to the approval of the General Assembly

duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security and that, accordingly, it may make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken by the administering authority. The wording of the Article seems to rule out conscription.

¹ Article 79. For a, somewhat inconclusive, discussion of the meaning of that term see the Minutes of the Fourth Commission of the First General Assembly (Supplement No. 4 to issues No. 14, 15, 17 and 19 of the *Records of the First General Assembly* in 1945 and 1946). In announcing, on January 23, 1946, in the House of Commons the decision of the British Government to place Tanganyika, Togoland and the Cameroons under the trusteeship system the Prime Minister informed the House that, without prejudice to the ultimate determination of the meaning of the phrase 'States directly concerned,' the British Government considered that the following States must be regarded as directly concerned: France in respect of Togoland and the Cameroons, Belgium in respect of Tanganyika, and the Union of South Africa in respect of all three. The interpretation of that phrase gave rise to opposing views at the First General Assembly, to which the various Trusteeship Agreements were submitted for approval. A minority of States, including Soviet Russia, urged a definition of that phrase, in the sense of an extensive interpretation of its terms, before the Trusteeship Agreements were approved. According to the view put forward by the United States, the 'State directly concerned' was the trustee State itself, whose obligations were fulfilled by affording an opportunity to States

claiming a special interest in the matter to express their views and to submit their proposals. That interpretation may not be quite consistent with the terms of Article 79 of the Charter which lays down that the terms of trusteeship 'shall be agreed upon by the States directly concerned,' which would seem to exclude unilateral action by one State directly concerned. (The French text is even more explicit. It lays down that the terms of trusteeship 'seront objet d'un accord entre les États directement intéressés.') On the other hand, as Article 79 is silent on the vital question of the nature and the conditions of the necessary 'agreement' of the States directly concerned, it must be presumed to have left the matter to be settled, in the absence of an agreed solution, by a requisite majority of the General Assembly. The Trusteeship Committee of the First General Assembly, in proceeding to approve the various Trusteeship Agreements, adopted a proposal of the United States according to which 'the General Assembly in approving the terms of Trusteeship does not prejudice the question of what States are or are not "directly concerned" within the meaning of Article 79' (General Assembly, Doc. 2 258, December 12, 1946, p. 13). In fact, all Members of the United Nations were given the opportunity to present their views with reference to the terms of the Trusteeship Agreements approved by the General Assembly. In voting against the approval of the Trusteeship Agreements Soviet Russia gave as one of the reasons for her action the fact that the 'states directly concerned' had not been specified. See Wolfe in *A.J.*, 42 (1948) pp. 368-388. And see generally on trusteeship agreements Parry in *B.Y.*, 27 (1950), pp. 104-185, and Vedovato in *Hague Recueil*, 76 (1950), (i.), pp. 613-694.

in the case of ordinary trust territories and of the Security Council in the case of strategic areas.¹ Similar agreement and approval are required for the alteration or amendment of the trust instruments. The Charter provides expressly that the authority administering the trust territories shall be either one or more States or the United Nations as a whole.² The First General Assembly approved, in December 1946, Trusteeship Agreements submitted to it in respect of the following eight trust territories, hitherto subject to the mandates system : Tanganyika,³ British Togoland,⁴ and the British Cameroons,⁵ to be administered by Great Britain ; French Togoland⁶ and the French Cameroons,⁷ to be administered by France ; Ruanda Urundi,⁸ to be administered by Belgium, Western Samoa,⁹ to be administered by New Zealand ; New Guinea,¹⁰ to be administered by Australia. In view of the approval of the terms of these Trust Agreements, the General Assembly found that the conditions for the setting up of the Trusteeship Council were fulfilled and proceeded to elect the required number of members of the latter. In 1947 the Security Council approved the Trusteeship Agreement in respect of the Territory of the Pacific Islands, a strategic trust area comprising the Marianos, Carolina, and the Marshall Islands, which were formerly administered by Japan as a mandated territory.¹¹ In the same year the Second General Assembly approved the Trusteeship Agreement for Nauru¹² While Australia, New Zealand, and the United Kingdom are the Administering Authority, Nauru is to be administered by Australia in accordance with an agreement concluded by the three Governments concerned. In 1950 the General Assembly approved the Trusteeship Agreement for Somaliland, to be administered by Italy the only non-member of the United Nations entrusted with that function.¹³

¹ See below, § 94k.

² Article 81.

³ *Treaty Series* No. 19 (1947) Cmd. 7081.

⁴ *Ibid.*, No. 21 (1947), Cmd. 7083.

⁵ *Ibid.*, No. 20 (1947), Cmd. 7082.

⁶ *Ibid.*, No. 67 (1947), Cmd. 7199.

⁷ *Ibid.*, No. 66 (1947), Cmd. 7198.

⁸ *Ibid.*, No. 64 (1947), Cmd. 7196.

⁹ *Ibid.*, No. 65 (1947), Cmd. 7197.

¹⁰ *Ibid.*, No. 68 (1947), Cmd. 7200.

¹¹ *Ibid.*, No. 76 (1947) Cmd. 7233.

¹² *Ibid.*, No. 89 (1947), Cmd. 7290.

¹³ This was consistent with the terms of Article 81 of the Charter which provides that the administering

The
Terms
of the
Trustee-
ship
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ments.

§ 94ja. Notwithstanding some variations of language, the principal provisions of the several Trusteeship Agreements follow a uniform pattern in the attempt to give effect to the objects of the system of trusteeship as set up in the Charter. Thus in Article 3 of the Trusteeship Agreement for the British Cameroons the 'Administering Authority' undertakes to administer the Territory in such a manner 'as to achieve the basic objectives of the international trusteeship system as laid down in Article 76 of the Charter.' The Administering Authority undertakes to collaborate with the General Assembly and the Trusteeship Council in the discharge of their functions defined in Article 87 of the Charter in the matter of reports and petitions, and to facilitate, at times to be agreed upon, any periodic visits to the Territory which these organs may deem necessary. The Administering Authority is to be responsible for the peace, order, good government and defence of the Territory. In order to fulfil these obligations the Administering Authority is to possess full powers of legislation, administration and jurisdiction in the Territory. It is to be entitled to constitute the Territory into a customs, fiscal or administrative union or federation with adjacent territories under its sovereignty or control. In order to ensure that the Territory 'shall play its part in the maintenance of international peace and security' ¹ the Administering Authority, unlike in the case of mandated territories, is entitled to establish naval, military and air bases, and to erect fortifications— in addition to possessing the right of stationing its own forces there and, generally, of taking such measures as are in its opinion necessary for the defence of the Territory. However, so far as the native population is concerned, only volunteer forces may be used for that purpose.

authority may be 'one or more States or the Organisation itself.' However, the provision of Article 86 (1) relating to the Trusteeship Council as composed of Members of the United Nations left room for no such latitude. Italy is not a member of the Trusteeship Council except to the extent that she takes part, without the right to

vote in the deliberations of the Council concerning the Trust Territory for Somaliland and general questions affecting the operation of the trusteeship system.

¹ Art. 4 of the Togoland Agreement. And see above, p. 227, n. 4.

The Agreements contain provisions obliging the Administering Authority to promote the development of free political institutions suited to the Territory and to give the inhabitants a progressively increasing share in the government of the country with a view to their political advancement to self-government and eventual independence¹ in accordance with Article 76 (b) of the Charter. Provision is made for safeguarding native laws and customs as well as native land and resources in the interest of the native population. Although the Administering Authority is entitled to create monopolies, these must be either of a purely fiscal character in the interest of the Territory or calculated to promote the economic advancement of its inhabitants.² Although the Administering Authority is bound to refrain from economic discrimination against the nationals of any Member of the United Nations, it is expressly provided that such equality of treatment shall be contingent upon the inhabitants of the Territory receiving most-favoured-nation treatment in the territories of the State concerned. The Trusteeship System thus avoids the unconditional 'open-door' principle adopted in some of the mandates, a system which proved highly disadvantageous to the territories concerned. The Administering Authority is under an obligation to ensure in the Territory complete freedom of conscience and, so far as is consistent with the requirements of public order and morality, freedom of

¹ The words 'or independence' appear even in the Trusteeship Agreement on the Pacific Islands, an undeveloped strategic Trust Area to be administered by the United States (Art. 6). They were inserted in the course of the consideration of the Agreement by the Security Council. The United States originally opposed the insertion of these words because of the unlikelihood that such independence 'could possibly be achieved within any foreseeable future in this case.' The Trusteeship Agreement with Italy concerning Somalia is the only instrument which sets a definite limit to the duration of the trusteeship, namely, a period of ten years.

² The provisions as to monopolies

met with considerable criticism in the course of the consideration of the Draft Agreements by the General Assembly. As a result the representatives of Great Britain and Belgium made a declaration before the General Assembly stating that their Governments had no intention of using the grant of private monopolies as a normal instrument of policy; that such monopolies would be granted only when such a course was essential in the interest of the inhabitants, and that they would be granted only for limited periods and promptly reported to the Trusteeship Council (Doc. A 258, December 12, 1946, p. 6).

religious teaching and the free exercise of all forms of worship. Subject to requirements of public order it is to guarantee to the inhabitants freedom of speech, of the press, of assembly, and of petition. Effective provision is to be made for the educational advancement of the inhabitants. According to most Trusteeship Agreements,¹ disputes between the Administering Authority and another Member of the United Nations concerning the interpretation or application of the provisions of the Trusteeship Agreement shall be submitted, if they cannot be settled by negotiation or other means, to the International Court of Justice.

**Strategic
Trust
Areas.**

§ 94k. The Charter distinguishes between ordinary trust territories and so-called strategic areas which may include part or all of the trust territory. With regard to these areas the strategic requirements of defence and security make it necessary that the functions which with regard to trust territories in general are exercised by the General Assembly should be performed by the organ which by virtue of its composition is able to act more expeditiously and which is more particularly associated with international peace and security, namely, the Security Council.² But it is expressly provided that the general principles of trusteeship as laid down in Article 76 of the Charter apply to strategic areas and that, subject to the specific trusteeship agreements and requirements of security, the Security Council shall avail itself of the services of the principal organ of the trusteeship system, namely, the Trusteeship Council.³ The Trusteeship Agreement for the Territory of the Pacific Islands (formerly Japanese Mandated Islands), approved by the Council in April 1947, differs but little from other Trusteeship Agreements. Thus the application of the provisions of Articles 87 and 88 of the Charter in the matter of annual reports and visits to the Territory can be limited in respect of areas

¹ Namely, those relating to Togoland and the Cameroons under British and French administration, Western Samoa and Ruanda-Urundi. There seems to be no reason of principle for

the absence of such provisions from other Trust Agreements.

² Articles 82 and 83.

³ Article 83. See also *Canadian Commentary on the Charter*, p. 61.

which may from time to time be specified by the Administering Authority as closed for security reasons.¹

§ 94l. The fundamental importance of the system of trusteeship in the scheme of the Charter is given expression by the fact that the ultimate responsibility for its operation rests with the General Assembly and, with regard to strategic areas, with the Security Council. These bodies approve the trusteeship agreements; their consent is required for any alteration or modification of those agreements; they bear the general responsibility for the administration of such trust territories and strategic areas in regard to which the administering authority is placed with the United Nations as a whole; and, finally, the General Assembly exercises, in principle, concurrent jurisdiction with the Trusteeship Council with regard to the supervision of the administration of the trust territories. In particular, it is to the General Assembly that the administering authority is to make an annual report with regard to the territory entrusted to its administration.²

§ 94m. The normal function of supervision of the administration of trust territories is conferred upon the Trusteeship Council— one of the six principal organs of the United Nations. In particular, the Trusteeship Council may, under the authority of the General Assembly³: (a) consider reports submitted by the Administering Authority; (b) in consultation with the latter accept and examine petitions from the inhabitants of trust territories and, probably, from elsewhere; (c) arrange for periodic visits to trust territories at times agreed upon with the Administering Authority⁴; (d) formulate questionnaires on the political,

¹ Art. 13. And see, generally, Robbins in *Bulletin of Department of State*, 16 (1947), pp. 783-790.

² Articles 87 and 88. With regard to strategic areas the functions of the United Nations are exercised by the Security Council (Article 83).

³ Article 87.

⁴ No corresponding provision is to be found in the mandates. The liberal interpretation given by the Trusteeship Council to the provisions of the

Charter concerning petitions from and visits to trust territory may be gauged from the fact that the first visiting mission sent by the Council was that sent to Western Samoa in 1947 to investigate a petition from the leaders and representatives of that Territory asking that it be granted self-government. See Finkelstein in *International Organization*, 2 (1948), pp. 266-282. Visits of this nature have become a prominent feature of

economic, social, and educational progress of the inhabitants of the trust territories—such questionnaires to form the basis of the annual reports submitted to the General Assembly by the Administering Authority; (e) take any other action in conformity with the Trusteeship Agreements. The various Trusteeship Agreements lay down that the Administering Authority shall make to the General Assembly an annual report on the basis of the questionnaire drawn up by the Trusteeship Council¹—such reports to include information bearing on the measures taken to give effect to the suggestions and recommendations of the General Assembly and the Security Council. It is also provided that the Administering Authority shall designate a representative to attend the sessions of the Trusteeship Council at which the annual reports are considered.

The composition of the Trusteeship Council² differs radically from that of the Mandates Commission under Article 22 of the Covenant. The salient feature of the composition of the latter was that its members were not representatives of Governments and, secondly, that the majority of the members of the Commission were not nationals of the mandatories. According to Article 86 of the Charter the Trusteeship Council consists of States members of the United Nations each of which has one vote.³ The Charter lays down that the representatives of these States must be persons 'specially qualified.'⁴ The States in question are: (a) those which administer trust territories; (b) such permanent members of the Security Council as do not administer trust territories; (c) States elected by the General

the work of the Trusteeship Council. A detailed account of them will be found in the successive issues of the *Yearbook of the United Nations*.

¹ In April 1947 the Trusteeship Council approved provisionally the form of a questionnaire which, in accordance with Article 88 of the Charter, should form the basis of the annual reports on each Trust Territory. The document contains questions on such matters as the status of the Territory (including the organisation of its legislative, administrative,

and judicial systems) and its inhabitants, international and regional relations, and the advancement achieved in the political, economic, educational and social spheres. The latter includes questions on standards of living, status of women, human rights, labour conditions, public health, sanitation, drugs, alcohol, population, social security and welfare, housing and town planning, and penal organisation (Doc. T/14).

² Article 86.

³ Article 89 (1).

⁴ Article 86 (2).

Assembly for a period of three years. In this category as many States are to be elected as is necessary to ensure that the total number of members of the Trusteeship Council is divided equally between those members of the United Nations which administer trust territories and those which do not. By the end of 1953 the composition of the Trusteeship Council was as follows: members administering Trust Territories (Australia, Belgium, France, New Zealand, United Kingdom, United States); permanent members not administering Trust Territories (China, Soviet Russia); elected members (El Salvador, Syria, India and Haiti).

The composition of the Trusteeship Council appears, at first sight, open to objection inasmuch as it substitutes governmental representation for the system which obtained with regard to the Mandates Commission. The latter was composed of individuals not representing any Government, and this fact was generally regarded as a guarantee of its impartiality and independence. But it must be borne in mind that a substantial measure of such guarantee is implied in the fact that one half of the members of the Trusteeship Council are States not administering trust territories; that the Trusteeship Council is accountable to and acts under the authority of the General Assembly which has concurrent jurisdiction with it in the function of supervision normally exercised by the Trusteeship Council; that the latter is, in law, bound to perform its functions in a manner calculated to fulfil the purpose of the trusteeship system; and that the adoption of the principle of majority in the voting of the Trusteeship Council¹ minimises the danger of an undue tendency to political compromise alien to the objects of trusteeship but inherent in bodies acting under the requirement of unanimity. Moreover, the circumstance that the decisions of the Trusteeship Council are decisions of Governments, as distinguished from those of private individuals, may be a factor increasing their effectiveness and authority.

§ 94n. In considering the question of sovereignty over trust territories- a question which is by no means of mere academic importance- the distinction must be borne in

Sovereignty
over Trust
Territories.

¹ Article 89 (2).

mind between sovereignty as such (or what may be described as residuary sovereignty) and the exercise of sovereignty. The latter is clearly vested with the trustee powers subject to supervision by and accountability to the United Nations. For most practical purposes the consequences of such exercise of sovereignty are identical with those flowing from sovereignty proper. Thus as the trustee States wield full power of jurisdiction as well as of protection, internal and external, over the inhabitants of the trust territories, the governments of these territories are entitled to exact allegiance from the inhabitants although, in strict law, these do not possess the nationality of the trustee powers.¹ For it is fundamental that trust territories do not form part of the territory of the States entrusted with their administration. For this reason the latter cannot cede or otherwise alter the status of trust territories except with the approval of the United Nations in which the residuary sovereignty must be considered to be vested.²

The governing consideration is that, in the language of the Charter, it is the United Nations which establishes under its authority the system of trusteeship and that the status of the Power exercising sovereignty is that of 'the administering authority.'³ In essence the position is the same as in the corresponding case of mandates.⁴ The terms 'trust' and 'tutelle' (in the French text of the Charter)⁵ are terms of generally accepted legal connotation implying a delegation and fundamental limitation of authority—a limitation inconsistent with the exclusive advantage or an unrestricted plenitude of power in the authority entrusted with the functions of administration. The Charter is a legal instru-

¹ See the statement of the British Prime Minister in the House of Commons on January 23, 1946, to the effect that such persons have the status of 'British protected persons.'

² See above, p. 236.

³ Article 81. When the Charter was drafted there was no disposition to rule out the possibility of the United Nations transferring the trust territory in case of a violation of the trusteeship agreement or of the with-

drawal or expulsion of the trustee Power from the United Nations. See *Canadian Commentary on the Charter*, p. 52.

⁴ See above, § 94c.

⁵ The terms used are 'régime international de Tutelle,' 'territoire sous tutelle,' 'accords de Tutelle,' 'Conseil de Tutelle.' The Spanish text refers to 'administración fiduciaria,' 'territorios fideicometidos,' 'consejo de administración fiduciaria.'

ment, and the technical terms used in it must be given an interpretation consonant with the general principles of law applicable to the terms in question. Whatever may be the motives or incentives of direct advantages animating the State vested with the functions of administration, the relation of 'trust' or 'tutelage' or 'fideicommissum'¹ implies fundamentally a relation of service and delegation wholly incompatible with any exclusiveness of rights of sovereignty on the part of the State concerned. This aspect of the legal situation is of the essence of the system of trusteeship. For this reason there may be some difficulty in accepting as helpful the reasoning of the International Court of Justice in its Advisory Opinion concerning the *Status of South-West Africa* where, apparently in answer to the contention of South Africa to the effect that the obligations of the mandate had terminated with the dissolution of the League of Nations, the Court stated that it is 'not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other [corresponding] legal conception of private law.'² Any suggestion that the obligations of the mandate had terminated as the result of the dissolution of the League of Nations could properly be answered by holding, as the Court in fact did, that the provisions of the mandate created an international status for the territory, independent of the continued existence of one of the parties to the original instrument.³ But the notion of delegation of powers and of the primary and residuary sovereignty of the authority from which the powers of the administering State are derived is a general principle of law of enduring value and practical application for both mandates and trust territories.⁴

Although the majority of Trusteeship Agreements provide that the territories in question shall be administered as an

¹ See above, p. 236, n. 5.

² *I.C.J. Reports*, 1950, p. 132.

³ See above, p. 215.

⁴ See the observations on the subject in Judge McNair's Separate Opinion, *ibid.*, p. 148. He refers in this connection, to 'rules and institutions of private law as an indication of policy and principles rather than as

directly importing these rules and institutions.' It is probable that in this case the rules and principles are not essentially different. The notion of delegation of powers, and the concomitant obligation of accountability, are general principles of law. See Schwartz-Liebermann, *Vormundschaft und Treuhand* (1951).

'integral part' of the Administering State,¹ it was made clear at the time of the approval of the Agreements that that phrase does not imply any claim to sovereignty over the trust territories.² That fact of delegation implies also the ultimate power of revocation in case of abuse or failure of the trust vested in the Administering State. Finally, the provisions of the various Trusteeship Agreements pointing to the eventual self-government or independence of the Trust Territories emphasise the absence of intention to transfer sovereignty to the Administering States. The inhabitants of Trust Territories do not acquire the nationality of the Administering State. Treaties concluded by it do not apply automatically to the Trust Territory, although provision is made for their application if, in the opinion of the Administering Authority, they are appropriate to the needs of the Trust Territory and are conducive to the accomplishment of the principles of the trusteeship system. The question whether the establishment of a customs, fiscal or

¹ Article 4 of the Agreement for New Guinea uses the expression 'as if it were an integral part of Australia.' The expression 'as an integral part' does not occur in the Agreement for Tanganyika probably for the reason that the latter is a self-contained territory of substantial size, while Togoland and the Cameroons are composed of narrow strips of territory adjoining, respectively, the Gold Coast and Nigeria, they had been administered in the past as integral parts of the latter territories, subject to the provisions of the mandates. Finally, the phrase does not occur in the relevant Article 3 of the Agreement for the Pacific Islands administered by the United States (see above, § 94k); it appeared in the Draft submitted by the United States to the Security Council but was deleted by common agreement. It will be noted that the expression in question was used in 'B' and 'C' mandates.

² The French and Belgian delegates to the General Assembly stated that 'it was the interpretation of their Governments that the words "as an integral part" were necessary as a

matter of administrative convenience and were not considered as granting to the Governments of Belgium and France the power to diminish the political individuality of the Trust Territories. The British delegate stated that the retention of the words 'as an integral part' in the Trusteeship Agreement for Togoland and the Cameroons under British administration 'did not involve administration as an integral part of the United Kingdom itself and did not imply British sovereignty in these areas' (General Assembly, Doc A 268, December 22, 1946, p. 6). In the course of the discussion of the terms of the Trusteeship Agreement concerning the former Japanese mandated territories the representative of the United States in the Security Council wished it to be recorded as the view of the United States that the Trusteeship Agreement is 'in the nature of a bilateral contract between the United States, on the one hand, and the Security Council on the other': *Security Council, Official Records, Second Year, No. 23 (1947), p. 476*. This statement, it is believed, accurately expresses the legal position.

administrative union of the trust territory with other territories subject to the sovereignty or control of the Administering State is compatible with the principles of the trusteeship system is a question the answer to which must depend upon the circumstances of each individual case.¹ In 1949 the General Assembly adopted a Resolution requesting the Trusteeship Council to recommend to the Administering Governments that the flag of the United Nations be flown over all Trust Territories side by side with the flag of the Administering Authority concerned and the territorial flag, if any. The Resolution, inasmuch as by implication it denies any right of exclusive sovereignty of the Administering Power, is in accordance with the legal position of the trust territories.²

§ 940. It is in keeping with the character of the Charter of the United Nations, among the purposes of which figure prominently the encouragement and promotion of fundamental human rights and freedoms, that it should also concern itself with dependent territories, other than trust territories. Fundamental freedoms include, ultimately, freedom from government imposed by another State or nation. An international society committed in its Charter to the recognition of these principles cannot disinterest itself in peoples which have not yet attained a condition of self-

Dependent
Peoples
outside
the
Trustee-
ship
System.

¹ That question has been the subject of examination by the General Assembly and Committees appointed by it and the Trusteeship Council. For an account of the work of the Committee on Administrative Unions see Huang in *AJ* 43 (1949) pp. 716-732. See also Mathiot in *Etude Géog. Scille* (1950) vol. 1, pp. 349-364. The General Assembly has resolved that administrative, fiscal or customs unions should not in any way compromise the evolution of any Trust Territory towards self-government or independence, or change the distinct character of a Trust Territory. In 1952 the General Assembly asked the Administering Authorities to continue to transmit detailed information to the Trusteeship Council on the operation of all administrative unions, indicating the

advantages derived by the indigenous inhabitants from such unions. It also expressed the hope that the Administering Authorities would consider the freely expressed wishes of the population on the subject and that they would consult the Trusteeship Council on any changes in the existing unions or any proposals to establish new unions. The following are the existing unions of this kind: British Togoland and Cameroons with Nigeria; French Togoland and Cameroons with the French Union; Ruanda Urundi with Belgian Congo; Tanganyika with Kenya and Uganda; and New Guinea with Papua, which is an Australian non-self-governing territory.

² See *11 Q*, 3 (1950), p. 279. As to the United Nations flag see below, § 168g.

government and the well-being of which is not safeguarded by the system of trusteeship. From this point of view Chapter XI of the Charter, which bears the title 'Declaration Regarding Non-Self-Governing Territories,' is of special significance. In that Declaration members of the United Nations administering territories 'whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories.' That obligation includes, in particular, the duty, in the language of the Charter :

- (a) 'to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses,' and
- (b) 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.'¹

These, within their general compass, are legal obligations. But they are obligations for the implementation of which no machinery is provided, and to that extent they may create the impression, which is not wholly justified, of establishing merely a moral obligation. Thus while the States in question are required to transmit regularly to the Secretary-General statistical and other information relating to economic, social, and technical conditions, such information is described as being of a 'technical nature,' for 'information purposes,' and only in so far as this is consistent with 'security and constitutional considerations.'² In connection with the information to be supplied under Chapter IX the question arises as to the position following upon the fact that, in the view of the State internationally responsible, a territory has become self-governing and that, therefore, there is no longer an obligation to transmit the information required under the

¹ Article 73.

² Article 73(c).

terms of that Chapter. While it is clear that a decision on the subject cannot properly lie within the exclusive competence of the State hitherto bound to supply information, it is not a decision which can easily be made by reference to a ready-made or elastic formula¹ as to what constitutes a self-governing territory. Yet although the United Nations does not in this case possess anything approaching the powers of supervision and scrutiny with which it is endowed with regard to trust territories, the subject matter of the Declaration is one of legitimate concern for the United Nations. In particular, the General Assembly has in regard to it the same powers of discussion and, probably, of recommendation which it has in respect of 'any questions or any matters within the scope' of the Charter (Article 10).² On the other hand, there seems to be no warrant in the terms of this part of the Charter for extending the obligations of the members of the United Nations in relation to information

¹ The General Assembly and various organs appointed by it have studied the question as to what are factors amounting to 'self government.' In 1953 the following were considered by the General Assembly to be relevant though not exhaustive conditions (a) the political advancement of the population sufficient to enable them to decide the future destiny of the territory by means of democratic processes; (b) the functioning of a representative system of government with periodic elections on a democratic basis; (c) enjoyment of individual rights; (d) absence of any pressure or coercion on the population so that it may be in the position to express its views as to the national or international status which it may wish to attain; (e) assurance that the views of the population would be respected. It is doubtful whether, as decided by it in 1953, the General Assembly acting by simple majority is the proper body to answer questions of that complexity.

² In February 1946, the General Assembly approved a Resolution on Non-Self-Governing Peoples in which the Secretary-General was requested to include in his annual report on the work of the Organisation a summary of the information transmitted to him

by Members under Article 73. In the course of that year Great Britain, France, the United States, Australia, New Zealand, Belgium, Denmark and Holland either offered or declared their intention of transmitting information with regard to certain of their dependent territories. In December 1946, the General Assembly instructed the Secretary-General to convene a Committee composed in equal numbers of the representatives of the above mentioned States and of States elected by the General Assembly, and aided by representatives of certain specialised agencies in an advisory capacity, for the purpose of assisting the General Assembly in the consideration of the information received. *Journal of the Assembly*, No. 75, Suppl. A 64, Add. 1, p. 884. As to the first Report submitted by the United States see Arnold in *Foreign Affairs*, 25 (1947), pp. 655-666. In 1947, the Governments administering non-self-governing territories in the South Pacific signed an agreement establishing the South Pacific Commission whose object is to promote the economic and social advancement of the two million inhabitants of the South Pacific. see Sudy in *Bulletin of State Department*, 16 (1947), p. 459.

to be supplied and otherwise, for instance, by enlarging the scope of information to cover matters of constitutional development or the measure of progress achieved in the direction of self-government or independence.¹ With regard to both trust territories and non-self-governing territories, the achievement of the purpose of the Charter depends in equal measure on the fulfilment by the members of the United Nations of their existing obligations and on their determination to curb any tendency on the part of the General Assembly or other organs of the United Nations to extend the obligations of the Members either directly or by way of recommendations calculated to exercise pressure of a political or moral character.²

X

NEUTRALISED STATES

Westlake 1. pp 27-31 Moore 1 § 12 Hyde 1 §§ 29-197-198 Bluntschli § 745—Keith's Wheaton pp 110-114 Anzilotti pp 238-249 Scelle 1 pp 121-134 Heffter, § 145 Hackworth 1 § 15 Strupp *Elements* § 7c

¹ See above p. 241, n. 1

² Thus there has been a tendency to assimilate in some measure the contents and the machinery of examination of the information supplied with regard to non-self-governing territories to those of trust territories. A special Committee, created by the General Assembly, examines by reference to a detailed Standard Form of items approaching that relating to Trust Territories the information received from States administering non-self-governing territories. Moreover, the General Assembly has declared the voluntary submission of data relating to constitutional developments in these territories to be fully consistent with the spirit of the Charter. In 1952 the General Assembly recommended that the administering States should voluntarily include in their reports information as to details relating to the extent of self-determination in the territories in question, 'in particular regarding their political progress and the measures taken to develop their capacity for self-deter-

mination and to satisfy their political aspirations and to promote the progressive development of their free political institutions. With regard to Trust Territories themselves, the General Assembly adopted in 1952 a Resolution (558 (VI)) requesting the Administering States to supply information *inter alia* as to 'the measures, taken or contemplated, which are intended to lead the Trust Territory in the shortest possible time, to the objective of self-government or independence' and 'the period of time in which it is expected that the Trust Territory shall attain the objective of self-government or independence.' As to non-self-governing territories in relation to the Charter see *International Conciliation* No. 435 (1947), *Ex in International Organization*, 4 (1950), pp. 199-218; Johnson in *Year Book of World Affairs*, 1951, pp. 226-231; Eagleton in *A.J.*, 47 (1953), pp. 88-93; Kelsen *The Law of the United Nations* (1960), pp. 550-566; Fawcett in *B.Y.*, 26 (1949), pp. 85-93.

Fauchille, §§ 348-367 (5) Pradier-Fodéré, ii, §§ 1001-1015 Nys, i, pp. 410-431 - Rivier, i, § 7 Calvo, iv §§ 2596-2610 Cruchaga, i §§ 168-176 - Cavaglieri, pp. 164-174 - Piccioni, *Essai sur la neutralité perpétuelle* (2nd ed., 1902) Regnault, *Des effets de la neutralité perpétuelle* (1898) - Tswettsoff, *De la situation juridique des États neutralisés* (1895) - Wicker *Neutralisation* (1911) - Descamps, *L'État neutre à titre permanent* (1912) - Richter, *Die Neutralisation von Staaten* (1913) - Krauel, *Neutralität, Neutralisation, und Befriedung im Völkerrecht* (1915) - Littell, *The Neutralisation of States* (1920) - Dupuis, *Le droit des gens et les rapports des Grandes Puissances avec les autres États* (1920) - Sottile, *Nature juridique de la neutralité à titre permanent* (1920) - Ekdahl, *La neutralité perpétuelle avant le pacte de la Société des Nations* (1923) Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933) (a comprehensive treatise) - Morand in *R.G.*, 1 (1894), pp. 522-537 - Nys in *R.I.*, 2nd ser., 2 (1900), pp. 467 and 583, 3 (1901), p. 15 - Westlake in *R.I.*, 2nd ser., 3 (1901), pp. 389-397 - Winslow in *A.J.*, 2 (1908), pp. 366-386 - Hagerup in *R.G.*, 12 (1909), pp. 577-602 - Wicker in *A.J.*, 5 (1911), pp. 639-652 - Erich in *Z.V.*, 7 (1913) pp. 452-476 - Graham in *A.J.* 21 (1927), pp. 79-94 - Moscato in *Rivista*, 22 (1930) pp. 379-395 526-541 and 23 (1931), pp. 54-66, 199-215 Dollé in *Haqqi Ricord* 67 (1933) (1) pp. 7-112.

§ 95. A neutralised State is a State whose independence and integrity are for all future time guaranteed by an international convention, under the condition that such State binds itself never to take up arms against any other State except for defence against attack, and never to enter into such international obligations as could indirectly involve it in war. Not to be confused¹ with neutralisation of States is, in the first place, neutralisation of parts of States, of rivers, canals, and the like, which has the effect that war cannot be made and prepared there; secondly, the special protection arranged, for the term of war, in special conventions for certain establishments; and thirdly, the unilateral declaration of a State that it will always remain neutral.²

¹ See below, § 207, and vol. ii, § 72, with Note on demilitarisation, neutralisation, and internationalisation. As to Tangier see Cmd. 2203 of 1924 for the Convention organising the Tangier zone; Treaty Series, No. 26 (1928), for the Convention of 1928; *A.J.*, 23 (1929), Suppl., pp. 235-264; below, vol. ii, § 72 (9), and Rule in *R.I.*, 3rd ser., 5 (1924), pp. 590-629; von Gravenitz, *Die Tangier Frage* (1925); Cot in 52 *Clunet* (1925), pp. 609-627; Weir Brown in *J.C.L.*, 3rd ser., 7 (1926), pp. 86-90; Fitzgerald in *R.G.*, 34 (1927), pp. 145-170,

Hudson in *A.J.*, 21 (1927), pp. 231-237 (the Mixed Court); Toynbee, *Survey*, 1929, pp. 189-201. Charles, *Le statut de Tanger* (1927); Stuart, *The International City of Tangier* (1931); Baldoni, *La zona di Tangeri* (1931), and in *Rivista*, 22 (1930), pp. 396-414 542-582; and see above, § 94.

² On so called 'autonomous neutralisation' see Robertson in *A.J.*, 11 (1917), pp. 607-616. There is no doubt that any State can declare itself permanently neutral, but it is not 'neutralised' in the sense hitherto

Act and
Condition
of
Neutral-
isation.

§ 96. The act through which a State becomes a neutralised State for all time is a treaty of the guaranteeing States between themselves and the State concerned, by which treaty the former guarantee collectively the independence and integrity of the neutralised State. The condition of the neutralisation is that the neutralised State abstains from any hostile action and, further, from any international engagement which could indirectly involve it in hostilities against any other State. It follows from the neutralisation that the neutralised State can, apart from frontier regulations, neither cede a part of its territory nor acquire new parts of territory without the consent of the guaranteeing States.¹

Inter-
national
Position
of Neu-
tralised
States.

§ 97. Since a neutralised State is under the obligation not to make war against any other State, except when attacked, and not to conclude treaties of alliance, guarantee, and the like, it is frequently maintained that neutralised States are part sovereign only, and not International Persons occupying the same position as other States. This opinion has, however, no basis if the facts and conditions of their neutralisation are taken into consideration. If sovereignty is nothing else than supreme authority, a neutralised State is as fully sovereign as any not-neutralised State.² It is entirely independent outside as well as inside its borders; independence is not identical with unlimited liberty of action.³

Switzer-
land.

§ 98. The Swiss Confederation,³ which was recognised by

understood. An instance of self-neutralisation is afforded by Iceland, which in 1918 declared herself 'permanently neutral'—*British and Foreign State Papers*, 111 (1917-1918), p. 706. Article 24 of the Conciliation Treaty of February 11, 1929, between the Holy See and Italy (the Lateran Treaty, see below, § 106) may be regarded as another instance. In that Article the Holy See declares that 'it desires to take, and shall take, no part in any temporal rivalries between other States,' and that the Vatican City shall therefore 'be invariably and in every event considered as neutral and inviolable territory'; *Documents*, 1929, p. 224; It seems that self-neutralisation (or autonomous neutralisation) may have political but cannot have legal conse-

quences see Graham, *op. cit.* at pp. 87, 88, and, in particular, Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 179-186.

¹ This is a much-discussed and very controversial point. See Piccioni, *op. cit.*, p. 82; Descamps, *La neutralité de la Belgique* (1902), pp. 508-527; Fauchille in *R.G.*, 2 (1895), pp. 400-439; Westlake in *R.I.*, 2nd ser., 3 (1901), p. 396; Graux in *R.I.*, 2nd ser., 7 (1905), pp. 39-52; Rivier, i p. 172; Descamps, *L'État neutre à titre permanent* (1912), pp. 215-217; de Louter, i, pp. 365, 366; Strupp, *op. cit.*, pp. 279-289. See also below, § 215.

² See below, § 126.

³ See Schweizer, *Die Geschichte der schweizerischen Neutralität*, 2 vols. (1895), and Rhorman in *A.J.*, 12 (1918), pp. 241-250, 462-474, and 780-795.

the Westphalian Peace of 1648, has pursued a traditional policy of neutrality since that time. During the French Revolution and the Napoleonic Wars, however, it did not succeed in keeping up its neutrality. French intervention brought about in 1798 a new Constitution, according to which the several cantons ceased to be independent States and Switzerland turned from a Confederation of States into the simple State of the Helvetic Republic, which was, moreover, through a treaty of alliance, linked to France. It was not till 1814 that Switzerland became again a Confederation of States, and not till 1815 that she succeeded in becoming permanently neutralised. On March 20, 1815, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia signed the declaration in which the permanent neutrality of Switzerland was recognised and collectively guaranteed, and on May 27, 1815, Switzerland acceded to this declaration. Article 84 of the Act of the Vienna Congress confirmed this declaration, and an Act, dated November 20, 1815, of the Powers assembled at Paris after the final defeat of Napoleon, recognised it again.¹ Since that time Switzerland has always succeeded in maintaining her neutrality. She has built fortresses and organised a strong army for that purpose, and in January 1871, during the Franco-Prussian War, she disarmed a French army of more than eighty thousand men who had taken refuge on her territory, and guarded them till after the war.² The 'unique situation' of Switzerland was recognised by the Council of the League of Nations when she was admitted as an original member on the understanding that she 'shall not be forced to participate in a military

¹ See Martens, *N.R.*, ii. pp. 157, 173, 419, 740.

² See Mowat in *B.Y.*, 1923 1924, pp. 90-94; Rappard, *L'entrée de la Suisse dans la Société des Nations* (1924), vol. ii. § 292g; and Guggenheim in *Z.b.R.*, 7 (1928), pp. 266-273. See also Bonjour, *Geschichte der schweizerischen Neutralität* (1946), (also in English translation, 1946). During the application of sanctions

against Italy in 1935 and 1936 Switzerland interpreted the above quoted condition of her admission as meaning that the participation on her part in economic measures was conditional upon their not endangering her military neutrality. See *Sixteenth Assembly, Plenary Meetings*, (October 10, 1935, p. 6, and the Message of the Swiss Federal Council of December 2, 1935 (*Bundesblatt*, 1935, pp. 943, 944).

action or to permit the passage of foreign troops or the preparation of military enterprises upon her territory.' ¹ The Charter of the United Nations admits of no such latitude, and although Switzerland has become a member of many specialised agencies and a party to the Statute of the International Court of Justice she has remained outside the United Nations.

Belgium. § 99. Belgium ² became neutralised from the moment she was recognised as an independent State in 1831. The Treaty of London, signed on November 15, 1831, by Great Britain, Austria, Belgium, France, Prussia, and Russia, stipulated at the same time in Article 7 the independence and the permanent neutrality of Belgium, and in Article 25 the guarantee of the signatory five Great Powers.³ The guarantee was renewed in Article 2 of the Treaty of London of April 19, 1839,⁴ to which Great Britain, Austria, France, Prussia, Russia, and Holland were parties, and which was the final treaty concerning the separation of Belgium from the Netherlands.⁵

The neutrality of Belgium was violated in 1914, when Germany attacked her for the purpose of invading France through Belgian territory.⁶ For this reason Belgium, at the

¹ See vol. II, § 292g. See also Schindler in *RI*, 3rd ser., 19 (1938), pp. 433-472. As to the position with regard to the United Nations see Guggenheim in *Neue Schweizer Rundschau*, November and December, 1945, the same, *Völkerbund, Dumbarton Oaks, und die schweizerische Neutralität* (1945), and in *Annuaire Suisse de droit international*, II (1945), pp. 9-17. See also Hageman, *Die neuen Tendenzen der Neutralität und die völkerrechtliche Stellung des Schweiz* (1945). And see Lohve in *BY*, 24 (1947), pp. 87-89, and Huber in *Annuaire Suisse*, 3 (1948), pp. 9-28. In 1953 Switzerland became a party to the Convention for the establishment of a European Convention for Nuclear Research. In its Message of August 15, 1953, the Federal Council relied on the opinion of leading Swiss international lawyers to the effect that International Law does not prohibit a permanently neutralised State from

providing accommodation in its territory for an international laboratory devoted to purely scientific objects.

² See Descamps, *La Neutralité de la Belgique* (1902), and *L'Etat neutre à titre permanent* (1912), Sanger and Norton, *England's Guarantees to Belgium and Luxemburg* (1916); *Neutrality of Belgium* (1920), Foreign Office Peace Handbook; Langelbach in *American Historical Review*, 39 (1933-1934), pp. 48-72.

³ See Martens, *N.R.*, xi, pp. 394 and 404.

⁴ See Martens, *N.R.*, xvi, p. 770.

⁵ Annexed to it is the Treaty of the same date between Belgium and Holland.

⁶ Charles de Visser, *Belgium's Case* (1916); Strupp, *Die Neutralisation und die Neutralität Belgiens* (1917), and *op cit.*, pp. 59-89; Garner, §§ 431-452; Nippold, *Die Verletzung der Neutralität Luxemburgs und Belgiens* (1920); Kunz, *Das Problem*

conference after the First World War, asked that she should cease to be neutralised, and the Powers acceded to her demand. By Article 31 of the Treaty of Versailles, Article 83 of the Treaty of St. Germain, and Article 67 of the Treaty of Trianon, Germany (as the successor of Prussia) and Austria and Hungary 'consent to the abrogation of the Treaties of April 19, 1839, and undertake immediately to recognise and to observe whatever conventions may be entered into by the Principal Allied and Associated Powers . . . in concert with the Governments of Belgium and of the Netherlands to replace the said Treaties of 1839.' By the 'Locarno Pact' of December 1 1925,¹ Great Britain, France, Germany, Italy, and Belgium took 'note of the abrogation of the treaties for the neutralisation of Belgium.' Thus Belgium ceased *de facto* to be a neutralised State at the end of the First World War,² although certain legal formalities required for the formal discharge of her old status remained incomplete. In March 1936, in view of the changes in the political situation of Europe since 1919 and the denunciation of the Treaty of Locarno by Germany,³ Belgium in pursuance of a policy of non involvement, asked to be released from the obligations of the Treaty of Locarno and announced a somewhat restricted interpretation, on her part, of her obligations under Article 16 of the Covenant of the League.⁴ These claims were conceded by Great Britain and France subject to the obligations of the Covenant.⁵ How-

von der Verletzung der belgischen Neutralität (1920), and in Strupp, *Wort.*, 1 pp. 122-124; Fleischmann in Liszt, § 11 (n. 8), Le Roy, *L'Abrogation de la neutralité de la Belgique* (1923); Jaspar, *Belgium and Western Europe since the Peace Treaty in Journal of British Institute of International Affairs*, July 1924, p. 172; Gottschalk, *Frankreich und das neutralisierte Belgien* (1926); Banning, *Les origines et les phases de la neutralité belge* (1927); Ministère des Affaires Étrangères, *Documents Diplomatiques, La version des traités de 1839* (Brussels, 1920), *Tolman* 4 J. 20 (1932), pp. 514-532.

¹ See below, § 577a, and vol. II § 11d (d).

² Thus no special arrangement, as in the case of Switzerland (see § 98 above), was considered necessary when she became an original member of the League.

³ See below, p. 961, n. 1.

⁴ On October 14, 1936, in a speech to his Council of Ministers, the King of the Belgians made a declaration as to future Belgian policy which was widely interpreted as a return to the status of neutrality. See Lapeadelle in *R.I.P.* (Paris), 18 (1936), pp. 538-546. And see *ibid.*, pp. 605-697, for the text of the speech.

⁵ The first step of international importance in this direction was made on April 24, 1937, when Great Britain and France, in a joint communication

ever, no such claims to a special status of neutrality or neutralisation were made when Belgium became a member of the United Nations, and her status of permanent neutrality must now be regarded as merged in the benefits and the obligations of the general system of collective security set up by the Charter of the United Nations.

Luxemburg.

§ 100. The Grand Duchy of Luxembourg¹ was from 1815 to 1890 in personal union with the Netherlands, but at the same time a member of the Germanic Confederation, and Prussia had after 1856 the right to keep troops in the fortress of Luxemburg. In 1866 the Germanic Confederation came to an end, and Napoleon III. made efforts to acquire Luxemburg by purchase from the King of Holland, who was at the same time Grand Duke of Luxemburg. As Prussia objected to this, it seemed advisable to neutralise Luxemburg. A conference met in London, at which Great Britain, Austria, Belgium, France, Holland and Luxemburg, Italy, Prussia, and Russia were represented, and on May 11, 1867, a treaty was signed for the purpose of its neutralisation, which is collectively guaranteed by all the signatory Powers, Belgium as a neutralised State herself excepted, in Article 2.²

The neutralisation took place, however, upon the abnormal condition that Luxemburg was not allowed to keep

addressed to Belgium, released the latter from her guarantee to these two Powers resulting from the Treaty of Locarno and from the London Agreement of March 19, 1936, concluded subsequently to the denunciation of the Treaty of Locarno by Germany (see below, p. 967, n. 4). At the same time Great Britain and France affirmed the continued validity of their own obligations of guarantee towards Belgium as laid down in these instruments, while Belgium expressly declared her continued adherence to the obligations of the Covenant of the League (Cmd. 5437 (1937)). The latter included the obligation to grant the right of passage through Belgian territory to States co-operating in the enforcement of, the Covenant through common action to which Belgium had assented.

¹ See Servais, *Le Grand-Duché de Luxembourg et le traité de Londres*

(1879); Fyschen in *R.I.*, 2nd ser., 1 (1899), pp. 5-42; Wompach, *Le Luxembourg neutre* (1900); Sanger and Norton, *op. cit.*; Strupp, *op. cit.*, pp. 90-149; Servais, *La neutralité du Grand-Duché de Luxembourg pendant la guerre de 1914-1918* (1919); Griesinger, *Die völkerrechtliche Stellung Luxemburgs nach dem Krieg* (1927); Wehrer, *La politique de neutralité et d'arbitrage du Grand-Duché de Luxembourg* (1934), and in *R.G.*, 31 (1924), pp. 169-202; Block, *Luxembourg und der Völkerbund* (1935); Born in *Rivista*, 17 (1925), pp. 3-17; Whittton in *Hague Review*, vol. 17 (1927) (ii.), pp. 453-571; Wehrer in *R.I.*, 3rd ser., 13 (1932), pp. 329-366, 641-663; Bech in *Dictionnaire diplomatique de l'Académie diplomatique internationale*, 1934; Bumiller in *ZeV.*, 22 (1938), pp. 34-70.

² See Martens, *N.R.G.*, xviii. p. 448.

any armed force, with the exception of police for the maintenance of safety and order, nor to possess any fortresses. Germany violated the neutrality of Luxemburg in 1914¹ for the purpose of invading France, and its neutralisation, like that of Belgium, came apparently to an end as a result of the First World War. By Article 40 of the Treaty of Versailles and Article 84 of the Treaty of St. Germain in 1919, Germany and Austria respectively 'adhered to the termination of the régime of neutrality,' and agreed to accept in advance the arrangements which might be made regarding Luxemburg by the Allied and Associated Powers. No arrangements were actually made for the abrogation by treaty of the neutralisation of Luxemburg.² However, as in the case of Belgium, her permanent neutralisation must now be regarded as having been terminated by her unqualified membership of the United Nations. By a treaty of July 25, 1921,³ Luxemburg entered into an economic union with Belgium.⁴ That Union, in turn, entered into a Customs Union with Holland on September 5, 1944.

§ 101. The Permanent Statute of the Free Territory of Trieste constituted in the Treaty of Peace with Italy of 1946^{Free Territory of Trieste} laid down that the Territory shall be demilitarised and declared neutral; that no armed forces, except upon direction of the Security Council of the United Nations, shall be allowed; and that the Government of the Free Territory shall not make

¹ *Neutralité du Grand-Duché de Luxembourg pendant la guerre 1914-1918*, published by Ministère d'Etat, Luxembourg, 1919: Garner, §§ 453-459

² By a note addressed to the League on April 28, 1923, the Government of Luxemburg asserted that the Treaty of May 11, 1867, was still in force and that Luxemburg was a perpetually neutral State (*Off. J.*, 1923, p. 722). The position of Luxemburg as a member of the League was not free from obscurity. Her representatives, when first applying for admission to the League, expressed a desire to retain her neutralisation, to have it placed under the guarantee of the League, and to be freed from such obligations of the Covenant as

were incompatible with it (*Records of the First Assembly*, Fifth Committee, pp. 184 and 225). Upon the withdrawal of this reservation Luxemburg was admitted to the League on December 16, 1920, and at the same time her Government undertook to introduce the legislation required for modifying her constitution so as to make it consistent with her obligations under the Covenant (*Off. J.*, 1921, pp. 96-97, 708-709). See Wehrer in *R.G.*, 31 (1924), pp. 169-202, 1 *rai* in *Rivista*, 17 (1925), pp. 3-17; Fauchille, § 365; Hudson in *B.Y.*, 16 (1935), p. 141.

³ *L.N.T.S.*, 9 (1922), p. 224.

⁴ Crockaert in *R.I.*, 3rd ser., 3 (1922), pp. 203-221, and above, p. 179, n.

or discuss any military arrangements or undertakings with any State.¹

XI

NON-CHRISTIAN STATES

Westlake, i. p. 40 -Phillimore, i. §§ 27-33 Bluntchli, §§ 1-16 Rivier, i. pp. 13-18 -Fauchille, §§ 40-44 (1) -Martens, § 41- Nys, i. pp. 120-137 -Westlake, *Papers*, pp. 141-143.

§§ 102 and 103, which related to non-Christian States, are now omitted as being substantially comprised in § 28 above.

XII

THE HOLY SEE

Toynbee, *Survey*, 1929, pp. 422-478 -Scelle, i. pp. 290-307- Giannini, *Saggio di una bibliografia sugli accordi del Laterano* (1930) Sibert, pp. 419-426 -Tostain, *Le traité politique du Lateran et la personnalité en droit international public* (1930)- Le Fur, *Le Saint-Siège et le Droit des Gens* (1930) --the same in *R.I. (Paris)*, 3 (1929), pp. 25-69 Doumoto, *La Città del Vaticano nella Teoria Generale dello Stato* (1930) Bruzzola, *La Città du Vatican est elle un Etat ?* (1932) Dilhar, *Les accords de Lateran* (1932) --Giovella, *La Città du Vatican et la notion d'Etat* (1933) Fahn, *The Legal Position of the Holy See* (transl. from Italian 1935) Eckhardt *The Papacy and World Affairs* (1937) *Round Table*, 19 (1928-1929), pp. 740-764 -Anzilotti in *Rivista*, 21 (1929), pp. 165-176 Diena, *ibid.*, pp. 177-187 -Jemolo, *ibid.*, pp. 188-196 Morelli, *ibid.*, pp. 197-236 -Scott in *A.S. Proceedings* 1929, pp. 13-23 De la Brière in *R.I. (Paris)* 3 (1929), pp. 13-24 the same in *R.I.*, 3rd ser., 10 (1929), pp. 123-158 and in *Hague Recueil*, vol. 33 (1930) (iii.), pp. 115-163 Ruzé in *R.I.*, 3rd ser., 10 (1929), pp. 336-364 Fenwick in *A.J.*, 23 (1929), pp. 370-374 -Delos in *R.G.*, 36 (1929), pp. 452-478 Ottolenghi in *Rivista*, 22 (1930), pp. 180-195 -Cicchini, *ibid.*, pp. 196-211 Strupp in *Z.V.*, 15 (1930), pp. 531-574 Oeschey, *ibid.*, pp. 623-663 Ballardore Pallieri in *Z.o.R.*, 11 (1931), pp. 505-525 -Kaas in *Z.o.V.*, 3 (1932-1933), pp. 488-522 (with an extensive bibliography on pp. 489, 490) Ireland in *A.J.*, 27 (1933), pp. 271-289 -Schoen in *Z.o.R.*, 14 (1934), pp. 1-25 D'Avack in *Rivista*, 27 (1935), pp. 83-124, 217-236 -Kunz in *A.J.*, 46 (1952), pp. 308-314 Von der Heyde in *Oesterreichische Zeitschrift für öffentliches Recht*, 2 (1950) pp. 572-586.

The
Former
Papal
States.

§ 104. When the Law of Nations began to grow up among the States of Christendom, the Pope was the monarch of

¹ See Leprettre, *Le statut international du Vatican* (1949); Udina in *Year Book of World Affairs*, 1950, pp. 174-190. *R.I.F.*, 16 (1947), pp. 161-175; Kel-

one of those States—namely, the so-called Papal States.¹ Throughout the existence of the Papal States, until their annexation by the Kingdom of Italy in 1870, the Pope was a monarch and, as such, the equal of all other monarchs. His position was, however, even then anomalous, as his influence and the privileges granted to him by the different States were due not alone to his being the monarch of a State, but also to his being the head of the Roman Catholic Church. But this anomaly did not create any real difficulty, since the privileges granted to the Pope existed within the province of precedence only.

§ 105. When, in 1870, Italy annexed the Papal States and made Rome her capital, she had to undertake the task of creating a position for the Holy See and the Pope which was consonant with the importance of the latter to the Roman Catholic Church. It seemed impossible that the Pope should become an ordinary Italian subject and that the Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church. To meet the case the Italian Parliament passed in 1871 an Act regarding the guarantees granted to the Pope and the Holy See, which is commonly called the 'Law of Guarantee.'² No Pope recognised this Italian Law of Guarantee, nor had foreign States an opportunity of giving their express consent to the position of the Pope in Italy created by that law. But in practice foreign States as well as the Pope himself, although the latter never ceased to protest against the condition of things created by the annexation of the Papal States—made use of the provisions³ of that law. Several foreign States sent, side by

The
Italian
Law of
Guaran-
tee.

¹ This State owed its existence to Pepin-le Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen II and Adrian I., who crowned them as Kings of the Franks. It remained in the hands of the Popes till 1798, when it became a Republic for about three years. In 1801 the former order of things was re-established,

but in 1809 it became a part of the Napoleonic Empire. In 1814 it was re-established, and remained in existence till 1870.

² Its principal provisions (Martens, *A.R.G.*, xviii. p. 41) will be found in the former editions of this treatise.

³ But the Pope never accepted the allowance provided by the Law of Guarantee.

side with their diplomatic envoys accredited to Italy, special envoys to the Pope, and the latter sent envoys to foreign States.¹ They concluded with the Holy See agreements, usually called concordats,² which they treated in most respects as analogous to treaties. The question of the legal position of the Holy See was widely discussed in the literature of International Law, and many writers, including the author of this treatise, were of the view that although the Holy See was not an international person, it had by custom and tacit consent of most States acquired a quasi-international position.³

The
Lateran
Treaty,
1929.

§ 106. The hitherto controversial international position of the Holy See was clarified as the result of the Treaty of February 11, 1929, between the Holy See and Italy—the so-

¹ See *Strupp, Wört.*, § ii. pp. 232-243. In 1935 the Italian Court of Cassation held that the Maltese Order was an international person. In 1884 Italy recognised the Order's right of legation, and in 1929 by decree admitted its right to be described as sovereign and to receive certain ceremonial treatment: *Nanni and Others v. The Maltese Order, Giurisprudenza Italiana*, 1935. I (1) p. 415; *Annual Digest*, 1935-1937, Case No. 2. This seems to apply only to the Catholic branch of the Order under the 'Prince and Grand Master' in Rome. Its diplomatic representative forms part of the diplomatic corps in Vienna and Budapest: see Hold-Ferneck, i. p. 247, and Cansacchi, *La Personalità di diritto internazionale del S.M.O. Gerosolimitano Dello di Malta* (1936).

² In a case decided in 1934 the Supreme District Court of Bavaria based its decision on the view that concordats had the same internal validity as treaties: *In re A Nun's Dress, Annual Digest*, 1933-1934, Case No. 176. And see on concordats generally de la Brière in *Hague Recueil*, vol. 62 (1938) (i.), pp. 371-464.

³ On the position of the Holy See before 1929 see Hall, § 98; Westlake, i. pp. 37-39; Phillimore, ii. §§ 278-440; Moore, i. § 18; Bluntschli, § 172; Garais, § 13; Fauchille, §§ 370-

396; Nys, ii. pp. 349-376; Rivier i. § 8; Fiore, i. §§ 520, 521; Martens, i. § 84; Anzilotti, pp. 76-85; Cavaglieri, pp. 123-133; Gemma, pp. 45-51; Smith, i. pp. 207-229; De Louter, i. pp. 164-167; Cruchaga, i. §§ 323-337; Fiore, *Della conduzione giuridica internazionale della Chiesa e del Papa* (1887); Bompard, *Le Pape et le droit des gens* (1888); Imbart-Latour, *La Papauté en droit international* (1893); Olivart, *Le Pape, les États de l'Église et l'Italie* (1897); Le Fur, *Le Saint-Siège et la Cour de Cassation* (1911); Lamport, *Die volkerrechtliche Stellung des apostolischen Stuhles* (1910); Praag, §§ 6 and 272-274; Baetgen in *Strupp, Wört.*, ii. 232-243; Wymen, *Die Rechts und insbesondere die Vermögensfähigkeit des apostolischen Stuhles nach internationalem Rechte* (1919), and *Die päpstliche Diplomatie* (1922); De la Brière, *L'organisation internationale du monde contemporain et la Papauté souveraine* (1924); Chrétien in *R.G.*, 6 (1899), pp. 281-291; Bompard in *R.G.*, 7 (1900), pp. 369-387; Flaischlen in *R.I.*, 2nd ser., 6 (1904), pp. 85-94; Higgins in *J.C.L.*, New Ser., 9 (1909), pp. 252-264; Gidel in *R.G.*, 18 (1911), pp. 589-620; Donnedieu de Vabres, *ibid.*, 21 (1914), pp. 339-349; Scelle, *ibid.*, 24 (1917), pp. 244-255; Goyau in *Hague Recueil*, 1925 (i.), pp. 199-226; Ruzé in *R.I.*, 3rd ser., 7 (1926), pp. 5-56.

called Lateran Treaty.¹ In that Treaty Italy acknowledged the sovereignty of the Holy See in international matters as inherent in its nature and as being in conformity with its tradition and the requirements of its mission in the world (Article 2). At the same time she recognised the State of the Vatican City under the sovereignty of the Supreme Pontiff (Article 26).² Italy also recognised the passive and active right of legation as belonging to the Holy See in accordance with International Law (Article 12).³ Article 24 of the Treaty contained a declaration by the Holy See with regard to the sovereignty belonging to it in international matters. It was stated there that the Holy See does not desire to take and shall not take part in temporal rivalries between other States and in international conferences concerned with such matters 'save and except in the event of such parties making a mutual appeal to the pacific mission of the Holy See, the latter reserving in any event the right of exercising its moral and spiritual power.' Accordingly, the same Article provided that the Vatican City shall in all circumstances be considered as neutral and inviolable territory.⁴ The Law of Guarantees of 1871 was formally abrogated. The Holy See declared the Roman question to be definitely and irrevocably settled, and recognised the Kingdom of Italy with Rome as the capital of the Italian State. The Treaty was accompanied by a Concordat and by a Financial Convention which, in consideration of the material injury suffered by the Holy See by reason of the loss of the Patrimony of St. Peter in 1870, provided for the payment of a substantial sum by Italy to the Holy See.

¹ For the texts of the Lateran Agreements see *Documents*, 1929, pp. 216-241; *A.J.*, 23 (1929), Suppl., pp. 187-195.

² This is a repetition of Article 3 in which Italy 'recognises the full ownership, exclusive dominion, and sovereign authority and jurisdiction of the Holy See over the Vatican.'

³ As to the foreign service of the Vatican City see Benson, *Vatican Diplomatic Practice* (1936) and De la Brière in *R.J.* (Paris), 15 (1935), pp. 340-346. As to the position of diplomatic agents of Italian nationality

accredited to the Holy See see Morelli in *Rivista* 26 (1934), pp. 42-56. As to concordats see Bierbaum, *Das Konkordat* (1928); Lange-Ronneberg, *Die Konkordate* (1929); Giannini, *I concordati post-bellici* (1930); Huber, *Verträge zwischen Staat und Kirche im Deutschen Reich* (1930); Wagnon, *Concordats et Droit International* (1935).

⁴ See also above, § 96, p. 243, n. 2. On the immunity of the property of the Vatican City in connection with military operations see Herbert Wright in *A.J.*, 39 (1944), pp. 452-457.

The
Status
of the
Vatican
City in
International
Law.

§ 107. The Lateran Treaty marks the resumption of the formal membership, interrupted in 1871, of the Holy See in the society of States. Undoubtedly, the constituent elements of statehood are, in the case of the Vatican City, highly abnormal or reduced to a bare minimum. The territory of the Vatican City does not exceed one hundred acres. Its population is less than seven hundred and is composed almost exclusively of persons residing therein by virtue of their office.¹ Its independence as a government, while, on the one hand, somewhat impaired by the close association with the Italian State, has, on the other hand, a peculiar character by reason of the nature of the spiritual purpose for the better fulfilment of which it exists. Also, having regard to the wording of the Treaty, it is not always easy to decide whether sovereign statehood in the field of International Law is vested in the Holy See or in the Vatican City. In fact there are writers who maintain that, far from there being one, controversial, international person, there exist as the result of the Lateran Treaty two international persons—the Holy See and the Vatican City—the only point in dispute being whether these two persons are united by a personal or a real union.²

The accurate view is probably that the Lateran Treaty has created a new international State of the Vatican City, with the incumbent of the Holy See as its Head. That State possesses the formal requirements of statehood and is an international person recognised as such by other States. Its true significance in the field of International Law lies in the fact that international personality is here recognised to be vested in an entity pursuing objects essentially different from those inherent in national States such as those which

¹ And of their descendants, who must emigrate when they marry or attain the age of twenty-five.

² For a discussion of these views see Falcon, *op. cit.* And see, in addition to the writers cited above at p. 252, Jarrige, *La condition internationale du Saint-Siège avant et après les accords du Latran* (1930); Bracci, *Italia, S. Sede e Città del Vaticano* (1931); Arangio-Ruiz in *Rivista di*

diritto pubblico, 1929, pp. 615 *et seq.*; Ballardore Pallieri in *Rivista internazionale di scienze sociali*, etc., 1930, pp. 195 *et seq.*; Ruffini in *Atti della Reale Accademia delle Scienze di Torino*, 66 (1931), pp. 585 *et seq.*; Giacometti in *Zeitschrift für die gesamte Staatswissenschaft*, xc., Part I. (1931), pp. 40 *et seq.*; Petroncelli in *Rivista internazionale di scienze sociali*, etc., 1932, pp. 169 *et seq.*

have hitherto composed the society of States. A way is thus opened for direct representation in the sphere of International Law of spiritual, economic, and other interests lying on a plane different from the political interests of States. The possibilities, in a similar direction, inherent in the constitution of the International Labour Organisation are discussed below.¹

XIII

STATES AT PRESENT INTERNATIONAL PERSONS

§ 108. In Europe there are

European
States

Albania²

Czechoslovakia

Austria³

Denmark.

Belgium

Eire (Ireland).

Bulgaria

Finland

¹ See § 940*ff*.

² In 1913 Albania was constituted a sovereign independent kingdom and neutralised, 'sa neutralitet (sic) est garantiu për les six Përsonances' (Mertens, *N.R.G.*, 3rd ser., ix pp. 650-651). In the consideration of Albania's application for admission to the League of Nations doubt was expressed whether the status of 1913 continued to exist or not. She was finally admitted to the League on December 17, 1920, no reference being made to her neutralisation (*Records of the First Assembly*, Fifth Commission, pp. 189-190, and 212-214; and *Journal of the First Assembly*, pp. 276-278). Loucheville, § 366 (1), and the Declaration made by Great Britain, France, Italy, and Japan of November 9, 1921, in *L.N.T.S.*, 12, p. 383. See Toynebee, *Survey*, 1927, pp. 164-164, and 1934, pp. 535, 536. In 1934 Italy invaded Albania and, for a time, brought her independence to an end. See Soren in *American Political Science Review*, 35 (1941), pp. 311-317. Albanian sovereignty was restored in 1945. However, owing partly to the non-recognition of her government by a number of States, Albania was not

invited to the Conference at San Francisco in 1945 and she did not become an original member of the United Nations.

³ In 1938 Austria was annexed by Germany. See Toynebee, *Survey*, 1938 (ii) pp. 179-259. Klinghoffer, *Les aspects juridiques de l'occupation de l'Autriche* (1943), Harcourt Wright ii 17-38 (1944), pp. 621-635. On November 1, 1943 the Foreign Ministers of Great Britain, the United States and Soviet Russia signed at Moscow a Declaration in which they stated that they regarded the annexation imposed upon Austria by Germany as null and void and that they wished to see the re-establishment of a free and independent Austria. In 1945 a number of States, including the Great Powers, recognised the Austrian Government. An Austrian representative was admitted as observer to the last meeting of the Assembly of the League of Nations in 1946. On the question of the continuity of Austria subsequent to her annexation by Germany in 1938 see Verosta, *Die internationale Stellung Österreichs* (1947).

France.	Poland.
Germany. ¹	Portugal.
Great Britain.	Roumania
Greece.	Spain.
Holland.	Sweden.
Hungary.	Switzerland.
Iceland. ²	Turkey.
Italy.	Union of Soviet Socialist
Luxemburg	Republics (Russia).
Norway.	Yugoslavia.

The following are very small, but yet full sovereign States :
Monaco,³ San Marino,⁴ the Vatican City⁵ and
Liechtenstein.⁶

The following is half sovereign State :
Andorra (under the protectorate of France and Spain).

American
States.

§ 109. In North America there are :

The United States of America.

Canada.

The United States of Mexico.

In Central America there are .

Costa Rica.

Haiti.

Cuba.

Honduras.

Dominican Republic
(San Domingo)

Nicaragua.

Panama.

Guatemala.

El Salvador

¹ See below § 237a. The position which arose after the Second World War and which resulted in the division of Germany into the Federal Republic of Germany (in the West) and the Democratic Republic of Germany (in the East) must be regarded as provisional. The position of the Saar Territory, which is a party to international conventions in its own name, is anomalous. See Heraud in *R.G.*, 52 (1948), pp. 186-209.

² See above, § 87, p. 172, n. 2.

³ But see now the Treaty between France and Monaco referred to above, § 93, p. 193, n. 5. In April 1937 the Principality of Monaco accepted generally the jurisdiction of the Permanent Court of International Justice

and adhered to the Optional Clause of Article 36 of the Statute: see *Monthly Summary*, May 1937, p. 120.

⁴ See above, p. 194, n.

⁵ See above, §§ 106, 107. Liechtenstein was refused admission to the League on the ground that it did 'not appear to be in a position to carry out all the international obligations imposed by the Covenant,' presumably on account of its small size: *Records of the Second Assembly, 1921, Plenary Meetings*, p. 686. But see above, p. 178, n. 5. See Antrando, *Les 'petits États de l'Europe' (1933)*, and Ratin, *Le Liechtenstein et ses Institutions (1949)*.

⁶ As to Monaco see above, p. 193, n. 5.

In South America there are

The United States of	Ecuador
Argentina	Paraguay.
Bolivia	Peru
The United States of	Uruguay.
Brazil.	The United States of
Chile.	Venezuela.
Colombia.	

§ 110 In Africa there are Full sovereign States

Egypt.	Libya	African States
Ethiopia ¹	Union of South Africa	
Liberia		

Half sovereign States

Tunis	(under French protectorate)
Morocco	

§ 111 In Asia there are the following States

Afghanistan	India ⁴	Japan	Asiatic States
Burma	Indonesia	North Korea.	
Cambodia ²	Iran (Persia).	South Korea	
Ceylon	Iraq ³	Laos ²	
China	Israel	Lebanon. ⁶	
Hedjaz and Nejd (Saudi Arabia) ⁵		Mongolia ⁷	

¹ As to the purported annexation of Ethiopia by Italy in 1936 see above, p. 152, and below, p. 71. In an Agreement concluded in January 1942 between Great Britain and the Emperor of Ethiopia the former recognised Ethiopia as being a free and independent State and the Emperor its lawful ruler (Cmd. 6334 Ethiopia No. 1 (1942)). That Agreement was replaced by one concluded in 1944 which did away with most of the restrictions, necessitated by the war, upon Ethiopian sovereignty (Cmd. 6584, Ethiopia No. 1 (1945)). See also Bentwich in *B. Y.*, 22 (1945), pp. 275-278. As the result of a decision of the General Assembly in 1949 Ethiopia is linked in a Federation with Eritrea which apart from matters reserved to the Federation has full autonomy in domestic affairs.

² See above, § 58.

³ Hedjaz appeared in the Annex to the Covenant as an original member of the League. She never became a member. In 1927 she was united with the Kingdom of Nejd. See Lounsbury, *Survey*, 1928, pp. 284-319. In 1932 she assumed the name of Kingdom of Saudi Arabia. See also the Agreement for Friendship and Neighbourly Relations between Great Britain and Saudi Arabia of April 20, 1942. *Treaty Series*, No. 17 (1947), Cmd. 7084.

⁴ As to India see above, p. 209 n. 4.

⁵ See above, § 94d.

⁶ See above, p. 217.

⁷ In January 1946, following a plebiscite held in Outer Mongolia in October 1945 China recognised the independence of Outer Mongolia. See Weiling Pang in *R. G.*, 51 (1947), pp. 172-186.

The Sultanate of Mus- Philippine

cat and Omar ¹

Commonwealth.

Transjordan.

Nepal.²

Siam

Yemen.⁴

Pakistan.

Syria ³

Viet-minh.

Vietnam.⁵Half sovereign State : Tibet ⁶Austra-
lasian
States.

§ 111a. Australia

New Zealand.

¹ The international position of this State is not clear. It is not a British Protected State although the United Kingdom exercises there some jurisdictional rights of an extra territorial character with regard to its subjects. These are defined in a treaty of friendship, commerce and navigation of December 2, 1951 between the United Kingdom and Muscat (Treaty Series, Muscat, No 1 (1952) Cmd 8462). See also the Civil Air Agreement of 1947 between the two countries registered in the United Nations Treaty Series vol 27 p 287. The Sultanate has also concluded treaties with other States. See Young in 4 J 46 (1952) pp 704 708.

² Since 1934 an Extraordinary and Minister Plenipotentiary has been accredited from Nepal to Great Britain, and a British diplomatic representative of the same rank has been accredited to Nepal. For the Treaty of Friendship between Great Britain and Nepal of December 21, 1923, see Aitchison, *A Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries*, vol 14 (1929), p 75. In 1947 normal diplomatic and consular relations were established between the United States and Nepal. See *Bulletin of State Department*, 16 (1947), p 949, for the detailed Agreement on the subject.

³ See above p 217.

⁴ For the Treaty of February 11, 1934, in which the United Kingdom recognised Yemen's complete and absolute independence in all affairs of whatsoever kind, see *Documenta*, 1934, p 155, Treaty Series, No 34 (1934), Cmd 4752. 'On the Seven Weeks' War in 1932 between Saudi Arabia and Yemen see Toynbee, *Survey*, 1934, pp 310 321. See also Jacob in *Grotius Society*, 18 (1932), pp 131 153.

⁵ See above § 88.

⁶ Nominally Tibet (and, partly, Sinkiang) is regarded as being under the protection or suzerainty of China.

With regard to Mongolia the political dependence on Soviet Russia, which seems to have included a treaty right of the latter to send troops to the Mongolian People's Republic, was not inconsistent with the nominal sovereignty of China. See Nemzer in *A J*, 31 (1930) pp 452 464. See also Makarov in *Z h I*, 7 (1937) pp 311 344.

In Article 2 of the Treaty of July 3, 1914 between Great Britain, China and Tibet, it was recognised that Tibet was under the suzerainty of China. See Aitchison, *op cit*, p 35. According to Article 9 of the Treaty of September 7, 1904, between Great Britain and Tibet the latter undertook not to cede or otherwise dispose of its territory, or to permit intervention by foreign Powers or to admit their representatives or to grant concessions or to pledge revenues to foreign Powers or their subjects, without the consent of Great Britain. Aitchison *op cit*, p 25. See Toynbee, *Survey*, 1934, pp 675 691, 1935 (1) pp 332 335. As to the present position see Sen in *R t*, 55 (1951) pp 417 438 and Choudhary in *Indian Year Book of International Affairs*, 1 (1952) pp 185 196. On May 2, 1951 an agreement was concluded between China and Tibet which provided that China shall be responsible for the foreign relations of Tibet and that the Tibetan army shall be absorbed in the Chinese army. Sikkim and Bhutan, both on the southern border of Tibet are Indian protectorates. A treaty of August 8, 1949 regulates the relations between India and Bhutan and a treaty of December 8, 1950 the relations between Sikkim and India. In both cases India undertook the responsibility for the defence and the foreign relations of the two territories. Sinkiang is now no more than a province of China. In the Sino Russian Treaty of August 14, 1945 Russia recognised Chinese sovereignty over Sinkiang. See Woo, *China and the Soviet Union* (1950), p. 400.

CHAPTER II

POSITION OF THE STATES IN INTERNATIONAL LAW

I

INTERNATIONAL PERSONALITY

Vattel, 1. §§ 13-25—Hall, § 7—Westlake, 1. pp. 306-309—Lawrence, § 57—
Phillimore 1. §§ 144-147 Moore 1 § 23 Bluntschli, §§ 64-81 Liszt, § 13
(1. m.) Fauchille §§ 235-241 Nys, II pp. 216-222—Pradier-Fodère, 1.
§§ 165-195 Merignhac, 1. pp. 233-239 Rivier, 1 § 19 Fiore, 1 §§ 367-371
Martens 1 § 72 De Loutch, 1 pp. 232-235 Gemma, pp. 107-115—
Fontenay, *Des droits et des devoirs des États entre eux* (1888)—Bustamante,
pp. 187-195 Kenwick, pp. 213-228 Pillet in *R.G.*, 5 (1896), pp. 60 and
236, 6 (1899), p. 503 Cavagheni *I diritti fondamentali degli Stati nella
società internazionale* (1906) Kelson *Das Problem der Souveränität und die
Theorie des Völkerrechts* (1920), pp. 213-224 Knubben, *Die Subjekte des
Völkerrechts* (1925), pp. 202-238 Korte, *Grundfragen der völkerrechtlichen
Rechtsfähigkeiten* (1931) pp. 98-101 Scelle, *Manuel élémentaire de droit
international public* (1943), pp. 87-95 Graf L. *Grundrechte der Staaten im
Völkerrecht* (1948) Lord Phillimore in *Hague Recueil*, 1923, pp. 29-71
—Brown in *A.J.*, 9 (1915), pp. 305-335—Luttiger in *Z.O.*, 6 (1926), pp. 203-
212 Briery in *Hague Recueil*, vol. 23 (1928) (m.) pp. 470-477—Bruns
in *Z.O.V.*, 1 (1929), pp. 12-25 Bilsinger, *ibid* pp. 63-76—Petraschek in
Archiv für Rechts- und Sozialphilosophie 27 (1931) pp. 409-523

§ 112. Until the last two decades of the nineteenth century there was general agreement that membership of the international community bestowed so-called fundamental rights on States.¹ Such rights were chiefly enumerated as the rights of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation. It was maintained that these fundamental rights are a matter of course and self evident, since the

¹ As to the fundamental duties of States see Briery in *B.Y.*, 1926 pp. 20, 21, and Pearce Higgins in *A.S. Proceedings*, 1927, pp. 17-22. It will be observed that the very notion of fundamental rights, if it is not abused as a cover for breaches

of the law or for purely political assertions, lies and brings into prominence the corresponding duty to respect the fundamental rights of international personality. In so far as it does that, the notion of fundamental rights is beneficent and not wholly tautologous

community of nations consists of sovereign States. 'But no unanimity existed with regard to the number, the appellation, and the contents of these alleged fundamental rights.¹ That condition of things has led to a searching criticism of

¹ Contrast, for instance, Pillet in *R.G.*, 5 (1898), pp. 66 and 236, and *ibid.*, 6 (1899), p. 503, with Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911), pp. 106-204. And see the same in *Hague Recueil*, vol. 55 (1935) (iv.), pp. 674 *et seq.* See also the 'Declaration of the Rights and Duties of Nations' proclaimed by the American Institute of International Law in 1916, at its first meeting at Washington; see *A.J.*, 10 (1916), p. 212, and the Report. This Declaration is repeated in Project No. 7 of the American Institute of International Law for the codification of 'American International Law'; see *A.J.*, 20 (1926), Special Suppl., pp. 311, 312. See also for a similar declaration the resolution of the Interparliamentary Union of August 1928, quoted and commented upon by Bruns in *Z.d.V.*, 1 (1929), pp. 14 *et seq.* And see the Convention on Rights and Duties of States adopted by the Seventh Pan-American Conference in December 1933: *A.J.*, 28 (1934), Suppl. p. 75; Hudson, *Legislation*, vi, p. 620; *Z.o.V.*, 4 (1934), p. 650. The Bogotá Charter of the Organisation of American States of April 30, 1948, includes a chapter on the fundamental rights and duties of States (*A.J.*, 46 (1952), Suppl. p. 45). The degree of usefulness of statements of that character may be gauged from a survey of the Articles of that Charter. Article 6 lays down the principle of juridical equality, in respect both of rights and duties, independently of the power of the State to ensure respect for its rights. Article 7 provides that 'every American State has the duty to respect the rights enjoyed by every other State in accordance with international law.' Article 8 lays down that 'the fundamental rights of States may not be impaired in any manner whatsoever.' Articles 9 and 10 lay down the principle of the declaratory nature of recognition (see

above, § 71a). Article 11 provides that 'the right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State.' Article 12 lays down that 'the jurisdiction of States within the limits of their national territory is exercised equally over all inhabitants, whether nationals or aliens.' Article 13 affirms the right of each State 'to develop its cultural, political and economic life freely and naturally'; it lays down that 'in this free development, the State shall respect the rights of the individual and the principles of universal morality.' Article 14 lays down the principle of observance and publicity of treaties. Articles 15 and 16 prohibit intervention by way of armed force and other means of pressure. Article 17 lays down the principle of inviolability of territory and non-recognition of territorial title acquired by force. In Article 18 the parties bind themselves to refrain from the use of force except in self-defence.

In 1947 the International Law Commission formulated a somewhat similar draft declaration of Rights and Duties of States on the basis of a proposal made by Panama. For its text and somewhat formal criticism see Kelsen in *A.J.*, 44 (1950), pp. 259-276. See also Report of the Commission for its First Session in *A.J.*, 44 (1950), Suppl. pp. 13-22. The General Assembly transmitted the draft for consideration by Governments. There may be legitimate doubt as to the usefulness of instruments of this nature which, if sufficiently comprehensive, must tend to assume the complexion of a codification - or proposals for change - of a very general character of the principal rules of International Law. For a survey of various treaties and drafts on the subject see Preparatory Study concerning a Draft Declaration on the Rights and Duties of States (*U.N. Publication*, 1948).

the whole matter, and many¹ have urged, rightly, it is believed, that the notion of fundamental rights of States should totally disappear from the exposition of the Law of Nations. However, under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and numerous actual rights and duties are customarily recognised which are derived from the very membership of the community of nations. They are rights and duties which do not arise from treaties between States, but which the States customarily enjoy and are subject to simply as international persons, and which they grant and receive reciprocally as members of the community of nations. .

§ 113. International personality is the term which characterises fitly the position of the States within the international community, since a State acquires international personality through its recognition as a member. What it really means can be ascertained by going back to the basis² of the Law of Nations. Such basis is the common consent, express or implied, of the States that a body of legal rules shall regulate their intercourse with one another. Now legally regulated intercourse between sovereign States is only possible under the condition that a certain liberty of action is granted to every State, but that, on the other hand, every State consents to a certain restriction of action in the interest of the liberty of action granted to every other State. Recognition of a State as a member of the community of nations involves recognition of such State's equality, dignity, independence, and territorial and personal supremacy. But the recognised State recognises in turn the same qualities in other members of the community, and it thereby assumes responsibility for violations committed by it. All these

Inter-
national
Person-
ality a
Body of
Qualities.

¹ See Stoerk in Holtzendorff's *Encyklopädie der Rechtswissenschaft*, 5th ed. (1890), p. 1291; Jellinek, *System der subjectiven öffentlichen Rechte* (1892), p. 302; Brierly, pp. 60-62. The arguments of these writers have met, however, with considerable resistance, and the existence of fundamental rights of States

is emphatically defended by other writers. See, for instance, Piller, *loc. cit.*; Brierly, *op. cit.*; Bustamante, *op. cit.* Westlake, i. p. 306, denied the existence of so-called fundamental rights. See also *Annuaire*, 28 (1921), pp. 218-224, and 32 (1923), pp. 238-245.

² See above, § 12.

qualities constitute as a body the international personality of a State, and international personality may therefore be said to be the fact, involved in the very membership of the community of nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognised by every other State.

Other
Charac-
teristics of
the Posi-
tion of the
States
within the
Commun-
ity of
Nations.

§ 114. But the position of the States within the community of nations is not exclusively characterised by these qualities. The States constitute a community because there is constant intercourse between them. Intercourse is therefore a condition without which the community of nations could not exist. Again, there are exceptions to the protection of the qualities which constitute the international personality of the States, and these exceptions are likewise characteristic of the position of the States within the international community. Thus, in time of war belligerents have a right to violate one another's personality in many ways. Thus, further, in time of peace as well as in time of war, such violations of the personality of other States are excused as are committed in self-preservation¹ or through justified intervention. Finally, the question of jurisdiction is of essential importance for the position of the States within the international community. Intercourse, self-preservation, intervention, and jurisdiction will, therefore, be discussed in turn in this Chapter.

II

EQUALITY, RANK, AND TITLES

Vattel, ii. §§ 35-48—Lorimer, i. pp. 168-181; ii. p. 280 Westlake, i. pp. 321-325—Phillimore, i. § 147; ii. §§ 27-43 Wheaton, §§ 162-169—Moore, i. § 24 Hyde, ii. §§ 11, 51, 52, 246 Fenwick pp. 213-228 Bluntchli, §§ 81-94 Fauchille, §§ 272-278 Pradier-Fodéré, ii. §§ 484-504—Mérignhac i. pp. 310-320 Rivier, i. § 9—Nys, ii. pp. 235-255 Calvo, i. §§ 210-259 Fiore, i. §§ 428-451, and *Code*, §§ 393-426—Martens, i. §§ 70, § 1—De Louter, i. pp. 235-240—Cruchaga, i. §§ 242-247 Suarez, i. §§ 49, § 0—Sibert, pp. 264-276—Keith's Wheaton, pp. 323-331—Stowell, pp. 343-348—*Harvard Research* (1932), pp. 475-736 (a valuable treatise on the jurisdictional immunities of foreign States)—Lawrence, *Essays*, pp. 191-213—Westlake,

¹ See below, §§ 129-133f.

Papers, pp. 86-109—Huber, *Die Gleichheit der Staaten* (1909)—Schücking, *Der Staatenverband der Haager Konferenzen* (1912), pp. 216-229—Satow, i. §§ 21-88—Nelson, *Die Rechtswissenschaft ohne Recht* (1917), pp. 96-106—Dickinson, *The Equality of States in International Law* (1920)—Kapisardi-Mirabelli, *Il principio dell' uguaglianza giuridica degli Stati* (1920)—Goebel, *The Equality of States* (1923)—Dupuis, *Le droit des gens et les rapports des grandes puissances avec les autres États avant le pacte de la Société des Nations* (1921), pp. 13-167 and 421-529—Korte, *Grundfragen der völkerrechtlichen Rechtsfähigkeit und Handlungsfähigkeit der Staaten* (1934)—Weiss in *Hague Recueil*, 1923, pp. 525-551—Nys and Streit in *R.I.*, 2nd ser., 1 (1899), pp. 273-313, and 2 (1900), pp. 5-25—Hicks in *A.J.*, 2 (1908), pp. 530-561—Armstrong in *A.J.*, 14 (1920), pp. 540-564—Charles de Visser in *R.I.*, 3rd ser., 3 (1922), pp. 149-170, 300-335—Praag, *ibid.*, 4 (1923), pp. 436-454—Baker in *B.Y.*, 1923-1924, pp. 1-20—McNair in *Michigan Law Review*, 26 (1927), pp. 131-152—Rappard in *Problems of Peace*, ix (1931), pp. 14-53—Fischer Williams in *B.Y.*, 13 (1932), pp. 35-37—Scott in *Hague Recueil*, vol. 42 (1932) (iv.), pp. 566-583—Schindler, *ibid.*, vol. 46 (1933) (iv.), pp. 260-270—Strupp, *ibid.*, vol. 47 (1934) (i.), pp. 508-513—Bilfinger in *Z.o.V.*, 4 (1934), pp. 481-497—Wiers in *A.J.*, 31 (1937), pp. 437-448—Kelsen in *Yale Law Journal*,¹ 53 (1944), pp. 207-220—King in *A.J.*, 12 (1945), pp. 811-832. And see the literature quoted at p. 265 on jurisdictional immunities of foreign States.

§ 115. The equality of States before International Law is a quality derived from their international personality.¹ According to the traditional doctrine, whatever inequality may exist between States as regards their size, population, power, degree of civilisation, wealth, or other qualities, they are nevertheless equals as International Persons. This legal equality, which has now been modified in many respects, has four important consequences:

The first is that, whenever a question arises which has to be settled by consent, every State has a right to a vote, but, unless it has agreed otherwise,² to one vote only.

The second consequence is that legally—although not politically—the vote of the weakest and smallest State has, unless otherwise agreed by it, as much weight as the vote of the largest and most powerful. Any alteration of International Law by treaty has legal validity for the signatory Powers and those only who later on accede expressly or submit to it tacitly through custom. Accordingly, one result of State equality or, as some will prefer, of State

Equality of States and International Legislation.

¹ See above, §§ 14 and 113. For criticism of § 115 see Baker, *op. cit.* For the development of the doctrine of Equality since the publication of

Dickinson, *op. cit.*, in 1920 see McNair, *op. cit.*, and Schindler and Bilfinger, quoted above.

² See below, p. 277.

sovereignty—in the international sphere is that International Law as at present constituted knows of no legislative process in the proper sense of the term, i.e. the imposition of legally binding rules upon a dissenting State or minority of States.

Equality
of States
and Im-
munity
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tion.

§ 115a. The third consequence of State equality¹ is that—according to the rule *par in parem non habet imperium*—no State can claim jurisdiction over another. Therefore, although States can sue in foreign courts,² they cannot as a rule be sued³

¹ The statement as to the third and fourth consequences assumes that the foreign State and its Government have been duly recognised by the State in whose courts the proceedings are being taken: see above, §§ 71-75f, and note in particular *Wulfsohn v. Russian Socialist Republic*, cited above in § 75 (immunity granted to an unrecognised but *de facto* Government). Many of the cases cited above, §§ 71-75f, are relevant to § 115a. On the English rules generally see Westlake, *Private International Law* (7th ed.) (1925), §§ 190-193, and Dicey, *Rules* 52, 55, and 57.

² See Phillimore, ii. § 113 A, Young, *Foreign Companies and other Corporations* (1912), pp. 300-309; Nys, ii. pp. 340-348; Loening, *Die Gerichtsbarkeit über fremde Staaten und Souveräne* (1903); van Praag, §§ 164-190; Koellreutter in Strupp, *Wort*, i. pp. 387-389; and the following cases: *United States v. Wayner* (1867) L.R. 2 Ch. App. 582; *The Sapphire* (1870) 11 Wallace 164. See also below, § 348.

³ Even in respect of a personal act such as a promise of marriage and even when living incognito (*Mighell v. Sultan of Johore* [1894] 1 Q.B. 149). The statement that a sovereign State cannot be sued in the courts of a foreign State is broadly true, but the Municipal Law of different States differs considerably in giving effect to it. (a) As to England see *De Haber v. The Queen of Portugal* (1857) 17 Q.B. 171; *Duff Development Co. v. Kelantan Government* [1924] A.C. 797. See also above, § 75d; *Godman v. Winterton and Others*, below, p. 776, n. 5. (b) As to the United States of America see Hyde, i. §§ 246, 258; Hayes in

H.L.R., 38 (1925), pp. 599-621. (c) The rule applies equally to prevent proceedings against or affecting the property of a foreign sovereign State: *The Exchange v. McFadden* (1812) 7 Cranch 116, Scott, *Cases*, 300, *Farassier v. Krupp* (1878) L.R. 9 Ch. D. 351; *The Constitution* (1879) 4 P.D. 39; *The Parlement Belge* (1879) 4 P.D. 129 (1880) 5 P.D. 197. But there is probably no immunity when the State is such as owner of real property—for a survey of cases see Fairman in *A.J.*, 22 (1928), pp. 567, 568—unless such property is itself in a privileged position, e.g. on account of being a legation building. See the two judgments of the Supreme Court of Czechoslovakia of April 1928 and December 1929, as reported in *Annual Digest*, 1927-1928, Cases Nos. 111 and 251. And see, as to the first, Deak in *A.J.*, 23 (1929), pp. 582-594, and Bosco in *Rivista*, 21 (1929), p. 48. See also *Halig Limited v. Polish State*, in which the Prussian Tribunal for Conflicts of Jurisdiction refused, in March 1928, to entertain an action brought by a landlord against the Polish State because of the exhibition of the insignia of Poland. *Annual Digest*, 1927-1928, Case No. 104. And see the interesting judgment of the Italian Court of Cassation, given in 1934, concerning the British cemetery in Naples owned by the British Government. It was held that Italian Courts had no jurisdiction to entertain an action brought against the persons administering the cemetery on behalf of the British authorities: *Riccio v. Title, Giurisprudenza Italiana*, 1934, I (1), p. 976; *Annual Digest*, 1933-1934, Case No. 68. The immunity of government ships, both naval and commercial, is dis-

cussed below, §§ 447-451a. (d) As to French, Italian, Belgian, and Egyptian law see Walton in *Juridical Review*, 1919, p. 225, and in *J.C.L.*, 3rd ser., 2 (1920), pp. 252-258; Fauchille, § 270; and, in particular, Allen, cited below in this note. The three last-named States do not grant immunity to a foreign State in respect of acts which are not governmental, which means in most cases the acts of a foreign State as a trader. See Fox in *A.J.*, 35 (1941), pp. 632-640. (e) As to Germany see Liszt, § 13 (iv.), and Kruckmann in *Zeitschrift für Österreich*, i. (1927), pp. 161-192. See also *The Usurpa and The Siena, Annual Digest*, 1938-1940, Case No. 94.

On the question of the right of the agent or official of a State to claim State immunity when sued in a foreign court see *Pilger v. U.S. Steel Corporation* (N.Y. 1925) 127 Atl. 103, 130 Atl. 623, where the English Public Trustee was allowed to be sued in an American court (see *Michigan Law Review*, 24 (1926), pp. 729, 730). On the whole question see Report by Matsuda and Ikeno for the League of Nations Codification Committee on 'The Competence of the Courts in Regard to Foreign States,' C. 204 M. 1927 V., and *A.J.*, 22 (1928), Special Suppl., pp. 118-132, and comment by Kuhn in *A.J.*, 21 (1927), pp. 742-747. On the position of semi-governmental corporations see *Compania Mercantil Argentina v. United States Shipping Board* (1924) 40 T.L.R. 601, and *Coale v. Société Coopérative Suisse des Charbons* (N.Y. 1927) 21 Fed. (2nd) 180. It was held in *Hannes v. Kingdom of Roumania Monopolies Institute* (1940), 20 N.Y.S. (2d) 825; *Annual Digest*, 1938-1940, Case No. 72, that an autonomous corporation created and controlled by a foreign Government for exploiting commercial monopolies is not necessarily immune from suit. Apparently corporations created by the State but possessing a distinct legal personality are not immune from suit unless it can be proved that the property which is the subject matter of the action is the property of the State: *Ulen & Co. v. (Polish) National Economic Bank* (1940) 24 N.Y.S. (2d) 201; *Annual Digest*, 1938-1940, Case No. 74. As to im-

munities of corporations controlled by governments see also *In re Distribution of Petroleum* (1952) 13 Fed. R.; *A.J.*, 47 (1953), p. 502, where an United States Court held that the Anglo-Iranian Oil Co., being in part ownership and control of the British Government, was immune from subpoena. See also *Krajina v. The Tass Agency* (1949) 2 All E.R. 274 in which the Court found that the Telegraphic Agency of the Soviet Union was a governmental agency and as such immune from suit in an action for libel. And see Shepard, *Sovereignty and State Owned Commercial Enterprises* (1917). As to immunity of foreign States from taxation see Bishop in *A.J.*, 46 (1952), pp. 239-258. For an unusual, and unsuccessful, action before the Polish courts against the German Treasury and the City of Berlin for alleged illegal exactions of rates and taxes see *Annual Digest*, 1935-1937, Case No. 95 (*German Immunities in Poland case*). In *Lahalle and Lévy v. The American Battle Monuments Commission* the Court of Appeal of Paris held in 1936 that the latter, in its capacity as a department of the Government of the United States, was immune from the jurisdiction of French courts: *Annual Digest*, 1935-1937, Case No. 88.

The following in addition to the works referred to below in § 115a, is a selection from the extensive literature on jurisdictional immunity of foreign States. Puente, *International Law as applied to Foreign States* (1928), pp. 38-56; Spruth, *Gerechtigbarkeit über fremde Staaten* (1929); Provinciani, *Limiti della giurisdizione degli Stati stranieri* (1933); Allen, *The Position of Foreign States before National Courts, chiefly in Continental Europe* (1933); Stoupinitzky, *Statut International de l'U.R.S.S. Etat commercant* (1936); Fairman in *A.J.*, 22 (1928), pp. 569-585; Hervey in *Michigan Law Review*, 27 (1925-1926), pp. 751-775; Bosco in *Rivista*, 21 (1929), pp. 35-62; Brinton in *A.J.*, 25 (1931), p. 50-62; Feller, *ibid.*, pp. 83-90; Lenékidès in *R.G.*, 38 (1931), pp. 608-632; Fitzmaurice in *B.Y.*, 14 (1933), pp. 101-124; Van Praag in *R.L.*, 3rd ser., 15 (1934), pp. 652-682; Brookfield in *J.C.L.*, 3rd ser., 20 (1938), pp. 1-15; Block in *H.L.R.*, 59 (1948), pp. 1080-1086.

there, unless they voluntarily submit¹ to the jurisdiction of the court concerned.² This rule applies not only to actions brought directly against foreign States, but also to indirect actions, as when, for instance, a suit *in rem* is brought against a vessel in the possession of a foreign State. Although, in giving effect to this rule, courts occasionally refer to the 'comity of nations' as the basis of their decision,

¹ So far as Great Britain is concerned, the following acts do not amount to a submission to the jurisdiction: living here and entering into contracts here (*Mitchell v Sultan of Johore*, *supra*), assenting to an arbitration clause in a contract or moving to set aside an arbitrator's award (*Duff Development Co v Kelantan Government*, *supra*; *Compañía Mercantil Argentina v. United States Shipping Board*, *supra*), or engaging in trade (*Compañía Mercantil Argentina* case, *supra*), and see Keith's comments in *J C L*, 3rd ser., 5 (1923), pp. 126, 127, and 277, 276 and b (1924) p. 207. For an instance of effective waiver by previous submission to proceedings, see *Sultan of Johore v Abubakar* [1952] 1 All F.R. 1261. It appears to be still open whether a submission by a foreign State to the jurisdiction involves submission to execution against its property situate within the jurisdiction, but the weight of opinion seems to answer this question in the negative: see *Duff Development Co* case, *supra*, and Note (1) to that case in *Annual Digest*, 1923-1924, Case No. 65. *Dexter and Carpenter v Kingly Jarnagastjyreen et al.* decided in 1930 by the United States District Court of Appeals, 43 F. (2d) 705. *Annual Digest* 1929-1930, Case No. 70. Jessup and Deak in *A J*, 25 (1931), pp. 335-339, and see Krückmann, *op cit.*, p. 190, 191.

² But when a foreign State sues here, it submits itself to the ordinary incidents of procedure, so that, for instance, an order for security for costs (*Republic of Costa Rica v Erlanger* (1876) 3 Ch. D. 62) or an order for discovery (*Proteau v. United States of America* (1866) L.R. 2 Eq. 659) may be obtained

against it, and the defendant may set up against the foreign State a set off or a counterclaim arising out of the same matter in dispute (*South African Republic v La Compagnie Franco Belge* [1898] 1 Ch. 90) but he cannot take the opportunity of bringing against the foreign State what is substantially an independent action (*Union of Russian Soviet Socialist Republics v. Belgium* (1925) 42 T.L.R. 21) and even in a strictly related counterclaim the defendant cannot recover any excess, the counterclaim is in such a case 'a shield but not a sword', see *Annual Practice* (1928), Order 21, rule 17 (notes), and Westlake and Dicey, *op cit.* above, p. 222, n. 1. See also *United States v National City Bank of New York* *Annual Digest*, 1935-1937, Case No. 82. As to the limits of set off see *United States v New York Trust*, 75 F. Supp. 583, *Annual Digest* 1946, Case No. 12. As to counterclaims see *Republic of China v National City Bank* (1952) 104 F. Supp. 766, 1 F. 17 (1953) p. 321. *Republic of China v Pan Yau Mou* (1952) 105 F. Supp. 411. As regards the German case of *Helffeld v The Russian Government* see Kohler in *Z V* 4 (1910) pp. 309-333, the opinions of Laband, Mehl and Siefert *ibid.* pp. 134-148, Batz in *Law Magazine and Review* 35 (1909-1910) p. 207, Wolfman in *A J*, 4 (1910) pp. 373-383, Fauchille § 270. It has been held by an American court that the existence of a state of war does not deprive the opposing belligerent of the jurisdictional immunities to which he is otherwise entitled under International Law. See *Telkes v Hungarian National Museum* (No. 2), *Annual Digest*, 1941-1942, Case No. 160. And see for comments thereon *Cornell Law Quarterly*, 29 (1944) pp. 390-400.

the principle of immunity of sovereign States from the jurisdiction of the courts of other States has in fact been treated by courts of most countries as a rule of International Law. The extent and the basis of any rule of International Law on the subject are considered below.¹

§ 115aa. A ~~fourth~~ consequence of equality—or independence ^{State Equality and Recognition of Foreign Official Acts.}—of States is that the courts of one State do not, as a rule, question the validity or legality of the official acts of another sovereign State or the official or officially avowed acts of its agents, at any rate in so far as those acts purport to take effect within the sphere of the latter State's own jurisdiction² and are not in themselves contrary to International Law.³ It is not clear whether the rule in question can properly be regarded as a rule of Public International Law or whether it belongs to the province of Private International Law (Conflict of Laws).⁴ Considerations of public policy have often prevented a full recognition of the validity of foreign legislation. There is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by International Law.⁵ The question of foreign confiscatory, penal, and revenue legislation is referred to elsewhere.⁶

§ 115ab. Whatever may be the rule of International Law ^{Limits of Recognition of Foreign Legislation.} as to the duty of States (and their courts) to recognise the effects of foreign legislation within the foreign country concerned, it would appear that there is no such obligation.

¹ § 115ad.

² *The Exchange v. McFadden* (1812) 7 Cranch 116, Scott, Cases, 300; *Underhill v. Hernandez* (1897) 168 U.S. 250, 18 Sup. Ct. 83; *Wulfsohn v. Russian Socialist Republic* (1923) 231 N.Y. 372, 138 N.E. 24; *A. M. Luther Co. v. Sayer & Co* [1921] 3 K.B. 532; *Russian Commercial and Industrial Bank v. Comptoir d'Escompte* [1923] 2 K.B. 630, and *Ranque Internationale v. Goulasou*, *ibid.*, p. 682; both reversed, but without affecting the principle stated in the text, [1925] A.C. 112 and 150. For a criticism of the doctrine of 'the sacro-sanctity of the foreign Act of State' see Mann in *Law Quarterly Review*, 59 (1943), pp. 42-57, 156-171.

In the *Amund* case (No. 21) [1942] 1 All E.R. 236; [1942] 1 K.B. 345—the Court examined the validity of a Dutch decree imposing military service upon a Dutch national. See McNair *Legal Effects of War* (3rd ed., 1948) p. 377, for comments on this aspect of the case. And see above, § 75 with regard to the consequences of recognition. As to extra territorial operation of confiscatory decrees see below p. 328 n. 4.

³ See below § 115ab.

⁴ See above, p. 6.

⁵ See below, § 115ab, as to foreign legislation which is contrary to International Law.

⁶ See below, p. 328.

⁷ See above, § 115aa.

with respect to foreign legislation, whatever the place of its purported effect, which is in itself contrary to International Law.¹ Such legislation may properly be treated as a nullity and, with regard to rights of property, as incapable of transferring title to the State concerned either within its territory or outside it.² Thus, for instance, if a foreign State were to enact legislation confiscating without compensation the property of all citizens of the United Kingdom of the Protestant faith—an act clearly contrary to International Law—municipal courts, whether English or foreign, would be entitled and bound to disregard the effect of such legislation with regard to property forming the subject matter of any action brought before them.³ This would be so even if title to that property had passed, under the law of that State, to the State itself or some other party. Courts may be under a constitutional compulsion to give effect to the law of their own sovereign legislature even if violative of International Law although, as noted, they will not lightly impute to it the intention to violate International Law⁴ and although in

¹ See McNair, *Legal Effects of War* (3rd ed. 1948), p. 322; Fathuri in *B.Y.*, 12 (1931), pp. 95-106; Wortley in *Grotius Society*, 33 (1948), pp. 31-34; Morgenstern in *I.L.Q.*, 4 (1951), pp. 326-344. See also *Re, Foreign Confiscations* (1951), and Mann in *L.Q.R.*, 59 (1949), pp. 42-57, 155-171, and *ibid.* 70 (1954), pp. 181-202.

² See *Wolff v. Orholm* (1917) 6 Maule and Selwyn 92; *In re Krupp* [1917] 2 Ch. 188; *Republic of Peru v. Dieffenbach Brothers* (1888) 38 Ch.D. 348. There seems to be no judicial authority indicating a view contrary to that stated in the text. The cases of *Underhill v. Hernandez* (1897) 108 U.S. 250; *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297; *Ricaud v. American Metal Co.* (1917) 246 U.S. 304; and, in particular, *Luther v. Sagor*, [1921] 3 K.B. 532, frequently referred to in support of the proposition that courts must not question the legislation of foreign countries, are not germane to the present issue. There was no question, in these cases, of foreign legislative acts contrary to International Law. It will also be noted that in most of these cases the refusal of courts to examine the

validity of the foreign legislation in question was due to the fact that they were concerned with claims or property of the nationals of the legislating country (and that, apparently for that reason, the question of violation of International Law was not at issue). See, e.g., the qualifying statement by Russell L. J. in *Princess Olga Paley v. Weisz* that 'this Court will not enquire into the legality of acts done by a foreign Government against its own subjects in respect of property situate in its own territory' [1920] 1 K.B. at p. 730; and to the same effect: *United States v. Belmont* (1937) U.S. 321; *Salmoff v. Standard Oil Co.* (1933) 202 N.Y. 220; *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297; *Eastern States Petroleum Co. v. Asiatic Petroleum Corporation* (1939) 28 F. Supp. 279; *Annual Digest*, 1935-1940, Case No. 35. But see McNair, *op. cit.*, p. 302. A critical review of many of the cases cited is given by Lapstein, *Grotius Society*, 35 (1949), pp. 157-187. See also Van Hecke in *I.L.Q.*, 4 (1951), pp. 345-357.

³ See above, § 23.

⁴ See above, p. 45.

some countries courts have in fact the power to refuse to give effect to national legislation contrary to International Law.¹ There is in any case no compelling reason why they

¹ See, e.g. above, § 21a, as to the power of courts in France, Holland and other countries to refuse to give effect to national legislation inconsistent with binding treaties and as to the similar power of the courts of the United States in respect of the legislation of States conflicting with treaties binding upon the United States. Care must be taken not to generalise the proposition which is inaccurate when expressed in absolute terms that courts are not entitled to examine the validity or question the effect, from any point of view of foreign legislation. They do so frequently by reference to the question whether such legislation is penal or confiscatory (see below, § 146b) and whether, therefore it can be given extraterritorial operation in those infrequent cases in which it may be held to have such effect. Such legislation may also be examined by reference to the question of its formal validity and the constitutional competence of the organ responsible for it (see McNair *op. cit.* pp. 374-377; *Shapleigh v. Mier* (1937) 299 U.S. 468 and *Annual Digest*, 1935-1937, Case No. 14 and note thereto). Courts of some countries have on occasions refused to give effect as being contrary to their conceptions of public policy, to foreign confiscatory legislation even when not contrary to International Law and even when affecting solely the nationals of the legislative country within its territory. This in particular, is the consistent attitude of French courts. See e.g., *Union des Républiques Socialistes Soviétiques v. Indendant Général Surey*, 1929 Part I p. 217; *Annual Digest*, 1927-1928, Case No. 43 (and the comment thereon and other similar cases by Domke in *A.J.*, 36 (1942), pp. 26-29); *Scoutt Potamian Theriac v. Nathan Bloch*, Dalloz, 1939, p. 267; *Annual Digest*, 1938-1940, Case No. 54 (with regard to passing of property in the legislative country); *Volatron v. Moulin*, Dalloz, 1939, p. 329; *Annual Digest*, 1938-1940, Case No. 10. See Lapstein *op. cit.*, pp. 174-176, for a survey of

these cases. As to Italy see *Vaghi v. Ruckbank*, *Annual Digest*, 1938-1940, Case No. 56. As to Belgium see the *Urrutha case*, *Annual Digest*, 1935-1937, Case No. 94, and *Wilkening v. Belgian State*, *Annual Digest*, 1948, Case No. 66 (as to naturalisation). The only (somewhat incomplete) reports known to the Editor of recognition of effects of expropriation without compensation in relation to aliens are those given by some Belgian and Dutch courts in the matter of Mexican expropriations of foreign oil companies: see *Annual Digest*, 1938-1940, Cases Nos. 11 and 12. It does not appear that the question of compatibility with International Law was raised in these cases. And see as to Holland *The Bauwido*, *Annual Digest* 1935-1937, Case No. 73 and the note thereto, and the case of *Trust-Maatschappij Helictia*, *ibid.*, 1933-1934, Case No. 33. See also the decision of a German Court in the *Confiscation of Property of Sudeten Germans Case*, *ibid.* 1948, Case No. 12, directly applying the rule formulated in the text. And see, to the same effect, the Judgment of the Court of Aden in the case of *The Rose Mary* (1953) 1 W.L.R. 246. But see the case of the *Anglo-Iranian Oil Co. v. S.N.P. Oil Co.* decided in 1953 by a Venice Court (*F. v. Italiano*, 78 (1953), 1. p. 719) and in the same year, the decision of the Tokyo Higher Court in the *Nissho Maru*. However, in these two cases the courts in fact examined the relevant legislation as the Iranian Oil Nationalisation Law—and found that that legislation not being confiscatory, was not contrary to International Law. In the United States the decision in *Bernstein v. Van Heyghen Freres* (1941, 163 F. 2d. 246, *Annual Digest*, 1947, Case No. 5, which gave effect to oppressive legislation of the National-Socialist regime in Germany in relation to German nationals, was followed by an announcement of the State Department in the sense that the policy of the Executive, in cases of this description, was 'to relieve American courts from

should assist in giving effect to violations of International Law by a foreign legislature. In the absence of compulsory jurisdiction of international tribunals and having regard to the prohibition, under the Charter of the United Nations and elsewhere, of compulsive means of enforcement of International Law by national action, municipal courts may on occasions provide the only means for securing respect for International Law in this and other spheres. It would thus seem that neither principle nor practice countenance a rule which, by reference to International Law, obliges - or permits¹—courts to endow with legal effect legislative and other acts of foreign States which are in violation of International Law. It is equally consistent with principle that such violations of International Law on the part of foreign States ought not to be assumed in the absence of evidence of a cogent character.² Any complaint, on account of a judgment based on any such allegation, of the foreign State concerned is a suitable subject, at the request of that State for international judicial determination.³

any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials' (see Bishop, *International Law (Cases and Materials)* (1953), p. 627, *Bulletin of State Dept.*, 20 (1949), p. 592 and Woolsey in *A.J.*, 44 (1960), p. 137). For an outspoken refusal of an American court to treat compliance with a foreign confiscatory decree as a ground for relieving the defendant of liability see *Pleach v. Banque Nationale de la République d'Haiti*, where the Court said: 'Confiscation, in ostensible compliance with foreign edicts which are void in this State, has sometimes been compared, in its legal effect, to action by thieves or marauders. . . . That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognised by us, affords no controlling reason why it should be enforced in our courts': (1948) 77 N.Y.S. 2d. 41; *Annual Digest*, 1948 Case No. 7.

¹ This is so, in particular, in countries in which International Law is deemed to be part of Municipal Law. See above, § 21a. As, in the absence of reasons to the contrary,

effect ought to be given to foreign legislation in respect to title acquired under it in the foreign State which has enacted such legislation, it would appear that courts are entitled to disregard such legislation only if they are bound to do so and that therefore, in this case, discretion and duty coincide.

² Thus the rule noted above, p. 268, that, if only possible, no intention to violate International Law will be imputed to a statute, applies also to foreign legislation.

³ There would appear to be no decisive reason why foreign legislation should be treated in this respect differently from judgments of foreign courts. These may be refused enforcement on a number of grounds, including the fact that the foreign judgment violates principles of public policy of the *lex fori*. See *Huntingdon v. Altrid* [1893] A.C. 150; *Apt v. Apt* [1947], P. 127. It is possible that, from this point of view, an English court might refuse recognition, as being contrary to English conceptions of public policy, to foreign legislation which is clearly contrary to Inter-

§ 115ac. While British and American courts have rigidly adhered in the past to the principle of jurisdictional immunity and while they have declined to modify it either by distinguishing between activities of the State in the field of private law and activities *jure imperii*¹ or by readily implying waiver of immunity,² the position can no longer be regarded as free from doubt.³ It must also be noted that the mere claim by a foreign State, which is neither an actual nor a necessary party to the proceedings, that it has an interest in the case will not prevent the Court from adjudicating the action as between the parties to it.⁴ Thus, for instance, the circumstance that a foreign Government is or may be interested in a trust or similar fund is not a sufficient reason for declining jurisdiction.⁵ Moreover, although courts will not assume jurisdiction when a foreign Government is made a party either directly or indirectly as the result of an action *in rem* against property in its possession, the mere assertion, unsubstantiated by proof, by a foreign Government that it is the owner of the property which is the subject of controversy between the parties does not oust the jurisdiction of the court.⁶ Finally, with regard to loans contracted by Govern-

Limitations of Jurisdictional Immunity.

national Law. There is probably no substance in the argument that the review of or refusal of recognition to

such foreign legislation constitutes a denial of the sovereignty of the foreign State in question. For it may be argued, with no less force, that the sovereignty of the State of the *lex fori* is put under strain if its courts are compelled to give effect to foreign legislation which is contrary to International Law—especially if such legislation inflicts injury upon its nationals.

¹ See above, p. 264, n. 3, and below, § 451a, with regard to public ships. See also *Kingdom of Roumania v. Guaranty Trust Co. of New York* (2nd) 250 Fed. 341, 343, where the Court held that the purchase of shoes for the army constitutes the exercise of the 'highest sovereign function of protecting itself against the enemies.' An Italian court considered a similar transaction to be an act of a private law nature and, as such, outside the principle of jurisdictional immunity

(*Governo Rumeno v. Trutta, Giurisprudenza Italiana* (1926) (1) p. 774). And see below p. 274, n. 2

² See above, p. 266, n. 1

³ See below § 117ad.

⁴ *Hasle Selassie v. Cebu and Wireless Ltd.* (No. 1) [1938] C. 545, 539. See also *The Jupiter* (No. 2) [1925] P. 69; *The Jupiter* (No. 3) [1927] P. 122.

⁵ *In re Russian Bank for Foreign Trade* [1933] Ch. D. 745; *Annual Digest*, 1933-1934, Case No. 55.

⁶ See *Lamont v. The Travelers Insurance Company* (1939) 24 N.E. (2d) 81; A.J., 34 (1940), p. 349; *Annual Digest*, 1938-1940, Case No. 73. See also *The Nacemar* (1938) 303 U.S. 68; A.J., 32 (1938), p. 381; *Annual Digest*, 1938-1940, Case No. 68, on the authority and the degree of conclusiveness of the declarations of the foreign government. In *The Kabalo* the Court accepted the statement of the Belgian Ambassador as conclusive evidence of the legality of possession resulting from requisition by the Belgian Government—though not

ments abroad, the predominant view appears to be that the principle of immunity from jurisdiction does not entail the exemption of such governmental transactions from the operation of the law of the country where they were made.¹ In these and similar cases the equality of States cannot be regarded as even remotely affected in consequence of the subjection of the foreign State to local jurisdiction.

Jurisdictional Immunities and the Principles of International Law.

§ 115*ad*. The doctrine and practice of jurisdictional immunity of foreign States and their agencies have been variously --and often simultaneously² --deduced from the principles of equality, of independence, and of dignity of States. It is doubtful whether any of these considerations supply a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a State if it is subjected to ordinary judicial processes within the territory of a foreign State--in particular if that State, as appears to be the

necessarily of the fact of possession: (1940) 67 *Lloyd's List Law Reports*, p. 572; *Annual Digest*, 1938-1940, Case No. 92. See below, § 357*a*, on the conclusiveness of the statement of the executive departments. It has been held that jurisdictional immunity does not prevent statutes of limitation from running against foreign States: *Guaranty Trust Company of New York v. United States* (1938) 304 U.S. 126; *A.J.*, 32 (1938), p. 848; *Annual Digest*, 1938-1940, Case No. 69. See also *Federal Motorship Corporation v. Johnson and Higgins* (1948) 77 N.Y.S. (2d) 52; *Annual Digest*, 1948, Case No. 39.

¹ The House of Lords has held that a British Government loan contracted in the United States of America was, in the circumstances of the case, governed by subsequent United States legislation. It declined to accede to the view, approved by the Court of Appeal, that, as States are sovereign, loans contracted by them abroad must invariably be governed by their own law: *Rez v. International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500; *Annual Digest*, 1935-1937, Case No. 6. This decision is not wholly inconsistent with the Judgment of the Permanent

Court of International Justice in the *Serbian and Brazilian Loans cases*, P.C.I.J. Series A, Nos. 20, 21; *Annual Digest*, 1929-1930, Case No. 278. The decisions of the Supreme Courts of Sweden and Norway, given in 1937, equally denied that such governmental contracts are immune from the legislation of the State where the contract was made. See *Annual Digest*, 1935-1937, Cases No. 7 and 8 respectively. These, and similar, cases arose in connection with the Joint Resolution of the United States Congress which declared any provision requiring payment in gold or in a particular kind of coin or currency to be contrary to public policy. See Pleech, *The Gold Clause* (1936); Domke in *Clunet*, 63 (1936), pp. 547 ff.; Bagge in *R.I.*, 64 (1937), pp. 701, 816; Jéze in *Hague Recueil*, vol. 7 (1925), 174. See also the valuable article by Mann in *B.Y.*, 21 (1944), pp. 11-33, on the law governing State contracts. And see Nussbaum, *Money in the Law* (1950), pp. 414-445, and Mann, *The Legal Aspects of Money* (2nd ed., 1953), pp. 113-134, for an examination of the international aspects of gold clauses.

² As in *The Parliament of Belge* (1880) 5 P.D. 197, 207, 214, 220; *The Cristina* [1938] A.C. 485, at p. 498.

tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it.¹ The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection. The latter circumstance provides some explanation of the challenge to which it has been increasingly exposed — in addition to the circumstance that the vast expansion of activities of the modern State in the economic sphere has tended to render unworkable a rule which grants to the State operating as a trader a privileged position as compared with private traders. Most States, including the United States,² have now abandoned or are in the process of abandoning the rule of absolute immunity of foreign States with regard to what is usually described as acts of a private law nature.³ The position, in this respect, in Great Britain must be regarded as fluid.⁴

¹ See, e.g., in the United Kingdom the Crown Proceedings Act, 1947. There is room for the view that a State which commits a tort or a breach of contract in the territory of another State and claims the right to escape legal liability by reference to the doctrine of immunity in effect impairs the independence of that State as expressed in the normal functioning of its judicial institutions. See also the support given by the Supreme Court of the United States in *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682, 703, to the view that 'the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited whenever possible.'

² In 1952 the Department of State of the United States announced, as a matter of its future policy, that it would no longer favour claims to immunity on the part of foreign Governments in respect of their commercial transactions. See Bishop in *A.J.*, 47 (1953), pp. 93-106. The probable importance of the announcement is illustrated by the following observation of Stone C. J. in *Republic v. Hoffman* (1945) 324 U.S. 31; *Annual Digest*, 1943-1945 (Case No.

39) 'the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it is not to enlarge an immunity to an extent which the government though often asked, has not seen fit to recognise.' And see the Opinion of Mr. Justice Frankfurter in that case suggesting that it constituted an 'implied recession' from the decision in *Rizzi Brothers v. Steamship Pesaro* (see *ibid.*, p. 857, n. 3).

³ See, in particular, Fensterwald in *Harvard Law Review* 63 (1950), pp. 614-642; Fawcett in *B.Y.*, 25 (1946), pp. 34-51. For a survey of the position in various countries see Lauterpacht in *B.Y.*, 28 (1951), pp. 250-272. And see the literature referred to above, p. 265, and below, p. 275. As to French practice see Hamson in *B.Y.*, 27 (1950), pp. 293-331, and Castel in *A.J.*, 46 (1952), pp. 520-526.

⁴ This is so in particular with regard to foreign public vessels engaged in commerce. In *The Cristina* [1938] A.C. 48 the majority of the House of Lords expressed views not favourable to immunity from jurisdiction in such cases. See also the observations, on the latter case, of Evered M.R. in the *Dollfus Mieg* case [1950] 1 Ch. 333

In view of this it is not certain whether—and to what extent—the question can be regarded as affirmatively regulated by International Law. In particular, it is doubtful whether a State would be incurring international responsibility as the result of its courts assuming jurisdiction—including that of execution¹—over foreign States and their property except in cases in which customary International Law has, through uniform practice, crystallised into a generally or universally accepted rule, for instance, with regard to diplomatic immunity and the immunity of Heads of States and of warships. Pending the regulation, through comprehensive international agreement, of the question of jurisdictional immunity, the situation must be regarded as governed, in particular cases, by the Municipal Law of the country concerned. It must be a matter for consideration to what extent the future law on the subject can be based on the distinction, controversial as a matter of doctrine and difficult of operation in practice, between acts *jure imperii* and *jure gestionis*²; or on the assimilation of foreign States

and Lord Simon in *Sultan of Johore v. Abubakar*, [1952] 1 All E.R. 1268. However, in other respects English decisions tend to follow, with occasional hesitation but with a measure of rigidity, the doctrine of immunity. To that extent British practice has adapted, in some cases, an attitude going beyond both the requirements of International Law and the majority of States. See *Krajina v. Tass Agency* [1949] 1 All E.R. 774 (an action for alleged libel by an agency of a foreign State); *Dollfus Mieg et Cie v. Bank of England* [1949] Ch. 369; [1950] 1 Ch. 333; [1952] 1 All E.R. 572 (and comment thereon in *I.C.L.Q.*, 1 (1952), p. 543); *Kahan v. Federation of Pakistan* [1951] 2 K.B. 1003. In delivering the Opinion of the Judicial Committee of the Privy Council in *Sultan of Johore v. Abubakar* (*supra*) Lord Simon attached importance to dispelling the view that there exists 'any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances.' And see *Civil Air Transport Incorporated v. Central Air Transport Corporation* [1952] 2 All

E.R. 733, where an Order in Council was issued to the effect that the plea of immunity shall not constitute a bar to the jurisdiction of the court. See 'Aristeides' in *J.L.Q.* 3 (1950), pp. 159-177, and the comment by Johnson in *B.Y.*, 29 (1952), pp. 461-470.

¹ The courts of a number (though only of a minority) of States permit execution. See Lauterpacht in *B.Y.*, 28 (1951), pp. 241, 242. In 1951 a Belgian court, in a fully reasoned decision, affirmed its jurisdiction to order execution: *Société Commerciale de Belgique v. L'Etat Hellénique*, *Clunet*, 79 (1952), p. 244.

² See above, p. 264, n. 3. Purchase of goods to be resold to nationals was held by one French court to be an act *jure gestionis* (*Etat Roumain v. Pascalet*, *Dalloz hebdom.*, 1924, p. 260), by another to be an act *jure imperii* (*Lukhovskiy v. Gouvernement fédéral Suisse, Gazette du Palais*, 1920, ii., p. 382). There is room for the view that any activity of a State—even if ostensibly of a private law nature—is performed *jure imperii* as aiming at the welfare of the State. See, e.g.,

to the State of jurisdiction in the sense that foreign States ought to be entitled to such immunity, but no more, as is enjoyed by the domestic State before its own tribunals; or on the principle of reciprocity—a solution which would in effect deny the existence of a rule of International Law on the matter and which would give rise to uncertainty in practice seeing that courts would be under the necessity to ascertain in every case the position, in the foreign State concerned, with regard to a subject on which the law has tended to be far from clear. However that may be, this is a question where an authoritative formulation of the law is indicated having regard both to the requirement of certainty of the law and of reducing the somewhat artificial prominence of an aspect of international relations which is of limited intrinsic significance.¹

§ 116. Legal equality must not be confused with political equality. The enormous differences between States as regards their strength are the result of a natural inequality which, apart from rank and titles, finds its expression in the province of policy. Politically, States are in no manner equals. Arrangements made by the body of the Great Powers tend to gain the consent or the acquiescence of the minor States. But, however important the position and the influence of the Great Powers may be, they were not, before the establishment of the League of Nations, derived from a legal basis or rule.² Great Powers did not enjoy any superiority of right, but only a priority of action. Nor has a State

Political
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for this line of reasoning the decision of the Court of Appeal of Bordeaux in *Robin v. British Consul* where the Court declined jurisdiction in an action relating to a lease of consular premises: *Revue critique de droit international privé*, 40 (1951), p. 307.

¹ For recent discussions of the subject see, in addition to the literature referred to above at p. 265 and p. 273, Gmür, *Gerichtsbareit über fremde Staaten* (1948) and in *Annuaire Suisse*, 7 (1950), pp. 9-76; Loewenfeld in *Grotius Society*, 31 (1949), pp. 111-126; Lémonon and others in *Annuaire*, 44 (1) (1952), pp. 5-136; Lauterpacht in *B.Y.*, 28 (1951), pp. 220-272; *Inter-*

national Law Association Report, 45 (1952), pp. 210-232; and Carabiber in *Revue hellénique de droit international*, 5 (1952), pp. 22-41, and in *l'unet*, 79 (1952) p. 410. And see below, § 451a, as to public ships engaged in commerce.

² This is, however, maintained by a few writers. See, for instance, Lorimer, i. p. 170; Lawrence, §§ 113 and 114; Westlake, i. pp. 321-323; Pitt Cobbett, *Cases and Opinions on International Law*, 2nd ed., vol. i. (1909), p. 50; 4th ed. (by Bellot), vol. i. (1922), pp. 51, 52; and Somló, *Juristische Grundlehre* (1917), pp. 156, 157.

the character of a Great Power by law. It is nothing else than actual size, strength, and economic influence which make a State a Great Power. Changes, therefore, often take place.¹ Whereas at the time of the Vienna Congress in 1815 eight States—namely, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia—were still considered Great Powers, their number soon decreased to five, when Portugal, Spain, and Sweden lost that character. But the so-called Pentarchy of the remaining Great Powers turned into a Hexarchy after the unification of Italy, because the latter became at once a Great Power. The United States rose as a Great Power out of her civil war in 1865, and similarly Japan out of her war with China in 1895. Thereafter until the outbreak of the First World War there were eight Great Powers—Great Britain, Austria-Hungary, France, Germany, Italy, and Russia in Europe, and the United States of America and Japan outside Europe. The end of the First World War found Germany and Austria-Hungary defeated and the latter dismembered. Russia had undergone far-reaching internal changes and had, at that time, adopted a new international outlook. The importance of the remaining five, who were described in the Treaties of Peace as the 'Principal Allied and Associated Powers,' was recognised by Article 4 of the Covenant of the League in the composition of the Council, whereon Great Britain, France, Italy, and Japan (the United States having abstained from joining the League of Nations) acquired permanent seats. Thus the political hegemony of the Great Powers was, for the first time, given a legal basis and expression in that important international instrument. At the end of the Second World War, after the defeat of Germany, Italy, and Japan, the five great Powers were: the United States of America, Great Britain, Soviet Russia, France and China. However, apart from the Covenant of the League of Nations, the hegemony of the Great Powers

¹ For a historical survey see Triepel, *Die Hegemonie. Ein Buch von führenden Staaten* (1938). See also Mommsen, *Die Grossmachtstellung im*

Volkerrecht (1940) and Schwarzenberger, *Power Politics* (2nd ed., 1951), pp. 102-125.

was, prior to the Charter of the United Nations,¹ a political and not a legal one.²

§ 116a. The provisions of the Covenant of the League of Nations in the matter of the composition of the Council and, to a smaller extent, the principles determining the membership of the Governing Body of the International Labour Organisation,³ constituted a significant departure from the doctrine of the legal equality of States. They mark the first attempt on a larger scale⁴ to adapt that doctrine to the requirements of a progressive development of international organisation. Already before the establishment of the League of Nations it was recognised by many that it would

¹ See below, p. 279.

² In connection with the Great Powers mention should be made of an unofficial but important body known as the 'Conference of Ambassadors,' which came into existence after the First World War as the residuary legatee of the Supreme Council of the Allied Powers. It consisted of the British and Italian Ambassadors in Paris and a French diplomatist of ambassadorial rank, and was occasionally reinforced by the presence of the Japanese and Belgian ambassadors in Paris and of an American 'observer.' It was an Inter Allied, not an international, body, devised for the purpose of saving time, and it exercised a considerable influence in some of the post-war problems which were left over from the Paris Peace Conference, and in other matters: for instance, disarmament questions and the settlement of the Corfu affair in 1923 (see below, ii. § 52a (n.)). In a sense it acted, in regard to problems connected with the resettlement of Europe, as a bridge between the Supreme Allied Council and the Council of the League. See Pink, *The Conference of Ambassadors (Paris, 1920-1931)* (1942).

³ See below, § 340f.

⁴ In most international unions the voting strength of the members is determined substantially by the amount of their contributions to the finances of the organisation. See e.g. Article 3 of the Convention establishing the International Institute of Agriculture (see below, p.

997, n. 4); Article 6 of the Organic Statute of the International Health Office (below, p. 890); Article 3 of the Statutes of the International Hydrographic Bureau (below, p. 990); Article 1 of the Agreement establishing the International Wine Bureau (below, p. 936); Article 3 of the International Office of Chemistry (below, p. 991). And see Dickinson, *op. cit.*, p. 315, n. 1, quoting Huber, *op. cit.*, p. 102, n. 2, to the effect that the inequality of voting is not in such cases relevant to the principle of equality of States seeing that each State decides as to its own classification. See also Article 37 of the Agreement regarding the Regulation of Production and Marketing of Sugar of May 6, 1937, which lays down the number of votes to be exercised by the delegations of the various States to the Council set up by the Convention: Misc. No. 3 (1937), Cmd. 5461. See on the subject of inequality in voting and of weighting of votes Dickinson, *The Equality of States in International Law* (1920), pp. 310-321; Decleva, *La contribuzione internazionale* (1936); Riches, *Majority Rule in International Organization* (1940), pp. 245-290; Koo, *Voting Procedures in International Political Organizations* (1947); Schwarz-Liebermann, *Meinheitsentscheid und Stimmengewinnung* (1953); Sohn in *American Political Science Review*, 38 (1944), pp. 1192-1203; Jenks in *B.Y.*, 22 (1945), pp. 40-42; Weinschel in *A.J.*, 45 (1951), pp. 417-442; Ubertazzi in *Jus*, 4 (1953), pp. 187-209.

be of advantage for the small Powers to sacrifice a measure of theoretical equality in return for increased guarantees of their independence within the framework of an effective political organisation of States.¹ In so far as the doctrine of equality of States results in the requirement of unanimity it has been abandoned to some extent in a number of international organisations and institutions.² However, the rule of unanimity is a consequence of State sovereignty rather than of State equality. It is in the field of equality of representation that the doctrine of State equality has expressed itself most persistently, and it is a legiti-

¹ On the relative position of small and great Powers in the League of Nations see Zimmern in *Problems of Peace* (9th ser., 1934), pp. 54-73; Rappard, *ibid.*, pp. 14-53, and in *American Political Science Quarterly*, 49 (1934), pp. 544-575; Hambro in *International Affairs*, 15 (1936), pp. 167-182. And see the communication of Estonia, Latvia and Lithuania to the Secretary-General of February 6, 1935, on the setting up of a permanent combination of these States for the purpose of securing representation: *Z.S.V.*, 5 (1935), pp. 414-418. See also Morley, *The Society of Nations* (1932), pp. 348-350, 373-376; Yepes and da Silva, *Commentaire du Pacte*, 1 (1934), pp. 124-130.

* The International Commission for Air Navigation may amend the provisions of Annexes A-G by a three-fourths vote which must include two-thirds of all the votes which could be cast if all States were represented (Article 34 of the Air Navigation Convention of October 13, 1919, amended by proposal of June 15, 1929, which entered into force on May 17, 1933: *L.N.T.S.*, 138, p. 418). For the interpretation of this power by the Commission see *Official Bulletin*, 15, p. 37. Decisions of the International Committee of the Metric Union are taken by majority vote (Article 12, *Règlement* attached to the Convention respecting the Creation of an International Office of Weights and Measures. Signed at Paris, May 20, 1875: *Br. and For. St. P.*, 66, p. 562.) As to the Universal Postal Union see Articles 13 and 16

of the Convention as revised on March 30, 1934: H.M. Stationery Office, London, 1935, and *Documents du Congrès Postal de Londres*, 1929 (n.), p. 33; as to the Definitive Statute of the International Danube Commission of July 23, 1921, Article 35, see *L.N.T.S.*, 26, p. 14; as to the International Labour Organisation see Articles 403, 405, and 422 of the Treaty of Versailles. And see generally Riches, *The Majority Rule in International Organization* (1940). See also, for an interesting example, the Protocol of December 18, 1929, between Switzerland, France, and Germany concerning works for the regulation of the Rhine between Strasbourg and Istein: *L.N.T.S.*, 104, p. 27; Hudson, *Legislation*, v., p. 125. And see Hill, *The Public International Conference* (1929), pp. 187-195, 218-219, and the same in *A.J.*, 22 (1928), pp. 319-329; Meyers in *A.J.*, 31 (1937), pp. 440-444. In the recent constitutions of international organisations the majority principle has been widely accepted. This applies, for instance, to the UNRRA Organization (Articles III (1) and VIII of the Agreement of November 1943; Article X (4) of the Rules of Procedure); the Food and Agriculture Organization (Agreement of December 1944; Article III (8)); the European Central Inland Transport Organization (Article 3 (2), 13) (Cmd. 6685); the Inter-Allied Reparation Agency (Article 7) (Cmd. 6721). Frequently, special majorities are required. For a detailed survey see Jenks in *B.Y.*, 22 (1945), pp. 34-40.

mate task of the science of International Law and politics to examine the desirability¹ and the methods² of further modifications of this aspect of equality of States.

§ 1166. The Charter of the United Nations, though professing to be based on the principle of 'the Sovereign equality of all its members,'³ constitutes a significant landmark in the gradual modification of the traditional doctrine of equality of States. While in the General Assembly the principle of equality of representation and of voting power is, in general,⁴ the guiding rule,⁵ this is not the case in the more important organ of the United Nations, namely, the Security Council. On that body the five Great Powers - Great Britain, the United States, Soviet Russia, France, and China—are given permanent representation, while the six remaining seats on the Council are filled by periodic elections.⁶ Moreover, the principle of equality of voting power in the Security Council is substantially impaired as the result of the requirement, as a rule, of the concurrence of all the permanent members of the Security Council in decisions other than those relating to matters of procedure.⁷ One of the consequences of that inequality of voting power is that the ascertainment and enforcement, by an overriding decision of the Council, of obligations of pacific settlement and of International Law generally is legally possible only

State
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¹ Thus in any future development in the direction of curtailing equality of representation care would have to be taken not to combine the change with the impairment of full freedom of discussion rendering possible the exercise of the frequently beneficent influence of small Powers.

² The amount of the financial contribution to the organisation in question is one, but not the only, test. See also Sohn in *A.J.*, 40 (1946), pp. 71-99 and the literature cited above, p. 278. And see generally Dickinson and McNair, referred to above, p. 283.

³ Article 2 (1). For a discussion and criticism of the expression 'sovereign equality' see Kelson in *Yale Law Journal*, 53 (1944), pp. 207-220.

⁴ The equality of voting power is in effect disregarded whenever a valid decision of the Assembly is required to include the votes of the permanent members of the Security Council. See below, § 1684. Such requirement means, upon analysis, that special and enhanced weight is attached to the votes of the permanent members of the Security Council. Moreover, the general principle of equality of representation and voting power in the Assembly must be viewed in the light of the fact that its competence does not, as a rule, go beyond that of recommendation and co-ordination. See below, § 1681.

⁵ See below, § 1681.

⁶ See below, § 1684.

⁷ See below, *ibid.*

as against those members of the United Nations which are not permanent members of the Security Council. To that extent the relevant provisions of the Charter must be deemed to be contrary to the principle, which is of a fundamental character, that, regardless of any other aspects of equality, all members of a political community ought to be equal before the law. No such objection attaches to another important derogation from the doctrine of equality, namely, that members other than the Great Powers are bound, unless they elect to withdraw from the Organisation, by amendments of the Charter ratified by two-thirds of the members of the United Nations including all the permanent members of the Security Council.¹

Rank of
States.

§ 117. Although the States are equals as International Persons, they are nevertheless not equals as regards rank.² The differences as regards rank are recognised by International Law, but the legal equality of States is thereby as little affected as the legal equality of the citizens is affected within a modern State where differences in rank and titles of the citizens are recognised by Municipal Law. The vote of a State of lower rank has, as a rule,³ as much weight as that of a State of higher rank. The difference in rank nowadays no longer plays such an important part as in the past, when questions of etiquette gave occasion for much dispute. It was in the sixteenth and seventeenth centuries that the rank of the different States was zealously discussed under the heading of *droit de préséance* or *questions de préséance*. The Congress of Vienna of 1815 intended to establish an order of precedence between States, but dropped this scheme on account of practical difficulties.⁴

¹ Article 109 (2). The principle of equality of States is reaffirmed, with less violence to accepted terminology, in the Act of Chapultepec adopted in March 1945 by the Inter American Conference on War and Peace. The Act laid down in simple language that 'all sovereign States are juridically equal among themselves': *A.J.*, 39 (1946), p. 110.

² See Satow, pp. 23-51.

³ See above, p. 284.

⁴ Thus the matter is entirely based on custom, which recognises the following three rules:

(1) The States are divided into two classes—namely, States with, and States without, royal honours. To the first class belong Empires and Kingdoms; it includes Grand Duchies, to this class belong also the great Republics such as France, Germany, the United States of America, Switzerland, the South American Republics,

§ 118. To avoid questions of precedence, on signing a Treaty States of the same rank often observe a conventional usage which is called the 'Alternat.' According to that usage the signatures of the signatory States of a treaty alternate in a regular order or in one determined by lot, the representative of each State signing first the copy which belongs to his State. But sometimes that order is not observed, and the States sign either in the alphabetical order of their names in French or in no order at all (*pêle-mêle*).

§ 119. At the present time, save in a few exceptional instances, States have no titles, although formerly such titles did exist.¹

Titles of States.

and others. All other States belong to the second class. States with royal honours always precede other States.

(2) Full sovereign States always precede those under suzerainty or protectorate.

(3) Among themselves States of the same rank do not precede one another. Empires do not precede kingdoms, and since the time of Cromwell and the first French Republic monarchies do not precede republics. But the Roman Catholic States concede precedence to the Holy See, and the monarchs recognise among themselves a difference, with regard to ceremonials, between emperors and kings on the one hand, and, on the other, grand dukes and other monarchs.

¹ Thus the former Republic of Venice, as well as that of Genoa, was addressed as 'Serene Republic,' and the Republic of San Marino (see Treaty Series (1900), No. 9) is still, it is believed, addressed as 'Most Serene Republic.' Nowadays the titles of the heads of monarchical States are of importance to International Law in so far as they are connected with the rank of the respective States. Since States are sovereign, they can bestow any titles they like on their heads. Thus, according to the German Constitution of 1871, the Kings of Prussia had the title 'German Emperor'; the British monarchs have since 1877 borne the title 'Emperor or Empress of India'; the Prince of Roumania assumed in 1881, that of Serbia in 1822, and that of Bulgaria in 1908, the title of King.

But no foreign State is obliged to recognise such new title, especially when a higher rank would accrue to the State concerned in consequence of such a new title for its head. In practice such recognition will regularly be given when the new title really corresponds with the size and the importance of the State. History, however, reports several cases where recognition was withheld for a long time. Thus the title 'Emperor of Russia,' assumed by Peter the Great in 1701, was not recognised by France till 1745, by Spain till 1759, nor by Poland till 1764. And the Pope did not recognise the kingly title of Prussia, assumed in 1701, till 1786. The effect of refusal to recognise a new title is merely that the State making the change cannot claim from the State refusing to recognise it any privileges connected with the new title (see above, § 75).

With the titles of the heads of States are connected predicates. Emperors and Kings have the predicate 'Majesty,' Grand Dukes have the predicate 'Royal Highness,' Dukes that of 'Highness' and other monarchs that of 'Serene Highness.' The Pope is addressed as 'Holiness' (*Sacrilias*). Not to be confused with these predicates, which are recognised by the Law of Nations, are predicates which originally were bestowed on monarchs by the Pope and which have no importance for the Law of Nations. Thus the Kings of France called themselves *Rex Christianissimus* or First-born

III

DIGNITY

Vattel, ii. §§ 35-48 -Lawrence, § 120 -Phillimore, ii. §§ 27-43 -Wheaton, § 160
 --Bluntschli, §§ 82-83 --Heffter, §§ 32, 102, 103 Fauchille, §§ 279-284--
 Despagne, §§ 184-186--Pradier-Fodéré, ii. §§ 451-483--Rivier, i. pp.
 260-262--Nyn, ii. pp. 254, 255--Calvo, iii. §§ 1300-1302--Fiore, i. §§ 439-
 451--Martens, i. § 78--Dr Louter, i. pp. 247-249 Stowell, pp. 78-82,
 98-104--Sibert, pp. 276-282--Balladore Pallieri, pp. 371-375 Dickinson
 in *A.J.*, 22 (1928), pp. 840-844 Quadri in *Rivista*, 31 (1942), pp. 161-169.

Dignity
 a Quality.

§ 120. The majority of text-book writers maintain that there is a fundamental right of reputation attaching to every State. Such a right, however, does not exist, because no duty corresponding to it can be traced within the Law of Nations. Indeed, the reputation of a State depends just as much upon behaviour as that of every citizen within its boundaries. A State which has a corrupt Government and behaves unfairly and perfidiously in its intercourse with other States will be looked down upon and despised, whereas a State which has an upright Government and behaves fairly and justly in its international dealings will be highly esteemed.

Conse-
 quences of
 the Dig-
 nity of
 States.

§ 121. On the other hand, traditional International Law has ascribed certain legal consequences to the dignity of States as inherent in their international personality. These are chiefly the right to demand that their Heads shall not be libelled and slandered ; that their Heads and likewise their diplomatic envoys shall be granted extraterritoriality and inviolability when abroad, and that at home and abroad in the official intercourse with representatives of foreign States they shall be granted certain titles ; that their men-of-war shall be granted extraterritoriality when in foreign waters ; that their symbols of authority, such as flags and coats of arms, shall not be used improperly and shall not be treated with disrespect on the part of other States.¹ But while a Government

Son of the Church,' the Kings of Spain have called themselves since 1496 *Rex Catholicus*, and the Kings of England since 1521 *Defensor Fidei* ; the Kings of Portugal after 1748

called themselves *Rex Fidelissimus*, and the Kings of Hungary after 1758 *Rex Apostolicus*.

¹ See Hackworth, ii. § 127.

of a State, its organs, and its servants are bound in this matter by rigid duties of respect and restraint, it is doubtful whether a State is bound to prevent its subjects from committing acts which violate the dignity of foreign States, and to punish them for acts of that kind which it was unable to prevent.¹

¹ Many States have enacted legislation penalising defamation and libels of foreign Governments. See e.g. the Revised Statutes of Canada of 1927, c. 36, § 135; and the Ordinance of the Government of India of April 5, 1931, which provides against the publication of statements likely to promote unfriendly relations between His Majesty's Government and foreign Governments: *Br. and For. St. Papers*, 134, p. 207; Article 261 (*bis*) of the Swiss Federal Code, which provides for penalties for insulting State delegates to the Assembly or Council of the League of Nations, the Secretary General, or the Director of the International Labour Office. For an enumeration of the relevant provisions of various countries see Prouss in *A.J.*, 28 (1934), p. 650. According to the Criminal Law of England, 'everyone is guilty of a misdemeanour who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary, with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs.' See Stephen, 1 *Digest of the Criminal Law*, Article 103. See also Dickinson in *A.J.*, 22 (1928), pp. 840-844. During what has been called the 'reign of terror' in England at the end of the eighteenth century that rule received extended application in *King v. Hunt* (1799), 27 St. Tr. 627, 641, and *R. v. Peltier* (1803), St. Tr. 629, but these cases must be regarded as exceptional. For an interesting Law Officer's Report, given in 1779 concerning an alleged libel upon a former Grand Master of the Order of St. John of Jerusalem see McNair in *B.Y.*, 26 (1949), p. 27. As to the United States see Hackworth, n. § 129. For a distinction between insulting Adolf Hitler as Head of the German State and insulting him as Leader of the National-Socialist Party see the decision given by a Dutch Court in 1935 in

Public Prosecutor v. G., *Annual Digest*, 1935-1937, Case No. 11. In a decision given in 1936 the Patent Office of the German Reich held, in connection with an application for the registration of a trade mark, that there exists a rule of International Law according to which images of Heads of foreign States must not be used for commercial purposes: *ibid.*, Case No. 10. In *Monaco v. Monaco* the Court rejected the submission that it would be contrary to the dignity of the Head of a State to award him costs in an action in which he has been successful: (1937) 157 *T.L.R.* 231; *Annual Digest*, 1935-1937, Case No. 9. There is, of course, nothing to prevent a State from enacting legislation calculated to ensure respect for the dignity of other States. States may also conclude conventions with that object in view and, generally, in order to promote international goodwill. See e.g. the Convention on the Teaching of History adopted by the Seventh Pan-American Conference in December 1933, in which the contracting parties undertook to 'use the textbooks used for instruction in their respective countries 'with the object of eliminating from them whatever might tend to arouse in the immature mind of youth aversion to any American country' (Article 1): *A.J.*, 28 (1934), p. 72; Hudson, *Legislation*, vi. p. 612, and the Convention adopted in December 1936 by the Inter-American Conference concerning Peaceful Orientation of Public Instruction: *International Conciliation* (Pamphlet No. 32b), March 1937. See also for a similar suggestion the German Peace Plan of April 1, 1936, point 1: *The Times* newspaper, April 2, 1936. See also *School Textbook Revision and International Understanding* (2nd ed., 1933), where on pp. 23-30, 189-192, there will be found the texts of the resolutions of the Council and Assembly in 1932. For

In any case a State must prevent and punish such acts only as really violate the dignity of a foreign State. Mere criticism of policy, judgment concerning the past attitude of States and their rulers, utterances of moral indignation condemning immoral acts of foreign Governments and their monarchs, need neither be suppressed nor punished.¹ The position is different when the persons in question are in governmental service or otherwise associated with the Government of the country.² In 1949 the General Assembly of the United Nations approved a Convention on the International Transmission of News and the Right of Correction.³ The Convention provides for some, not altogether effective, remedy with regard to publication abroad of news despatches which, in the view of the complaining State, are either false and distorted or are 'capable of injuring its relations with other

a survey of the steps leading to these resolutions see Bailey in *The Education Year-book* (London, 1936), pp. 543-545. For the Resolution and a Draft Declaration of the Assembly in 1935 on ensuring impartiality of school text-books, and especially history books, see *Off. J.*, 1936, p. 65. In October 1937 the Assembly of the League approved a Draft, adopted by the Committee on Intellectual Co-operation, of a Declaration on the Teaching of History (Revision of School Text-books). The Declaration has now been signed by about twenty States, including Soviet Russia. Hudson, *Legislation*, vii. p. 850. On the possibility and projects of protecting international peace by municipal legislation against war propaganda as well as against acts injurious to foreign States see Pella, *La protection de la paix par le droit interne* (1933), and in *R.G.*, 40 (1933), pp. 401-505; Mirkine-Guetzévitch, *Droit constitutionnel international* (1933), pp. 244-290; Rappaport in *Grotius Society*, 18 (1932), pp. 41-64. As to the Convention of September 23, 1936, concerning the use of broadcasting in the cause of peace see below, p. 294, n. In 1947 the General Assembly of the United Nations passed a resolution in which it condemned 'all forms of propaganda, in whatever country conducted, which is either designed or likely to provoke or encourage any

threat to the peace, breach of the peace, or act of aggression.' For comment see Quincy Wright in *A.J.*, 42 (1948), pp. 128-136. See also Whitton in *Hague Recueil*, 72 (1949) (1.), pp. 588-656. In 1950 and 1951 Soviet Russia and a number of other Eastern European States passed legislation penalising incitement to war. See *A.J.*, 46 (1952), Suppl., pp. 34-42, 99-104.

¹ See Lauterpacht in *A.J.*, 22 (1928), pp. 114, 115, and in *Grotius Society*, 13 (1925), pp. 143-163, and *R. v. Antonelli and Barbers* (1905) 70 J.P. 4; and Fleischmann in *Liszt*, § 13 (n. 19). And see below, § 127a.

² Thus, when in January 1931 General Butler, of the United States Army, made at a banquet disparaging statements concerning the Italian Prime Minister, Italy complained. The United States Government thereupon expressed their regret at this unauthorised action on the part of an officer on active duty and reprimanded General Butler. See on this incident Stowell in *A.J.*, 25 (1931), pp. 321-324.

³ See General Assembly 3rd Session, Part II, Official Records, 1949, pp. 21 *et seq.* And see Whitton in *A.J.*, 43 (1949), pp. 73-87, on the United Nations Conference on Freedom of Information and the Movement against International Propaganda. See also Bolla in *Annuaire Suisse*, 5 (1946), pp. 29-62.

States or its national prestige or dignity.' In such cases the complaining State may submit to the State where the despatch is published its own version of the facts. The obligation of the latter is limited to the transmission of the corrected version to the news agency responsible for the original publication. If the correction is not published, the Secretary-General of the United Nations is under an obligation to give publicity, through the information channels at his disposal, both to the corrected version and to the original despatch and any comment of the Government where the despatch was published.¹

§ 122. Connected with the dignity of States are the maritime ceremonials between vessels, and between vessels and forts, which belong to different States. In former times discord and jealousy existed between the States regarding such ceremonials, since they were looked upon as means of keeping up the superiority of one State over another. Nowadays, so far as the open sea is concerned, they are considered as mere acts of courtesy recognising the dignity of States. They are the outcome of international usages, and not of International Law, in honour of the national flags. They are carried out by dipping flags or striking sails or firing guns.² But so far as the territorial maritime belt is concerned, littoral States can make laws concerning maritime ceremonials to be observed by foreign merchantmen.³

Maritime
Cere-
monials.

IV

INDEPENDENCE AND TERRITORIAL AND PERSONAL SUPREMACY

Vattel, i. *Préliminaires*, §§ 15-17—Hall, § 10—Westlake, i. pp. 321-325—Phillimore, i. §§ 144, 149—Wheaton, §§ 72-75—Hyde, i. §§ 51-64—Bluntschli, §§ 64-69—Hackworth, ii. §§ 150-159—Fauchille, §§ 253-271, 293-295 (4)—Mérignhac, i. pp. 258-267—Pradier-Fodéré, i. §§ 287-332—Rivier, j. § 21—Nys, ii. pp. 223-226—Calvo, i. §§ 107-109—Fiore, i. §§ 372-427, and *Code*, §§ 185-392—Martens, i. §§ 74, 75—Westlake *Papers*, pp. 86-101—Oruchaga,

¹ See Whitton in *A.J.*, 44 (1950), 141-145. Satow, vol. i. ch. vi. See also below, § 257.

² See Halleck, i. pp. 133-152, and ³ See below, § 187.

i. §§ 207-211—Suarez, i. §§ 51-54—Bustamante, pp. 217-230—Stowell pp. 87-111—Garner in *American Political Science Review*, February 1925, pp. 1-24—Pella in *Hague Recueil*, vol. 33 (1930) (iii.), pp. 677-830—Delbez in *R.G.*, 37 (1930), pp. 461-475—Preuss, *ibid.*, 40 (1933), pp. 606-645.

Independence and Territorial as well as Personal Supremacy as Aspects of Sovereignty.

§ 123. Sovereignty as supreme authority, which is independent of any other earthly authority, may be said to have different aspects.¹ Inasmuch as it excludes dependence upon any other authority, and in particular from the authority of another State, sovereignty is *independence*. It is *external* independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys. It is *internal* independence with regard to the liberty of action of a State inside its borders. As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is *territorial* supremacy (*dominium, territorial sovereignty*). As comprising the power of a State to exercise supreme authority over its citizens at home and abroad, sovereignty is *personal* supremacy (*imperium, political sovereignty*).

For these reasons a State as an International Person possesses independence and territorial and personal supremacy. These three qualities are nothing else than three aspects of the very same sovereignty of a State, and there is no sharp boundary line between them. The distinction is apparent and useful, although internal independence is nothing else than sovereignty comprising territorial supremacy, but viewed from a different angle.

Consequences of Independence and Territorial and Personal Supremacy.

§ 124. Independence and territorial as well as personal supremacy are not rights, but recognised and therefore protected qualities of States as International Persons. The protection granted to these qualities by the Law of Nations finds its expression in the right of every State to demand that other States themselves abstain, and prevent their agents and subjects, from committing any act which constitutes a violation of its independence or its territorial or personal supremacy.

In consequence of its external independence a State can,

¹ For a judicial discussion of these aspects see *Rex v. Jacobus Christian* in *B.Y.*, 1925, pp. 211-219, and in

J.C.L., 3rd ser., 6 (1924), pp. 245-254.

unless restricted by treaty,¹ manage its international affairs according to discretion; in particular it can enter into alliances and conclude other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace.²

In consequence of its internal independence and territorial supremacy, a State can adopt any constitution it likes, arrange its administration in any way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. According to the rule, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a State are under its dominion and sway, and foreign individuals and property fall at once under the territorial supremacy of a State when they cross its frontier. Aliens residing in a State can therefore be compelled to pay rates and taxes, and to serve in the police under the same conditions as citizens for the purpose of

¹ See below, § 126.

² While independence is a quality of statehood in the nature of a right it may, in certain circumstances, become a duty. A State may in a treaty bind itself not to part with or impair its own independence. Thus in Article 88 of the Treaty of St. Germain Austria's independence was declared to be inalienable and she undertook to abstain from any act which might directly or indirectly compromise her independence, in particular by participating in the affairs of another State. That undertaking was repeated and, to some extent, amplified in the Geneva Protocol of October 4, 1922, in which Austria agreed to abstain from any regulations or from any economic or financial engagement calculated to compromise this independence. In 1931 the Permanent Court of International Justice held, by eight votes to seven and without, in effect, giving reasons for its decision, that a proposed régime of customs union between Austria and Germany establishing a common customs frontier and customs tariff, and providing for freedom from import and export duties between them, would not be compatible with the Geneva Protocol:

Series A/B, No. 40. Seven out of the eight majority Judges held that the customs union would also be incompatible with the Treaty of St. Germain. The individual Opinion of Judge Anzilotti contains, in addition to weighty reasons in support of part of the Court's Opinion, some interesting observations on the effect of restrictions of State sovereignty on its independence (pp. 57-58). For the literature, to a large extent critical, on this case see vol. ii, § 25a_g. It was held by the Permanent Court in August 1932, in the *Case concerning the Interpretation of the Statute of the Memel Territory*, that the grant of autonomy to a territorial unit does not result in a division of sovereignty in a way disturbing the unity of the State: P.C.I.J., Series A/B, No. 49, p. 313. See also the various treaties of the United States with some of the Republics in the Caribbean (see below, § 135) which give the United States the right of intervention to preserve the independence of these Republics and oblige the latter not to conclude any treaty endangering their independence or providing for a cession of their territory to a foreign Power (see e.g. the Treaty of September 16, 1915, with Haiti, below, p. 200 (n.)).

maintaining order and safety. But aliens may be expelled, or not received at all. On the other hand, hospitality may be granted to them whatever act they may have committed abroad, provided they abstain from making the hospitable territory the basis for attempts against a foreign State. And a State can through naturalisation adopt foreign subjects residing on its territory without the consent of the home State, provided the individuals themselves give their consent.

In consequence of its personal supremacy, a State can treat its subjects according to discretion,¹ and it retains its power even over such subjects as emigrate without thereby losing their citizenship. A State may therefore command its citizens abroad to come home and fulfil their military service, may require them to pay rates and taxes for the support of the home finances, may ask them to comply with certain conditions in case they desire marriages concluded abroad or wills made abroad to be recognised by the home authorities, and can punish them on their return for crimes they have committed abroad.²

Viola-
tions of
Independ-
ence and
Territor-
ial and
Personal
Supre-
macy.

§ 125. The duty of every State itself to abstain, and to prevent its agents and, in certain cases, subjects, from committing any act which constitutes a violation³ of another State's independence or territorial or personal supremacy is correlative to the corresponding right possessed by other States. It is not feasible to enumerate all such actions as might constitute a violation of this duty. But it is useful to give some illustrative examples. Thus, in the absence of treaty provisions to the contrary, a State is not allowed to interfere in the management of their internal or international affairs, nor to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse. A State is not allowed to send its troops, its men-of-war, or its police forces into or through foreign territory, or to exercise an act of administration or juris-

¹ Subject to Minority treaties and other international obligations, in particular the general obligations of the Charter of the United Nations relating to human rights and fundamental freedoms: see below, §§ 340b-340c. And see below, § 137, on

Humanitarian Intervention.

² The exercise of the various rights enumerated in this section is subject to the existence of restrictions created by treaty, of which many examples exist: see below, § 127.

³ See below, § 155.

diction on foreign territory, without permission.¹ Again, having regard to the personal supremacy of other States, a State is not allowed to naturalise aliens residing on its territory without their consent,² nor to prevent them from returning home for the purpose of fulfilling military service.

§ 126. Independence is not unlimited liberty for a State to do what it likes without any restriction whatsoever. The mere fact that a State is a member of the international community restricts its liberty of action with regard to other States, because it is bound not to intervene in the affairs of other States. And it is generally admitted that a State can through conventions, such as a treaty of alliance or neutrality and the like, enter into many obligations which hamper it more or less in the management of its international affairs. Independence is a question of degree, and it is therefore also a question of degree whether the independence of a State is destroyed or not by certain restrictions.³ Thus it is

¹ See below, § 128. But neighbouring States very often give such permission to one another, for instance, one State may permit the customs officers of another State to be stationed at a railway station in the former's territory for the purpose of examining the luggage of travellers. See *German Railway Station at Basle Case*, decided by a German Court in June 1928. *Annual Digest*, 1927-1928, Case No. 90, and see Vah, *Servitudes of International Law* (1933), pp. 117-127. See also Hackworth, II, § 153. And see *ibid.* §§ 150 and 151.

² See, however below, § 299.

³ See Judge Anzilotti's Opinion, referred to above, p. 287. Thus through Article 4 of the Convention of London of 1884, between Great Britain and the former South African Republic, stipulating that the latter should not conclude any treaty with any foreign State other than the Orange Free State, without approval on the part of Great Britain, the Republic was so much restricted that Great Britain considered herself justified in defending the opinion that the

Republic was not an independent State, although the Republic itself and many writers were of a different opinion. (See Rivier, I, p. 89; Westlake, *Papers*, pp. 419-460.)

Thus, to give another example, through Article I of the Treaty of Havana (see Martens, *N.R.G.*, 2nd ser., 32, p. 79) of May 22, 1903, between the United States of America and Cuba, stipulating that Cuba shall never enter into any such treaty with a foreign Power as will impair, or tend to impair, the independence of Cuba, and shall abstain from other acts, the Republic of Cuba was so much restricted that some writers maintain—wrongly, it is believed—that Cuba was under an American protectorate and only a half sovereign State. (See Whitcomb, *La situation internationale de Cuba* (1905); Hershey, p. 168, n. 33; Machado y Ortega, *La enmienda Platt* (1922) and Hyde, I, § 10.) As to the present position see below, § 135.

Again, the Republic of Panama is, by the Hay-Varilla Treaty of Washington of 1903 (see Martens, *N.R.G.*, 2nd ser., 31, p. 599, and Hyde, I, § 20), likewise burdened with some

generally admitted that States under protectorate are so much restricted that they are not fully independent, but half sovereign. On the other hand, the restrictions connected with the neutralisation of States do not, according to the correct opinion,¹ destroy their independence, although they cannot make war except in self-defence, cannot conclude alliances, and are in other ways hampered in their liberty of action.

Restrictions upon Territorial Supremacy.

§ 127. Like independence, territorial supremacy does not give an unlimited liberty of action. Thus, by customary International Law, every State has a right to demand that its merchantmen may pass through the maritime belt of other States. Navigation on so-called international rivers must be open to merchantmen of all States. Foreign monarchs and envoys, foreign men-of-war, and foreign armed forces must be granted extraterritoriality. Through the right of protection over citizens abroad, which is held by every State according to customary International Law, a State cannot treat foreign citizens passing through or residing on its territory arbitrarily according to discretion as it might treat its own subjects; it cannot, for instance, compel them to serve² in its army or navy. A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance,

restrictions in favour of the United States, but that does not mean that Panama is under an American protectorate. Restrictions in favour of the United States, imposed upon San Domingo by a Treaty of February 8, 1907 (A.J., 1 (1907), Suppl., p. 23; see also A.J., 11 (1917), p. 391, and Hyde, i. § 21), and upon Haiti by a Treaty of September 16, 1915 (A.J., 10 (1916), Suppl., p. 234; A.J., 16 (1922), pp. 607-610; and Hyde, i. § 22), raise similar questions. As to Nicaragua see Hyde, i. § 23.

While in the *Corfu Channel* case the International Court of Justice observed that 'between independent States, respect for territorial sovereignty is an essential foundation of international relations' (I.C.J. Re-

ports 1949, p. 35) in the *Lotus* case (Series A, No. 10, p. 18) the Permanent Court of International Justice stated that 'the first and foremost restriction imposed by International Law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State.'

¹ See above, § 97.

² See Hall, § 61, and Advisory Opinion of the Permanent Court upon the *Nationality Decrees in Tunis and Morocco* (1923), Series B, No. 4. See also Latcy in *Treaties Society*, 9 (1924), pp. 49-60, particularly at p. 60. And see below, § 155d, on the Plea of Non-discrimination.

to stop or to divert the flow of a river which runs from its own into neighbouring territory.¹ A State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighbouring State, e.g. as the result of working of factories emitting deleterious fumes.² Finally, a State is not allowed to permit on its territory the preparation of a hostile expedition³ against another country. In the *Corfu Channel* case the International Court of Justice held that in view of 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States,'⁴ the Albanian authorities were under an obligation to notify or give warning of the presence of a minefield in Albanian waters. As the Court found that in the circumstances of the case the Albanian authorities must be presumed to have had knowledge of the minefield, Albania was bound to pay compensation for the damage caused by the explosion of the mines.

In contradistinction to these restrictions by the customary Law of Nations, there are obligations of many a kind which a State can assume through treaties, without thereby losing its internal independence and territorial supremacy.⁵ Thus Napoleon 1. after the Peace of Tilsit of 1807 imposed upon

¹ See below, §§ 155aa, 178c.

² See the decision of the Trail Smelter Arbitral Tribunal of April 16, 1938, with regard to the damage caused by the smelter situated at Trail, British Columbia, to the inhabitants of the State of Washington: *A.J.*, 33 (1939), pp. 182-212. And see generally Andrassy, 'Les relations internationales de voisinage,' in *Hague Recueil*, 1951, and Thalmann, *Grundprinzipien des modernen zwischenstaatlichen Nachbarrechts* (1951).

³ See below, § 127a.

⁴ *I.C.J. Reports*, 1949, p. 22. Moreover, while the exclusive control exercised by a State within its territory does not, in the absence of fault, involve its responsibility for injuries suffered by a foreign State (see below, p. 343), such exclusive control was held—in the same case (*ibid.*, 1949, p. 19)—to have a bearing upon the

nature of the proof of 'the responsibility of the territorial State. The fact of exclusive control makes it often impossible for the foreign State, which is the victim of a violation of International Law, to furnish direct proof of the responsibility of the territorial State. In such cases, it was held, the foreign State 'should be allowed a more liberal recourse to inferences of fact and circumstantial evidence' (*ibid.*).

⁵ The Permanent Court several times took occasion to point out that, so far from treaty obligations being restrictions upon sovereignty, 'the right of entering into international engagements is an attribute of State sovereignty': see, for instance, Series A, No. 1, at p. 25, Series B, No. 10, at p. 21, and Series A, No. 23, at p. 26. And see below, § 554, on restrictive interpretations of treaties.

Prussia the restriction¹ not to keep more than 42,000 men under arms during ten years from January 1, 1809; after the First World War the Allies imposed upon Germany the restriction not to keep more than 100,000 men under arms, nor a navy larger than necessary for coast defence and purposes of police, nor any military or naval air forces; in the Treaty of Peace with Italy after the Second World War they limited the total strength of the Italian Army to 250,000.² There is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by treaties with other States.

Sub-
versive
Activities
against
Foreign
States.

§ 127a. The duty of a State to prevent the commission within its territory of acts injurious to foreign States³ does not imply an obligation to suppress all such conduct on the part of private persons as is inimical to or critical of the régime or policy of a foreign State. Thus there is no duty to suppress revolutionary propaganda on the part of private persons directed against a foreign Government. So long as International Law provides no remedy against abuses of governmental power, international society cannot be regarded as an institution for the mutual insurance of established Governments. On the other hand, States are under a duty to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions⁴ or attempts to commit common crimes against life⁵

¹ See Clerq, *Recueil des traités conclus par la France* (1864), ii p. 272.

² Article 61.

³ As to the pollution of water and air see below, § 155aa. See also Hackworth, ii § 157.

⁴ Article 1 of the Pan-American Convention of February 1928 on Duties and Rights of States in the event of Civil Strife (see above, p. 63, n.) seems to go further than that. It obliges the contracting parties to use all means at their disposal to prevent the inhabitants of their territories, nationals or aliens, from participating in, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil war. The same Article obliges the parties to forbid, so long as the belligerency of the rebels has not been

recognised, the traffic in arms and war material, except when intended for the Government. It has been held that contracts made with a view to promoting a hostile expedition against a foreign State are unenforceable. See *Floraheim v. Delgado*, decided by the Civil Tribunal of the Seine in July 1932; *Sirey*, 1934, 2, p. 75 (with a note by Niboyet); *Annual Digest*, 1931-1932, Case No. 9; and see *Z.o.V.*, 4 (1934), p. 937, for references to similar cases. For a detailed survey of the practice of the United States with regard to hostile expeditions see Curtis in *A.J.*, 8 (1914), pp. 1-37, 224-255, and Hackworth, ii, § 156.

⁵ On the alleged activities of Yugoslav terrorists in Hungary and the resulting appeal by Yugoslavia to the League in November 1934 see

or property.¹ Moreover, while subversive activities against foreign States on the part of private persons do not in principle engage the international responsibility of a State, such activities when emanating directly from the Government itself or indirectly from organisations receiving from it financial or other assistance or closely associated with it by virtue of the constitution of the State concerned, amount to a breach of International Law.² The principles of inde-

Toynbee, *Survey*, 1934, pp. 537-577; *Liais* in *R.G.*, 42 (1935), pp. 126-145; Kuhn in *A.J.*, 29 (1935), pp. 87-92. On December 10, 1934, the Council, 'considering that the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation in this matter' decided to set up a committee of experts to study the position with a view to preparing a draft convention: *Documents*, 1934, pp. 111-116; Dumas in *R.I.*, 3rd ser., 16 (1935), pp. 600-640; Eustathiades in *R.G.*, 43 (1936), pp. 386-415. Sottile in *Hague Recueil*, 65 (1936) (iii.), pp. 91-178; Donnedieu de Vabres in *R.I.*, 3rd ser., vol. 19 (1938), pp. 37-62, with special reference to the suggested establishment of an international criminal court for the suppression of terrorism. In 1936 the Assembly of the League considered the draft conventions prepared by the Committee of Experts. See Doc. A. 7, 1936. V. and, for the replies of governments, Docs. A. 24, 1936. V. and A. 24 (a), 1936. V. It expressed the view that the contemplated convention should have as its principal object: (1) to prohibit any form of preparation or execution of terrorist outrages; (2) to ensure effective co-operation for the prevention of such outrages; and (3) to ensure punishment of outrages of a terrorist and international character. The Assembly noted that although the proposed international criminal court did not secure general acceptance, the proposal was valuable inasmuch as the trial by such a court might constitute an alternative preferable to extradition or prosecution. For the Resolution of the Assembly see *Off. J.*, Special Suppl. No. 155. In May 1937

the Council decided to convene a Conference for the consideration of the matter: *Monthly Summary*, May 1937, p. 102. See also Caloyanni in *Grotius Society*, 21 (1935), pp. 77-92, and in *R.I.* (Paris), 15 (1935), pp. 46-71; Grietschinow in *Z.G.V.*, 5 (1935), pp. 181-185; Hudson in *A.J.*, 32 (1938), pp. 549-554. And see generally on mutual aid for the repression of crime Travers, *L'entraide répressive internationale et la loi française du 10 mars 1927* (1928); de Vabres in *R.G.*, 35 (1928), pp. 553-579. See also Dumas, *La responsabilité internationale des États* (1930), pp. 386-435; Lemkin, *Les actes constituant un danger général (international)* (1934); Roux in *Hague Recueil*, vol. 36 (1931) (ii.), pp. 81 et seq., 168 et seq. And see below, § 337a.

¹ On the question of responsibility for the boycotting of goods from a foreign country see Walz, *National boycott und Völkerrecht* (1939); Lauterpacht in *B.Y.*, 14 (1933), pp. 125-140; Hyde and Wehle in *A.J.*, 27 (1933), pp. 1-10; Preuss, *ibid.*, 28 (1934), pp. 667, 668; Bouve, *ibid.*, pp. 19-42; Friedmann in *B.Y.*, 19 (1938), pp. 142-145. And see Remer, *A Study of Chinese Boycotts* (1933), and Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 604-622.

² See Rapoport in *Répertoire*, ii, pp. 237-239; Lauterpacht in *A.J.*, 22 (1928), pp. 105-130, and in *Grotius Society*, 13 (1928), pp. 143-163; Bourquin in *Hague Recueil*, vol. 14 (1927) (i.), pp. 121-178; Pella, *ibid.*, vol. 33 (1930) (iii.), pp. 677-830 (on offences against foreign States generally); Delboz in *R.G.*, 37 (1930), pp. 461-475; Preuss, *ibid.*, 40 (1933), pp. 606-645, and in *A.J.*, 28 (1934), pp. 649-668; Van Dyke, *ibid.*, 36

pendence and non-intervention enjoin upon Governments and State officials the duty of scrupulous abstention not only from active interference, but from criticism of foreign laws and institutions.¹

Restrictions upon Personal Supremacy. § 128. Personal supremacy does not give unlimited liberty of action either. Although the citizens of a State remain under its power when abroad, such State is restricted

(1940), pp. 58-73; Smith in *Georgetown Law Journal*, 29 (1941), pp. 800-828; Fenwick in *A.J.*, 35 (1941), pp. 626-631; Cowles, *ibid.*, 36 (1942), pp. 242-251; Whitton in *Hague Recueil*, 72 (1948), (1), pp. 545-585. As to the responsibility of Soviet Russia for the activities of the Communist Party and the Third International see Verdross in *Z.o.R.*, 9 (1930), pp. 577-582. For details as to various protests against propaganda conducted by the Communist International see Tabouillot in *Z.o.V.*, 5 (1935), pp. 851-860. On the Chinese Russian incident of May 1929, arising out of alleged Communist activities of the Russian authorities of the Chinese Eastern Railway, see Toynebee, *Survey*, 1929, pp. 344-369. For the Statutes of the Communist International see *Documents*, 1928, pp. 57-63. When in November 1933 the United States recognised the Soviet Government, the latter undertook 'to respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States,' and to prevent such interference on the part of persons in governmental service or organisations under its control or in receipt of its financial assistance. See *A.J.*, 29 (1935), p. 657; and see *ibid.*, pp. 656-662, for a note by Hyde on the protest of the United States, in August 1935, against a 'flagrant violation' of this pledge, and Garner in *B.Y.*, 17 (1936), pp. 184-186. See also the Notes exchanged in December 1929 on the occasion of the resumption of diplomatic relations between Great Britain and Soviet Russia: *Treaty Series*, No. 2 (1930), Cmd. 3467. For the German-Japanese Agreement on Communism signed on November

20, 1936, at Berlin in which the parties agreed mutually to inform each other concerning the activities of the Communist International, to consult with each other as to the measures to combat its activity, and to co-operate in executing these measures, see *International Conciliation*, Pamphlet No. 327 (February 1937). On the National-Socialist propaganda wireless and otherwise directed against Austria in 1933 see *Documents*, 1933, pp. 385-398; Stenunt, *La radiophonie et le droit international public* (1932), pp. 37 *et seq.*; Preuss, *op. cit.*; Raestad in *Donnerstag de la coopération internationale* (1933). For the International Convention of September 23, 1936, concerning the Use of Broadcasting in the Cause of Peace see *Off. J.*, 1936, p. 1437, (Cmd. 5506, Misc. No. 6 (1937); *A.J.*, 32 (1938), p. 113; Hudson, *Legislation*, vii p. 409. In that Convention, ratified, among others, by Great Britain, France and the British Dominions, the Parties undertook to prohibit the broadcasting within their territories of any transmission calculated by reason of its inaccuracy or otherwise to disturb international understanding or to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a Contracting Party; See also above, p. 284 *n. (in fine)*. Fenwick in *A.J.*, 32 (1938), pp. 339-343; Raestad in *R.J.*, 16 (1935), pp. 280-298; Tomlinson, *International Control of Radiocommunications* (1938), pp. 226-233. As illustrating the difficulty of distinguishing in some cases between the acts of governments and of political parties closely associated therewith see Büniger's study on the relations of party and State in China in *Z.o.V.*, 6 (1936), pp. 286-302.

¹ See above, p. 284, n. 2.

in the exercise of this power with regard to all those matters in which the foreign State on whose territory these citizens reside is competent in consequence of its territorial supremacy. The duty to respect the territorial supremacy of a foreign State must prevent a State from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. A State must not perform acts of sovereignty in the territory of another State.¹ Thus, for

¹ It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended. Thus Germany restored to Switzerland, in 1935, a certain Herr Jacob-Salomon, an ex-German political refugee who had been abducted from Switzerland with the connivance of German officials. The case was submitted to arbitration, but soon after the commencement of the written proceedings Germany admitted in September 1935 that a State official 'acted in an inadmissible manner in this case' and surrendered Jacob to the Swiss authorities. For an account of this case and a survey of other cases of kidnapping of fugitives from justice on foreign territory see Preuss in *A.J.*, 29 (1935), pp. 502-507, and *ibid.*, 30 (1936), p. 123. See also Vaccaro v. Collier, the United States Marshal, where the United States Circuit Court of Appeals held on June 17, 1931, that an officer of the United States who forcibly arrested in Canada and forcibly carried across the frontier a person wanted by the United States police was guilty of kidnapping. The Court pointed out that an unlawful carrying of a person beyond the boundaries of a State to be dealt with by the laws of another State is a violation of the sovereignty of the former: 51 F. (2d) 17; *Annual Digest*, 1929-1930, Case No. 180. And see Villareal v. Hammond (1934), 74 F. (2nd) 503; *Annual Digest*, 1933-1934, Case No. 143, where the

Court in granting extradition of the prisoners accused of kidnapping certain persons in Mexico with the view to handing them over to the United States authorities, pointed out that that act in any case constituted a violation of Mexican territorial sovereignty. But see *United States v. Inaull et al.*, where the Court rejected the plea of the accused that as he had been unlawfully seized by the Turkish police while on a Greek vessel in Turkish waters the Court had no jurisdiction: 8 F. Supp. 310; *Annual Digest*, 1933-1934, Case No. 75. Similarly, in *Ex parte Lopez* the Court refused a writ of habeas corpus for which the accused applied on the ground that he had been forcibly seized in Mexico by some persons (whose subsequent extradition to Mexico was granted in the *Villareal Case*, above) and brought to the United States: 6 F. Supp. 342; *Annual Digest*, 1933-1934, Case No. 76. See also, to the same effect, *Jackson v. Olson*, *Annual Digest*, 1946, Case No. 27; *U.S. v. Unteraght*, *ibid.*, Suppl. Vol., 1919-1942, Case No. 53. This has also been the attitude of English courts: *Ex parte Scott* (1829) 9 B.C. 446; *Sinclair v. H.M. Advocate* (1890) 17 R. (J.C.) 38; *Ex parte Elliott* [1919] 1 All E.R. 376. For a contrary decision by a French Court see *Annual Digest*, 1933-1934, Case No. 77 (*In re Jolis*). And see generally on the question of jurisdiction with regard to persons apprehended in violation of International Law, *Harvard Research* (1935), pp. 623-632, Dickinson in *A.J.*, 28 (1934), pp. 234-245 and Morgenstern in *B.Y.*, 29 (1952), pp. 265-282. See also Hackworth, *ii*, § 152. Some countries make it a criminal offence to per-

instance, a State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land in which they reside, and from ordering them not to commit such acts as they are bound to commit according to the Municipal Law of the land in which they reside.¹

But a State may also by treaty obligation be in some respects restricted in its liberty of action with regard to its citizens. Thus the Treaty of Berlin of 1878 restricted the personal supremacy of Bulgaria, Montenegro, Serbia, and Roumania in so far as these States were thereby obliged not to impose any religious disabilities on any of their subjects,² and the policy of protecting racial, religious, and linguistic minorities by means of treaty obligations was carried further in the treaties concluded at the end of the First World War.³ Moreover, in so far as the principle of humanitarian intervention has become and is tending to become a rule of International Law, States are bound to respect the fundamental human rights of their own citizens.⁴ The Charter of the United Nations refers repeatedly to the promotion of human rights and fundamental freedoms, as well as of the observance thereof, as one of the principal purposes of the Organisation.⁵ And although the Charter provides for no

form in their territory governmental activities on behalf of a foreign State. See, e.g., *Kampfer v. Public Prosecutor of Zurich* decided in 1939 by the Swiss Federal Tribunal. *Annual Digest*, 1941-1942, Case No. 2. While a Government cannot exercise jurisdictional rights in foreign territory, it has been held repeatedly that, in pursuance of requisition decrees or similar measures, it may take peaceful possession of a vessel in foreign waters: *Erwin v. Quintanilla* (1938), 90 F. (2d) 935; *Annual Digest*, 1938-1940, Case No. 76. It appears from the decision in *The Navemar*—(1938) 18 F. Supp. 152, 158; 24 F. Supp. 495, 497—that possession gained in American waters by force, even if subsequently ratified by the foreign Government, is not a sufficient ground for jurisdictional immunity. For a somewhat different view see *The Cristina* (1938), 54 T.L.R. 512,

at pp. 518, 521. And see generally on the requisitioning of merchant ships abroad *McNair in J.C.L.*, 3rd ser., 27 (1915), pp. 68-78.

¹ For example, in time of war a belligerent is not entitled to prohibit one of its nationals, resident in a neutral State under the laws of which debts must be paid, from paying a debt due to a national of the other belligerent. For a survey of the law of the United States as to the jurisdiction of courts of equity over persons to compel the doing of acts outside the territorial limits of the State see *Mearns in Minnesota Law Review*, 14 (1929-1930), pp. 494-520. As to enforcement of foreign public law see below, § 144b.

² See above, § 73.

³ See below, §§ 340b-340c.

⁴ See below, § 137.

⁵ See Preamble and Articles 1 (3), 55, 62 (2), 68, 76 (c).

clear or specific legal obligations in this field, it cannot be said that under the Charter a State possesses unfettered freedom of action as to the treatment of its own citizens regardless of their 'human rights and fundamental freedoms.'¹

V

SELF-PRESERVATION

Vattel, ii. §§ 49-53, 119-121—Hall, §§ 8, 83-86—Westlake, i. pp. 312-317—Phillimore, i. §§ 210-220 Hyde, i. §§ 65-68—Fenwick, pp. 142-147—Hefster, § 30—Heilborn, pp. 280-290 Fauchille, §§ 242-252 (3)—Mérignhac, i. pp. 239-245 Pradier-Fodère, i. §§ 211-286 Rivier, i. § 20—Nys, ii. pp. 218-221 Calvo, i. §§ 208-209 Fiore, i. §§ 452-466—Martens, i. § 73 De Loutch, i. pp. 240-247 Bustamante, pp. 199-213 Stowell, pp. 112-130 Baty, pp. 87-112 Anzilotti, pp. 505-517—Sibert, pp. 230-247 Westlake, *Papers*, pp. 110-125—Cavaretta, *Lo stato di necessità nel diritto internazionale* (1910)—Gylichowski, *Studien zum internationalen Recht* (1912), pp. 27-71—Cavaglieri, *Lo stato di necessità nel diritto internazionale* (1918)—Strupp, *Das völkerrechtliche Delikt* (1920), pp. 122-129—Strisower *Der Krieg und die Völkerrechtsordnung* (1919), pp. 85-108—Rodick, *The Doctrine of Necessity in International Law* (1928)—Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 29-102 Vischer in *R.G.*, 24 (1917) pp. 74-108—Hindmarsh in *A.J.*, 26 (1932) pp. 310-326—Graud in *Haqqe Revue* vol. 49 (1934) (in), pp. 692-860—Hertz in *Friedensarte*, 35 (1935), pp. 137-142—Wright in *A.J.*, 29 (1935) pp. 373-395, and 30 (1936), pp. 45-46—Weiden in *Griech Society*, 24 (1938), pp. 105-132—Sperduti in *Rivista* 35 (1943), pp. 19-113. See also vol. ii. § 52m in connection with the conception of self-defence.

§ 129. From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States. Although, as a rule, all States are under a mutual duty to respect one another's personality, and are therefore bound not to violate one another, as an exception certain violations of another State committed by a State for the purpose of self-preservation are not prohibited by the Law of Nations. Most writers maintain that every State has a fundamental right of self-preservation. However, if every State really had a *right* of self-preservation, all the States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. But such duty does not

¹ See below, § 340f.

Self pre-
servation
an Excuse
for Viola-
tions.

exist. On the contrary, although self-preservation is in certain cases an excuse recognised by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repel them. It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. But, nevertheless, they remain violations, may therefore be repelled, and indemnities¹ may be demanded for damage done.

What
Acts of
Self-
preserva-
tion are
Excused.

§ 130. It is frequently maintained that every violation is excused so long as it was caused by the motive of self-preservation; but it becomes more and more recognised that violations of other States in the interest of self-preservation are excused in cases of *necessity* only. Only such acts of violence in the interest of self-preservation are excused as are necessary in self-defence, because otherwise the acting State would have to suffer, or have to continue to suffer, a violation against itself. If an imminent violation, or the continuation of an already commenced violation, can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified.² When, to give an example, a State is informed that a body of armed men is being organised on neighbouring territory for the purpose of a raid into its territory, and when the danger can be removed through an appeal to the authorities of the neighbouring country, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises, and the threatened State is justified in invading the neighbouring country and disarming the intending raiders.³

¹ See below, § 154

² Mr Webster, the American Secretary of State, defined the necessity which would be an excuse as a necessity of self defence as being 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'; see Moore, ii. § 217, p. 412. See also Grotius, ii. i. v.

³ The term self defence must not here be understood in its narrower sense as meaning defence against an act of individuals only, but also in its wider sense as meaning the warding off of a disaster caused or threatened by the work of nature. For instance, if a river flowing successively through the territories of two States is provided with a lock in the lower State, and

The reason of the thing, of course, makes it necessary for every State to judge for itself, in the first instance, whether a case of necessity in self-defence has arisen. But, unless the notion of self-preservation is to be eliminated as a legal conception, or unless it is used as a cloak for concealing deliberate breaches of the law, it is obvious that the question of the legality of action taken in self-preservation is suitable for determination and must ultimately be determined by a judicial authority or by a political body, like the Security Council of the United Nations, acting in a judicial capacity. The refusal on the part of the State concerned to submit to or abide by the impartial determination of that question must therefore be deemed to be *prima facie* evidence of a violation of International Law under the guise of action in self-preservation.¹ Thus the Charter of the United Nations leaves intact the inherent right of individual or collective self-defence in case of armed attack against a member of the United Nations until the Security Council takes action. But the Charter lays down expressly that measures taken in the exercise of the right of self-defence must be immediately reported to the Security Council and that they do not affect the general responsibility of the Council for the maintenance and the restoration of peace.²

§ 131. After the Peace of Tilsit of 1807, the British Government³ was cognisant of a secret article of this treaty, according to which Denmark should, in certain circumstances, be coerced into declaring war against Great Britain,

Case of
the
Danish
Fleet
(1807).

if, through a sudden rise of the upper part of the river, the territory of the upper State be dangerously flooded, and if there be not sufficient time to approach the local authorities, it would be an excusable act on the part of the upper State to send some of its own officials into the lower State to open the lock.

¹ See vol. ii. § 52m, on the question of self-defence, and the literature there cited. As will be seen there, the question is of very great importance in connection with the General Treaty for the Renunciation of War. The view stated in the text above differs substantially from that expressed in

previous editions. See also *Dinh in RG* 52 (1948), pp. 223-254.

² Article 51.

³ This account follows Hall's (§ 85) summary of the facts. See also Alison, *History of Europe*, etc., ed. 1849, viii. pp. 246-267; Holland Rose, *Napoleonic Studies* (1904), pp. 133-152; and the same writer's paper in the *Transactions of the Royal Historical Society*, New Ser., 20 (1906), pp. 61-77; and in *Cambridge History of British Foreign Policy*, i. (1922), pp. 361-364; Reddaway in *Baltic Countries* (published by the Baltic Institute), May, 1936; Kularud in *A J.*, 32 (1938), pp. 280-311.

and France should be enabled to seize the Danish fleet so as to make use of it against Great Britain. This plan, if carried out, would have endangered the position of Great Britain, who was then waging war against France. As Denmark was not capable of defending herself against an attack of the French army in North Germany under Bernadotte and Davoust, who had orders to invade Denmark, the British Government requested Denmark to deliver up her fleet to the custody of Great Britain, and promised to restore it after the war. And at the same time the means of defence against French invasion and a guarantee of her whole possessions were offered to Denmark by England. Denmark, however, refused to comply with the British demands; whereupon the British considered that a case of necessity in self-defence had arisen, shelled Copenhagen, and seized the Danish fleet.¹

Case of
Amelia
Island
(1817).

§ 132. Another example is supplied by the case of Amelia Island. 'Amelia Island, at the mouth of St. Mary's River, and at that time in Spanish territory, was seized in 1817 by a band of buccaneers, under the direction of an adventurer named McGregor, who in the name of the insurgent colonies of Buenos Ayres and Venezuela preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels.'²

Case of
the
Caroline
(1837).

§ 133. In 1837, during the Canadian rebellion, several hundreds of insurgents got hold of Navy Island on the Canadian side of the River Niagara and chartered a vessel, the *Caroline*, to carry supplies from the port of Schlosser, on the American side of the river, to Navy Island, and from there to the insurgents on the mainland of Canada. The

¹ The action of Great Britain in this case, while condemned by most Continental writers, is approved by many British and American writers. See, however, Reddie, *Researches*, ii. pp. 37-41, who disapproves of it, as

also does Walker, *Science*, p. 138, and Holland Rose, *Cambridge History of British Foreign Policy*, i. (1922), pp. 361-364.

² See Wharton, i. § 50a; Moore, ii. § 216; and Hyde, i. § 66 (n.).

Canadian Government, informed of the imminent danger, on December 29, 1837, sent across the Niagara, to the port of Schlosser, a British force which obtained possession of the *Caroline*, seized her arms, set her on fire, and then sent her adrift down the falls of Niagara. During the attack on the *Caroline* two Americans were killed and several others were wounded. The United States complained of this British violation of her territorial supremacy; but Great Britain asserted that her act was necessary in self-preservation, since there was not sufficient time to prevent the imminent invasion of her territory through application to the United States Government. The latter admitted that the act of Great Britain would have been justified if there had really been necessity in self-defence, but denied that, in fact, such necessity existed at the time. Nevertheless, since Great Britain had apologised for the violation of American territorial supremacy, the United States Government did not insist upon further reparation.¹

§§ 133a and 133b. During the period 1916 to 1919 the American Expeditions into Mexico, 1916-1919. civil war in Mexico and the ensuing disorder necessitated on several occasions the despatch of expeditionary forces by the United States into Mexico for the purpose of protecting American citizens and their property and punishing violations of American sovereignty.²

§ 133c. During the night of August 1, 1914, after having declared war on Russia, but before her declaration of war upon France, Germany marched troops into neutralised Luxemburg and occupied the country.³ At seven o'clock

The German Invasion of Luxemburg and Belgium (1914).

¹ See Wharton, i. § 54c; Moore, ii. § 217; Hyde, i. §§ 66, 248 (n.); and Hall, § 84. With the case of the *Caroline* is connected the case of *McLeod*, which will be discussed below, § 446. As to both cases see Jennings in *A.J.*, 32 (1939), pp. 82-99; Hall, § 86; Martens, i. § 73; Hyde, i. § 68, and others quote also the case of the *Virginus* (1873) as an example of necessity of self-preservation, but it seems that the Spanish Government did not plead self-preservation but piracy as justification for the capture of the vessel (see Moore, ii. § 309, pp. 895-903). That a vessel sailing under another State's flag can never-

theless be seized on the high seas in case she is sailing to a port of the capturing State for the purpose of an invasion or bringing material help to insurgents, there is no doubt. No better case of necessity of self-preservation could be given since the danger is imminent and can be frustrated only by the capture of the vessel.

² See Hyde, i. § 67; and *A.J.*, 10 (1916), pp. 337 and 890; 11 (1917), pp. 399-406; 13 (1919), p. 557. For the landing of British troops in China in 1927 for the protection of British subjects see *L.N. Monthly Summary* (7 March 1927), p. 48.

³ See above, § 100.

on the following evening, the German Minister at Brussels presented an ultimatum demanding from Belgium the right of passage for German troops through her territory, and threatening, in the event of refusal, to treat Belgium as an enemy. As Belgium refused to accede to the demands of Germany, German troops invaded Belgium on August 4, and, in spite of the heroic resistance of the Belgian army, almost the whole of Belgium was conquered, and remained under German occupation throughout the First World War. Germany justified this violation of the permanent neutrality of Luxemburg, as well as of Belgium, by pointing out that she was threatened by a Russian attack on one of her frontiers and by a French attack on another, and that necessity in self-preservation compelled her armies to break through Luxemburg and Belgium for the purpose of aiming a decisive blow at France. Outside Germany, it was almost universally recognised that this plea of necessity in self-preservation was a mere pretext, and was not justified by the facts of the case. Germany did not act in self-preservation at all, because she was not attacked and no attack was threatening. It was Germany who declared war upon Russia and France, and she attacked France through Belgium because she thought in this way she would be able quickly to defeat France and then to turn all her might against Russia.¹

The
Japanese
Invasion
of Man-
churia
(1931).

§ 133d. In the course of the Manchurian dispute between China and Japan in 1931 and 1932 (see vol. ii. § 52aa) the latter invoked the principle of self-defence as justifying her action in beginning military operations against China. But the Assembly of the League fully endorsed the findings of the Commission of Enquiry to the effect that the Japanese action could not be regarded as a measure of legitimate self-defence, although it did not 'exclude the hypothesis that the officers on the spot may have thought they were acting in self-defence.'² Japan challenged the competence of the League to pronounce on the matter and claimed the right

¹ See literature cited above, § 99. For the Japanese occupation of Chinese territory and the Allied occupation of Greek territory during the First World War see Garner, ii.

§§ 460-473; and as to the latter, below, § 135, and vol. ii. § 323.

² Report of the Commission, League Doc. C. 663. M 320 1932 VII.

to remain judge of the legality of her action said to have been taken in self-defence.¹ This was a claim which could not be admitted without reducing to an absurdity the notion of self-defence and the relevant international obligations of Japan.²

§ 133e. In June 1940, after Germany had invaded France and after the French Government signed an armistice with Germany, a substantial part of the French fleet took refuge in the French North African port of Oran. On July 3 a British emissary presented the French naval commander with the demand that, in order to prevent the French ships from falling into the hands of Germany, these ships should : (a) either sail under British control to a British port and be restored to France after the War ; (b) or sail to some distant French port, such as one in the West Indies or Martinique to be demilitarised ; (c) or be sunk by the French forces. After that demand had been rejected, British naval and air forces opened an attack and sank or damaged most of the French ships at Oran and its adjacent port. In the circumstances, the British action must be regarded as covered by the rigid legal requirements of action taken in self-preservation.³

§ 133f. In the course of the Second World War the United States, while remaining neutral, adopted measures which, on the face of it, could not be regarded as consistent with the law of neutrality as laid down in the Hague Conventions. It has been submitted elsewhere⁴ that these measures, including the transfer of destroyers to Great Britain in 1940 and the Lend-Lease Act of 1941, were in accordance with the changed position of neutrality consequent upon the General Treaty for the Renunciation of War. In addition the United States relied, solemnly and repeatedly, on the right of self-preservation as justifying in law the unprecedented departure from the established rules of neutrality. That

Sinking of the French Fleet at Oran, 1940.

Modification of Neutrality Obligations by the United States during the Second World War.

¹ *Documents*, 1932, p. 345.

² See Briery, pp. 253-259 ; Lauterpacht, *The Function of Law*, pp. 177-182 ; Wright, *op. cit.*, at p. 243 ; Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 552-568 ; and the literature referred to in vol. ii. § 520a.

³ For a detailed explanation of the motives of the British action see the statement of the Prime Minister in the House of Commons on July 4, 1940.

⁴ See below, vol. ii. § 292aa.

appeal to the plea of self-preservation received a most persuasive addition of strength through the fact that, in the eyes of practically all the peoples of the world, the national cause of the United States, vitally menaced by the ostensible will for world domination on the part of Germany, became identified with the survival of the Law of Nations as an effective code of international conduct.¹

VI

INTERVENTION

Vattel, ii. §§ 54-62 Hall, §§ 88-95—Westlake, i. pp. 317-321—Lawrence, i. pp. 102-124—Walker § 7 Wharton, i. §§ 45-72 Moore vi. §§ 897-926 Wheaton, §§ 63-71 Hyde, i. §§ 60-97 Fenwick, pp. 240-249 Bluntschli, §§ 474-480—Heffter, §§ 44-46—Geffcken in *Holtzendorff*, iv. pp. 131-168 Fauchille, §§ 300-333—Mérignac, i. pp. 284-310 Pradier-Fodéré, i. §§ 110-206 Fiore, i. §§ 561-608, and *Code*, §§ 548-562 Martens, i. § 76, 77—Gemina, pp. 117-125—De Loutet, i. pp. 250-258 Sibert, pp. 341-374—Suarez, i. §§ 64-73—Bustamante, pp. 312-343 Keith's Wheaton, pp. 154-203 Stowell, pp. 60-228 Scelle, ii. pp. 30-34—Bernard, *On the Principle of Non-intervention* (1860)—Hautefeuille, *Le principe de non-intervention* (1863)—Stapleton, *Intervention and Non-intervention, or the Foreign Policy of Great Britain from 1790 to 1865* (1866)—Geffcken, *Das Recht der Intervention* (1887)—Kebedgy, *De l'intervention* (1890)—Floeker, *De l'intervention, en droit international* (1896)—Drago, *Cobio coercitivo de deudas publicas* (1906)—Moulin, *La doctrine de Drago* (1908)—Wachter, *Die völkerrechtliche Intervention als Mittel der Selbsthilfe* (1911)—Cavaglieri, *L'intervento nella sua definizione giuridica* (1913)—the same, *Nuovi studi sull'intervento* (1928)—Schoenborn, *Die Besetzung von Territorien* (1914)—Hodges, *The Doctrine of Intervention* (1915)—Stowell, *Intervention in International Law* (1921) (containing an admirable bibliography)—Redslob, *Histoire des grands principes du droit des gens* (1923), *passim*—Brown, *International Society* (1923), pp. 90-100—Redslob, *Les principes du droit des gens moderne* (1937), pp. 113-148—Mosler, *Die Intervention im Völkerrecht* (1937)—Zanini, *Dell'Intervento* (1950)—Dupuis in *Hague Recueil*, 1924, i. pp. 369-406 Strisower in *Strupp, Wort.*, i. pp. 581-591—Winsfield in *B.Y.*, 1922-1923, pp. 130-149, and *ibid.*, 1924, pp. 149-162—Hettlage in *Z.J.*, 37 (1927), pp. 11-88—Guerrero in *R.G.*, 36 (1929), pp. 40-51—Potter in *Hague Recueil*, vol. 32 (1930) (ii.), pp. 611-685—Seferiadakis, *ibid.*, vol. 34 (1930) (iv.), pp. 386-400—Yepes, *ibid.*, vol. 47 (1934) (i.), pp. 51-90—Strupp, *ibid.*, pp. 513-521—Kaufmann, *ibid.*, vol. 55 (1935) (iv.), pp. 589-607—Ellis in *A.S. Proceedings*, 1933, pp. 78-88—Fenwick in *A.J.*, 39 (1945), pp. 645-663—Preuss in *Hague Recueil*, 74 (1949) (i.), pp. 605-619.

¹ See below, vol. ii. § 202aa.

§ 134. Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Such intervention can take place by right or without a right, but it always concerns the external independence or the territorial or personal supremacy of the State concerned, and the whole matter is therefore of great importance for the international position of States. That intervention is, as a rule, forbidden by International Law, which protects the international personality of the States, there is no doubt. On the other hand, there is just as little doubt that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take place by right, are nevertheless permitted by International Law.

Conception and Character of Intervention.

Intervention can take place in the external as well as in the internal affairs of a State. It concerns, in the first place, the external independence, and in the second either the territorial or the personal supremacy. But it must be emphasised that intervention proper is always *dictatorial* interference, not interference pure and simple.¹ Therefore intervention must neither be confused with good offices, nor with mediation,² nor with intercession, nor with co-operation, because none of these imply *dictatorial* interference. Thus, for example, in 1826, at the request of the Portuguese Government, Great Britain sent troops to Portugal in order to assist that Government against a threatening revolution on the part of the followers of Don Miguel; and in 1849, at the request of Austria, Russia sent troops into Hungary to assist Austria in suppressing a Hungarian revolt.³

¹ It also seems desirable to exclude from the category of intervention the toleration by a State upon its territory of the acts of private persons which endanger the safety of other States, though some writers do not make this distinction; see Redeloh, *op. cit.*, at p. 511, and Hettlage, *op. cit.*, at p. 25. See also Gemma in *Hague Review*, 1924, iii. p. 365, and Fauchille, § 300 (3). And see above, § 127a.

² See below, vol. ii. § 9.

³ See *A.J.*, Suppl., 22 (1928), pp. 118-124, on the request, in May

1927, by the Government of Nicaragua to the Government of the United States for assistance and good offices in order to ensure free and impartial elections in Nicaragua. As to the so-called Non-intervention Agreement of August 1936, between various European States in connection with the Civil War in Spain, see Lapradelle in *New Commonwealth Quarterly*, ii. (1936), pp. 285-308, and in *R.I. (Paris)*, 18 (1936), pp. 153 et seq.; Dean in *Geneva Special Studies*, vii. No. 8 (1936); Jessup in *Foreign*

Interven-
tion by
Right.

§ 135. It is apparent that such interventions as take place by right must be distinguished from others. Wherever there is no right of intervention, an intervention violates either the external independence or the territorial or personal supremacy. But if an intervention takes place by right, it never constitutes such a violation, because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is in duty bound to submit to the intervention. Now a State may have a right of intervention against another State, mainly for seven reasons :

(1) A State which holds a protectorate has a right to intervene in all the external affairs of the protected State.

(2) If an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in case the former deals with that affair unilaterally

The events of 1878 provide an illustrative example. Russia had concluded the preliminary Peace of San Stefano with defeated Turkey ; Great Britain protested because the

Affairs (U.S.A.), January 1937 ; Garner in *A.J.*, 31 (1937), pp. 66-73 ; Smith in *B.Y.*, 18 (1937), pp. 17-31 ; Scelle in *Friedenswarte*, 37 (1937), pp. 65-70 ; McNair in *L.Q.R.*, 53 (1937) ; Padelford in *A.J.*, 31 (1937), pp. 226-249. That Agreement, and the subsequent arrangements and agreements, while of importance as instances of the possibilities and limitations of *ad hoc* international co-operation in political matters affecting the peace of the world, cannot be easily brought within the accepted principles of International Law in the matter of intervention. Inasmuch as Italy and Germany undertook not to supply the rebellious forces with munitions of war, these agreements consisted in an undertaking on the part of certain Powers to refrain from committing an international illegality in consideration of the promise of other Powers to refrain from acting in a manner in which they were entitled—and, according to some, legally bound—to act. On the regulation of exports of munitions, in particular in connection with foreign civil wars, see Atwater, *American Regulation of Arms*

Exports (1941). It is doubtful whether the interference of various European States which sent or encouraged the sending of troops and munitions in support of the parties to the Spanish Civil War in the years 1936-1939 constituted intervention in the accepted sense. There is, however, no doubt that interference of that kind which amounts to denial of the right of every independent State to decide its form of government and political system is contrary to International Law. See, on intervention in the Spanish Civil War generally, Toynbee, *Survey*, 1937 (ii.) ; Vedolovato, *Il non intervento in Spagna* (1938) ; Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939) ; Rousseau in *K.J.*, 3rd ser., vol. 19 (1938), pp. 217-293, 473-549, 700-775, and vol. 20 (1939), pp. 114-149 ; Scelle in *R.G.*, 45 (1939), pp. 265-274, 473-540, and 46 (1939), pp. 197-228 ; Raestad, *ibid.*, pp. 613-637, 809-826. See *A.J.*, 26 (1931), p. 125, for the pronouncement by the United States Secretary of State on October 23, 1930, in connection with the revolution in Brazil.

conditions of this peace were inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, and Russia agreed to the meeting of the Congress of Berlin for the purpose of arranging matters.¹

(3) If a State which is restricted by an international treaty in its external independence or its territorial or personal supremacy does not comply with the restrictions concerned, the other party or parties have a right to intervene. Thus the United States of America, in 1906, intervened in Cuba in conformity with Article 3 of the Treaty of Havana² of 1903 (now virtually abrogated³) for the purpose of re-establishing order, and in 1904 in Panama in conformity with Article 7 of the Treaty of 1903⁴ (reiterated in

¹ Another example is provided by the Bryan Chamorro Treaty between the United States and Nicaragua of August 5, 1914, granting to the former an exclusive option to construct another interoceanic canal across Nicaraguan territory, and a naval base in the Gulf of Fonseca, and ceding to the former Great Corn Island and Little Corn Island in the Caribbean Sea. The Republics of Costa Rica, San Salvador, and Honduras protested against this Treaty on the ground that it violated treaty rights previously acquired by them. Costa Rica and San Salvador brought an action against Nicaragua before the Central American Court of Justice for the purpose of vindicating their rights, and the Court, on September 30, 1916, and March 9, 1917, pronounced judgment against Nicaragua, but, the United States of America not being a party to the litigation, the Court declared its inability to declare the Treaty null and void. See *A.J.*, 10 (1916), pp. 344-351, and 11 (1917), pp. 156-164, 181-229, 674-730. Hyde, *l. c.* § 23; and below p. 708, n. 4.

² See Martens, *N.R.G.*, 2nd ser., 32, p. 79; Robertson, *Hispanic American Relations with the United States* (1923), pp. 113, 114.

³ By the Treaty of May 20, 1934: see *A.J.*, 28 (1934), Suppl., p. 97; Woolsey, *ibid.*, 28 (1934), pp. 530-534. See also Torriente in *Foreign Affairs* (U.S.A.), 8 (1930), pp. 364-376; Toynbee, *Survey*, 1933, pp. 361-

393; *Documents*, 1934, pp. 443-447; *U.S. Treaty Series*, No. 866 (1934); Lliteras in *International Conciliation* (Pamphlet No. 296, January 1934).

⁴ Which provides that 'the same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon, and the territories and harbours adjacent thereto, in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.' See Martens, *N.R.G.*, 2nd ser., 31 (1905), p. 509, and see Jones, *The Caribbean Since 1900* (1936), pp. 339-352. Section 14 of the United States Act of March 24, 1934, providing for the independence of the Philippine Islands lays down that, during an interim period of ten years, the United States may intervene for the maintenance of the Government and for the protection of life and property and for other reasons: see Fisher in *American Bar Association Journal*, 19 (1933), p. 465; Jessup in *A.J.*, 29 (1935), p. 84. And see above, p. 194. On the intervention of the United States in Nicaragua in the years 1926-1930 see Toynbee, *Survey*, 1927, pp. 479-516, and 1930, pp. 397-406 (with a bibliography on p. 397). As to the intervention in Haiti in 1929 and 1930 see Toynbee, *Survey*, 1930, pp. 407-418 (with a bibliography on p. 407), and 1933, pp. 352-361. See also Millsap in *Foreign Affairs* (U.S.A.), 7 (1929), pp. 556-570, and

Article 10 of the Treaty of 1936).¹ Great Britain, France, and Russia, the guarantors of the independence of Greece, intervened in Greece during the First World War in 1916 and 1917 for the purpose of re-establishing constitutional government in conformity with Article 3 of the Treaty of London of 1863.² King Constantine had to abdicate, and his second son, Alexander, was installed as King of the Hellenes.

(4) If a State in time of peace or war violates such rules of the Law of Nations as are universally recognised by custom or are laid down in law-making treaties, other States have a right to intervene and to make the delinquent submit to the rules concerned. If, for instance, a State sought to extend its jurisdiction over the merchantmen of another State on the high seas, not only would this be an affair between the two States concerned, but all other States would have a right to intervene because the freedom of the open sea is a universally recognised principle. Or if a State which is a party to the Hague Regulations concerning Land Warfare were to violate one of these regulations, all the other signatory Powers would have a right to intervene.

Calcott, *The Caribbean Policy of the United States* (1942). And see the Exchange of Notes of July 4, 1947, between Haiti and the United States in which the latter agreed to the flotation of an internal loan in Haiti of \$10,000,000 (*Bulletin of State Department*, 17 (1947), p. 149). Such consent was required by the Agreement of 1941 between the two countries which provided that the public debt of Haiti should not be increased except by previous agreement between the two Governments. See also the Agreement of June 20, 1947, between the United States and Greece providing, at the request of the latter, for financial, material and technical assistance by the United States (*Bulletin of State Department*, 16 (1947), p. 1300). The Agreement provided for the sending of an American Mission to Greece to determine the details of the assistance to be given. The Agreement was to terminate, *inter alia*, at the request of the Government of Greece 'representing a majority of the Greek people' or if the continuation of the assistance is found un-

desirable or unnecessary by the General Assembly or the Security Council (the United States undertaking in the latter case to waive the exercise 'of any veto'). See also *ibid.*, 17 (1947), p. 144, for a similar Agreement, signed on July 12, 1947, between the United States and Turkey. And see *ibid.*, 16 (1947), pp. 827-900, for a collection of documents on the subject.

¹ Which provides that the two Governments may, subject to consultation, take the necessary measures of prevention and defence in case of an international conflagration or the existence of a threat of aggression endangering the security of Panama or the neutrality or security of the Panama Canal: *A.J.*, 34 (1940), Suppl., p. 147.

² Which provides that 'Greece, under the sovereignty of Prince William of Denmark and the guarantee of the three Courts, forms a monarchical, independent, and constitutional State.' See Martens, *N.R.G.*, 17, part ii, p. 79; and Ion in *A.J.*, 12 (1918), pp. 562-588.

(5) A State that has guaranteed by treaty the form of government of another State, or the reign of a certain dynasty over the same, has a right ¹ to intervene in case of a change in the form of government or of the dynasty, provided that the treaty of guarantee was concluded between the respective States and not between their monarchs personally.

(6) The right of protection ² over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned.³

(7) Finally, the Covenant of the League of Nations provided, as does the Charter of the United Nations, for the

¹ But this is not generally recognised; see, for instance, Hall, § 93, who denies the existence of such a right. It is difficult to see why a State should not be able to undertake the obligation to retain a certain form of government or dynasty. That historical events can justify such State in considering itself no longer bound by such treaty according to the principle *rebus sic stantibus* (see below, § 539) is another matter.

² See below, § 319.

³ The so-called *Drago Doctrine*, which asserts the rule that intervention is not allowed for the purpose of making a State pay its public debts, is unfounded, and has not received general recognition, although Argentina and some other South American States tried to establish this rule at the second Hague Peace Conference of 1907. But this Conference adopted, on the initiative of the United States of America, a 'Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.' According to Article I of this Convention, the contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders the settle-

ment of the *compromis* impossible, or, after the arbitration, fails to submit to the award. It must be emphasised that the stipulations of this Convention concern the recovery of all contract debts, whether or not they arise from public loans. The Drago Doctrine originates from Louis M. Drago, sometime Foreign Secretary of the Republic of Argentina. See Drago, *Cobro coercitivo de deudas publicas* (1906); Barclay, *Problems of International Practice*, etc. (1907), pp. 115-122; Moulin, *La Doctrine de Drago* (1908); Vivot, *La Doctrina Drago* (1911); Borchard, §§ 119-126, 371-375 and pp. 861-864 and the same *State Insolvency and Foreign Bondholders* 2 vols. (1951); Higgins, *The Hague Peace Conferences*, etc. (1909), pp. 184-197; Scott, *The Hague Peace Conferences* (1909), i. pp. 415-422; and in *A.J.*, 2 (1908), pp. 78-94; Calvo in *R.I.*, 2nd ser., 5 (1903), pp. 597-623; Drago in *R.G.*, 14 (1907), pp. 251-287; Moulin in *R.G.*, 14 (1907), pp. 417-473; Hershey in *A.J.*, 1 (1907), pp. 26-45; Drago in *A.J.*, 1 (1907), pp. 692-726; Spielhagen in *Z.I.*, 25 (1916), pp. 509-565; Dupuis, *Le droit des gens et les rapports des grandes puissances* (1921), p. 270-282; Fischer Williams in *Bibliotheca Visseriana*, ii. (1924) pp. 1-55, and *Chapters*, pp. 257-324; Scelle, ii. pp. 121-128. With regard to State Responsibility for the Non-payment of Contract Debts and Damages see below, § 156a.

collective intervention of the member-States for the purpose of restraining States which disturb the peace of the world by resorting to war or force generally or to threats of force in breach of the provisions of the Covenant.¹ Moreover, the Covenant contemplated collective intervention in certain events against States which were not members of the League.² The Charter of the United Nations imposes upon the Organisation the duty of ensuring that States which are not members shall act in accordance with its principles so far as this is necessary for the maintenance of international peace and security.³

Admissi-
bility of
Interven-
tion in
default of
Right.

§ 136. In contradistinction to intervention by right there are other kinds of intervention which cannot be considered illegal, although they violate the independence or the territorial or personal supremacy of the State concerned, and although such State has by no means a legal duty to submit patiently and suffer the intervention. Of such intervention in default of right there are two kinds, namely, such as is necessary in self-preservation and such as is necessary in the interest of the balance of power.

(1) As regards intervention for the purpose of self-preservation, it is obvious that, if any necessary violation — committed in self-defence — of the international personality of other States is, as shown above (§ 130), excused, such violation must also be excused as is involved in intervention. The question whether an act of self-help amounts to action in self-preservation is a matter of degree. In the *Corfu Channel* case, decided in 1949 between the United Kingdom and Albania, the International Court of Justice held that the action of the former in sending naval ships into Albanian waters to sweep them, after the efforts to secure Albanian co-operation had failed, constituted a violation of Albanian sovereignty, apparently in violation of International Law. The minefield had previously caused damage to two British destroyers and the Court held Albania

¹ See below, vol. ii. §§ 255-256, 525-526, 66a. And see below, § 168b.

² Especially Articles 10, 11, and 17. See Fauchille, § 333 (1), and

Schücking und Wehberg, pp. 168, 169. And see Bavaï, *L'interprétation de l'article 17* (1931).

³ Article 2 (6).

responsible for the damage caused.¹ However, the Court rejected the contention of the United Kingdom that her action was justified as necessary both in the interests of safety of navigation and in order to secure evidence which otherwise might be lost or destroyed, for the purpose of any future proceedings against Albania. Notwithstanding the somewhat general language used by the Court,² the admissibility of intervention in clearly specified cases and in a manner not inconsistent with the Charter of the United Nations, must still be regarded as a rule of International Law.

(2) As regards intervention in the interest of the balance of power, it was, in the absence of an international organisation of States such as the League of Nations or the United Nations, regarded as admissible. Since the Westphalian Peace of 1648 the principle of the balance of power played a preponderant part in the history of Europe. It found express recognition in 1713 in the Treaty of Peace of Utrecht, it was the guiding star at the Vienna Congress in 1815,³ when the map of Europe was rearranged, at the Congress of Paris in 1856, the Conference of London in 1867, the Congress of Berlin in 1878, and at the end of the Balkan War in 1913. Most of the interventions exercised in the Balkan Peninsula must, in so far as they are not based on treaty rights, be classified as interventions in the interest of the balance of power. Examples of this are supplied by collective interventions exercised by the Powers in 1880 for the purpose of preventing the outbreak of war between Greece and Turkey, in 1897 during the war between Greece and Turkey with regard to the island of Crete, and in 1913,

¹ See above § 127.

² The Court said: 'The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past, given rise to most serious abuses and such as cannot whatever be the present defects in international organisation, find a place in International Law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the

administration of international justice.' (*I.C.J. Reports*, 1949, p. 35). It is not clear whether the 'alleged right of intervention' refers to intervention generally or to intervention 'in the particular form' adopted by the United Kingdom. The Court recognised that the attitude of Albania constituted an extenuating factor in the case.

³ See Elbe in *Z.o.L.*, 4 (1934), pp. 226-260 (a valuable study). See also generally Quincy Wright in *A.J.*, 37 (1943), pp. 97-103 and the same, *The Study of War* (1942), ii. pp. 743-766.

towards the end of the Balkan War, for the purpose of establishing an independent State of Albania.¹

Humanitarian Intervention.

§ 137. There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals² according to discretion. But there is a substantial body of opinion³ and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible. Great Britain, France, and Russia intervened in

¹ *Financial Intervention and Control*.—Intervention, or something very like it, has sometimes taken place for the purpose of rehabilitating the financial situation of a State which is insolvent or suffering from serious embarrassment. One or more States whose nationals are creditors have stepped in and reorganised the finances of the debtor State, sometimes appointing collectors of customs revenues and other officers. Action of this nature has not infrequently led to prolonged military occupation or to a permanent condition of dependence of the debtor State. See, generally, Lippert, *Das internationale Finanzrecht* (1912); Manes, *Staatsbankrotte* (1922); Merkl in *Z.S.R.*, 3 (1923), pp. 590-627; Andreades in *Hague Recueil*, 1924 (iv.), pp. 5-105; Fischer Williams, *ibid.*, pp. 113-154, and *Chapters*, pp. 324-419; Jèze, *Hague Recueil*, 1925 (ii.), pp. 155-234; Borchard in *A.S. Proceedings*, 1932, pp. 134-170; Winkler, *Foreign Bonds: A Study of Defaults and Repudiations of Government Obligations* (1933); Hodson in Toynbee, *Survey*, 1934, pp. 43-94, on some State defaults in the post-war period. Among States which have been the subject of intervention or similar measures on financial grounds may be mentioned Egypt (see *Das internationale Recht der ägyptischen Staatsschuld* (1891); Murat, *Le contrôle international sur les finances de l'Égypte, de la Grèce, et de la Turquie* (1899)), Greece, Turkey (see Murat, *op. cit.*), and the Dominican Republic and Haiti (see Hyde, i. §§ 21,

22); Beman, *Intervention in Latin America* (1928); Beauvoir, *Le contrôle financier du gouvernement des États-Unis d'Amérique sur la République d'Haiti* (1930); Millsbaugh, *Haiti under American Control, 1915-1930* (1931); Jones, *The Caribbean since 1900* (1936); Montague, *Haiti and the United States, 1714-1938* (1940).

The League of Nations, through its Financial Committee, did important work in assisting the financial reconstruction and rehabilitation of States whose finances had been plunged into chaos as the result of the First World War, or who for other reasons would have been unable to raise loans upon satisfactory conditions without the support of a powerful external authority. For details and literature on the subject see the 7th edition of this volume, p. 279, n. As to the corresponding agencies and agreements after the Second World War see Appendix, pp. 1000-1010.

² See below, § 292.

³ See, e.g., Grotius, ii. 20, 36; Vattel, ii. 4, 56; Westlake, i. pp. 319, 320. See also Stowell, pp. 51-194 and in *A.J.*, 30 (1936), pp. 102-106; Fauchille, i. (1.), pp. 510-512; Martens, ii. pp. 109, 110; Bluntachli, p. 270; Janovsky and Flügen, *International Aspects of German Racial Policies* (1937), pp. 1-43; Rougier in *R.G.*, 17 (1910), pp. 448-466; Straus in *A.S. Proceedings*, 1912, pp. 45-54; Aronau in *Revue Internationale de droit pénal*, 19 (1948), pp. 173-244

1827 in the struggle between revolutionary Greece and Turkey when public opinion reacted with horror to the cruelties committed during the struggle. Intervention was often resorted to in order to put a stop to the persecution of Christians in Turkey. Undoubtedly the practice of intervention had not been as frequent as occasion seems to have demanded. The disinclination to take the responsibility for an international conflagration likely to follow upon such intervention or the consideration of the interests of the persecuted likely to suffer rather than to benefit from intervention unless fully backed by force,¹ have been to some extent responsible for the relative infrequency of humanitarian intervention. The fact that, when resorted to by individual States, it may be—and has been—abused for selfish purposes tended to weaken its standing as a rule of International Law. That objection does not apply to collective intervention.² The Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation,³ marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society. This is so although under the Charter as adopted in 1945 the degree of enforceability of fundamental human rights is still rudimentary and although the Charter itself expressly rules out intervention in matters which are essentially within the domestic jurisdiction of the State.⁴

✓ § 138. The *de facto* political character of much of the subject of intervention becomes clearly apparent through the so-called Monroe Doctrine⁵ of the United States of America. The
Monroe
Doctrine.

¹ See Jessup in *A.J.*, 32 (1938), pp. 116-119.

² See below, § 140b. But it must be noted that, possibly, to the extent to which 'human rights and fundamental freedoms' have become a persistent feature, partaking of the character of a legal obligation, of the Charter (see below, § 340f) they may have ceased to be a matter which is essentially within the domestic jurisdiction of States.

³ See below, § 163a.

⁴ See below, § 165f.

⁵ Wharton, § 57; Dana's Note, No. 36, to Wheaton, pp. 97-112; Hyde, 1, §§ 53-97; Fawcett, §§ 313-313 (20); Tucker, *The Monroe Doctrine* (1885); Moore, *The Monroe Doctrine* (1903) and *Digest*, 6, §§ 927-938; Mérygnac, *La Doctrine de Monroe à la fin du XIX^e Siècle* (1896); Beaumarchais, *La Doctrine de Monroe* (1898); Reddaway, *The Monroe Doctrine* (1898); Pétin, *Les États-Unis et la Doctrine de Monroe* (1900); Hoeb-

This doctrine, at its first appearance, was indirectly a product of the policy of intervention in the interest of legitimacy which the Holy Alliance pursued in the beginning of the nineteenth century after the downfall of Napoleon. The Powers of this Alliance were inclined to extend their policy of intervention to America, and to assist Spain in regaining her hold over the former Spanish colonies in South America, which had declared and maintained their independence, and which were recognised as independent sovereign States by the United States of America. To meet and to check the imminent danger, President James Monroe delivered his celebrated Message to Congress on December 2, 1823. This Message contains three quite different, but nevertheless equally important, declarations.

(1) In connection with the unsettled boundary lines in the north-west of the American continent, and with special reference to the challenging Russian ukase of September 28, 1821, the Message declared 'that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European Power.'

erlin, in *Z.V.* 7 (1913), pp. 11-38; Kraus, *Die Monroedoktrin* (1913); Bartlett in the *Law Magazine and Review*, 39 (1914), pp. 385-427; Zeballos in *R.G.*, 21 (1914), pp. 297-339; Root and Chandler in *A.J.*, 8 (1914), pp. 427-442 and 515-519; Hull, *The Monroe Doctrine* (1915); *A.S. Proceedings*, 8 (1914), pp. 6-230; Armstrong in *A.J.*, 10 (1916), pp. 77-103; Hart (A. B.), *The Monroe Doctrine* (1915) (most useful on account of its bibliography); Tower in *A.J.*, 14 (1920), pp. 1-25; Brown, *ibid.*, pp. 207-210; Hall, *The Monroe Doctrine and the Great War* (1920); Elliot in *International Law Association's Thirtieth Report*, vol. i. (1921), pp. 74-112; Cresson, *The Holy Alliance: The European Background of the Monroe Doctrine* (1922); Hughes in *A.J.*, 17 (1923), pp. 611-628; Thomas, *One Hundred Years of the Monroe Doctrine* (1923); Cleland, same title (1923); Robertson, *Hispanic-American Relations with the United States* (1923), pp. 101-142; Alvarez, *The Monroe*

Doctrine (1924); Pearce Higgins in *B.Y.*, 1924, pp. 103-118; Planas-Sunrez in *Hague Recueil*, 1924 (iv.), pp. 271-366; Temperley, *Foreign Policy of Canning* (1925), ch. v.; Perkins, *The Monroe Doctrine, 1823-1826* (1927), *The Monroe Doctrine, 1826-1867* (1932), *The Monroe Doctrine, 1867-1907* (1937); Montluc in *R.I. (Geneva)*, 6 (1928), pp. 22-42; Trolles, *Doctrina de Monroe* (1931), and in *Hague Recueil*, vol. 32 (1930) (ii.), pp. 397-602; Baty in *R.I.*, 3rd ser., 9 (1928), pp. 157-172; Barratt in *Grotius Society*, 14 (1928), pp. 1-27; Garner in *Political Science Quarterly*, 45 (1930), pp. 231-258; Bailey, *ibid.*, pp. 220-239; Bellegarde in *R.I. (Geneva)*, 8 (1930), pp. 119-127; Whitton in *R.G.*, 40 (1933), pp. 5-44, 140-180, 273-325; De la Barra in *R.I. (Paris)*, 17 (1936), pp. 311-321; Yepes in *R.I.F.*, 3 (1937), pp. 143-168. And see Phillips Bradley, *A Select Bibliography of the Monroe Doctrine, 1919-1929* (1929).

This declaration was never recognised by the European Powers, and Great Britain and Russia protested expressly against it. In fact, however, no occupation of American territory has since then taken place on the part of a European State.

(2) The Message, in continuance of the policy recommended by President Washington in his farewell address in 1796, then states that. 'In the wars of the European Powers, in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so. . . .'

(3) In regard to the contemplated intervention of the Holy Alliance between Spain and the South American States, the Message declared that while the United States had not intervened, and never would intervene, in wars in Europe, they could not, on the other hand, in the interest of their own peace and happiness, allow the allied European Powers to extend their political system to any part of America, and try to intervene in the independence of the South American republics.¹

Since the time of President Monroe, the Monroe Doctrine has been gradually somewhat extended in so far as the United States claims a kind of political hegemony over all the States of the American continent. Whenever a conflict occurs between such an American State and a European Power, at any rate if it is likely to have territorial consequences on the American continent, the United States is ready to exercise intervention.² Through the Civil War her hands were to a certain extent bound in the sixties of the last century, and she could not prevent the occupation of Mexico by the French army, but she intervened in 1865. Again, she did not intervene in 1902 when Great Britain, Germany, and Italy took combined action against Venezuela, because she was cognisant of the fact that this action was intended merely to make Venezuela comply with her inter-

¹ Note also in President Monroe's message the germ of the doctrine of self-determination. See Temperley, *Foreign Policy of Canning* (1926), ch. v., citing Reddaway, *op. cit.*

² All the cases of intervention on the part of the United States in the interest of the Monroe Doctrine are discussed in the thorough work of Kraus, *Die Monroedoktrin* (1913), pp 82-267.

national duties. But she intervened in 1896 in the boundary conflict between Great Britain and Venezuela ¹ when Lord Salisbury had sent an ultimatum to Venezuela, and she retains the Monroe Doctrine as a matter of principle.²

Merits
of the
Monroe
Doctrine

§ 139. The importance of the Monroe Doctrine is largely of a political, not of a legal, character. Since the Law of Nations is a law between all the civilised States as equal members of the Family of Nations, the States of the American continent are subjects of the same international rights and duties as the European States. The European States are, in principle, free to acquire territory in America as elsewhere. The same applies to intervention on the part of European Powers in American ³ affairs. But it is evident that the Monroe Doctrine, as one of the guiding principles of the policy of the United States, is not only of the greatest political importance. While its claim to legal validity has never been admitted, it has not been actively opposed by the European Powers. It was given a quasi-legal status by Article 21 of the Covenant which lays down that it does not affect 'regional understandings like the Monroe doctrine.'⁴

¹ See Cleveland, *The Venezuelan Boundary Question* (1913); Hyde, I. pp. 143-147. For two instructive Opinions of Law Officers in this connection see McNair in *B.Y.*, 26 (1949) pp. 44-47.

² Not so much an extension as an extensive interpretation of the Monroe Doctrine took place in the so-called Magdalena Bay case in 1912 when the Senate adopted the following resolution: 'When any harbour or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or safety of the United States, the Government of the United States could not see, without grave concern, the possession of such harbour or other place by any corporation or association which had such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.'

The Magdalena Bay Company, an American company which owned a tract of land of over 400,000 acres,

including the Magdalena Bay in Mexico, intended to sell this land to a Japanese company, but, before carrying out its intention, communicated with the Department of State in Washington for the purpose of ascertaining whether there was any objection to the intended transaction. See Kraus, *op. cit.*, pp. 230-238.

³ Many American writers, however, assert that the Monroe Doctrine could be established as a rule of 'American' International Law. See, for instance, Alvarez in *R.G.*, 20 (1913), p. 60, and Anderson in *A.S. Proceedings*, 6 (1912), p. 81. Alvarez, *The Monroe Doctrine* (1924), p. 560, prints an address by President Wilson in which the President said: 'The Monroe Doctrine is not part of international law. The Monroe Doctrine has never been formally accepted by any international agreement. The Monroe Doctrine merely rests upon the statement of the United States that if certain things happen she will do certain things.'

⁴ See e.g. Kraus, *op. cit.*

The Monroe Doctrine owed its origin to the necessity of establishing and maintaining the independence of the South American States. But these States consider that, in its original formulation, it is a reflection upon their independence. As members of the League of Nations they often expressed opposition to it.¹ Some of them refused in 1928 to become a party to the General Treaty for the Renunciation of War on the ground that the United States in signing and ratifying it affirmed its compatibility with the traditional principles of the Monroe Doctrine.²

§ 140. It is possible that, with the growing strength of the Latin-American States, the Doctrine may be transformed from what was originally an unilateral policy of the United States into a common principle of all the American Republics. The Declaration of the Principles of Solidarity of America adopted at the Pan-American Conference at Lima on December 24, 1938, went in that direction. The parties to the Declaration affirmed their determination to maintain these principles 'against all foreign intervention or activity that may threaten them.'³ On June 15, 1940, the United States informed Germany and Italy that 'in accordance with its traditional policy relating to the Western Hemisphere, the United States would not recognise any transfer, and would not acquiesce in any attempt to transfer, any geographic region of the Western Hemisphere from one non-American power to another non-American power.'⁴

The
Develop-
ment
of the
Monroe
Doctrine.

¹ See below, § 167*no.*

² See Toynbee, *Survey*, 1928, pp. 37-44. And see the Report of the United States Senate Committee on Foreign Relations, January 14, 1929: *Documents*, 1928, p. 6.

For a Mexican suggestion, made in 1933, to generalise the Monroe Doctrine by raising it 'to the rank of an American doctrine,' see Jessup in *A.J.*, 29 (1935), pp. 105-109.

³ See Fenwick in *A.J.*, 33 (1939), pp. 257-268; Wilcox in *American Political Science Review*, 36 (1942), pp. 434-453. In the Declaration of Lima the American States proclaimed their common concern and their determination to make effective, by consultation and otherwise, their

solidarity in case the peace, security or territorial integrity of any American Republic should be threatened by foreign intervention or activity. This step in the direction of what may be regarded as an extension of the Monroe Doctrine was tempered by the qualification that the 'Governments of the American Republics will act independently in their individual capacity, recognising fully their juridical equality as sovereign States': *A.J.* 34 (1940), Suppl., p. 200.

⁴ *Bulletin of State Department*, June 22, 1940, p. 681. For a criticism of the tendency to assert, by reference to the Monroe Doctrine as distinguished from the more general right of self-defence, the interest of the

In a declaration of the Ministers of Foreign Affairs of the American Republics adopted at Habana in July 1940 it was stated that any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty, or the political independence of an American State shall be considered as an act of aggression against all the American States signatories to the declaration.¹ At the same time, in the Convention on the Provisional Administration of European Colonies and Possessions in America, the various American States declared, in language both strikingly approximating to and going beyond the Monroe Doctrine, that any transfer or attempted transfer of the sovereignty, possession, or any interest in or control over colonies of non-American States located in the Western Hemisphere 'would be regarded by the American Republics as being against American sentiments and principles and the rights of American States to maintain their security and political independence.'² This attitude was reaffirmed, in the form of a declaration on assistance and American solidarity, in the Act of Chapultepec of March 3, 1945, adopted by the Inter-American Conference on War and Peace.³ The Act, in anticipation of the forthcoming Charter of the United Nations, described the declaration in question as a regional arrangement not inconsistent with the purposes and the principles of the general organisation. The Act of Chapultepec was re-affirmed and its provisions rendered more effective in the Treaty of Rio de Janeiro of September 2, 1947.⁴ The Charter of the United Nations leaves room for regional arrangements or agencies for maintaining international peace and security in a manner compatible with the objects of the United Nations.⁵

United States in outlying parts of the Western Hemisphere like Greenland or Iceland see Jessup in *A.J.*, 34 (1940), pp. 709-711. On August 18, 1938, The President of the United States declared that 'the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other empire.' For comment on this passage and its bearing on the Monroe Doctrine see

Fenwick in *A.J.*, 32 (1938), pp. 782-785, and Laing, *ibid.*, pp. 793-796. See also Sebilleau, *Le Canada et la doctrine de Monroe* (1937).

¹ *The International Conference of American States, First Supplement, 1933-1940* (1940), p. 360f.

² *Ibid.*, p. 373.

³ *A.J.*, 39 (1945), Suppl., p. 108.

⁴ See below, § 570.

⁵ Article 52 (1). See below, § 570.

The Monroe Doctrine has been said to have found some imitation in the so-called British¹ and Japanese² Monroe Doctrines.

§ 140a. As a matter both of history and of principle the prohibition of intervention must be regarded primarily as a restriction which International Law imposes upon States for the protection of the independence of other members of the international community. For this reason the notion and the prohibition of intervention cannot accurately extend to collective action undertaken in the general interest of States or for the collective enforcement of International Law.³ This means that while prohibition of intervention is a

The
Limits of
Prohibition of
Intervention.

¹ See the British Note of May 19, 1928, addressed to the United States in connection with the proposed Treaty for the Renunciation of War. The relevant passage of that Note is as follows: 'There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests any disregard of which by a foreign Power they have declared that they would regard as an unfriendly act.' See Cmd. 3109, p. 25, and Cmd. 3153, p. 10; *Documents*, 1928, p. 5. The former declarations referred to in the Note are probably those of 1903 and 1907 relating to the Persian Gulf (cited by Lindley, pp. 73, 74) and of 1922 regarding Egypt (*ibid.*, p. 246).

² In the years following upon the invasion of Manchuria, Japan made a series of statements claiming a special position in China. In April 1934 the Japanese Government announced that they would oppose any attempt on the part of China to avail herself of the influence of any other

country in order to resist Japan, including 'any joint operations undertaken by foreign Powers even in the name of technical or financial assistance' as bound to acquire political significance. For the text of the statement see *Documents*, 1934, p. 472. The British Government declared that it could not admit the right of Japan alone to decide whether any particular action, such as provision of technical or financial assistance, constituted a danger to peace: House of Commons, April 30, 1934, cols. 13-14; *Documents*, 1934, p. 476. The United States Government refused to admit that any nation 'can, without the assent of the other nations concerned, rightfully endeavour to make exclusive its will in situations where there are involved the rights, the obligations, and the legitimate interests of other sovereign States': *Documents*, 1934, p. 477. And see *ibid.*, pp. 477-486, for the other relevant statements; Blakelock in *Foreign Affairs (U.S.A.)*, 11 (1933), pp. 671-681; Klévanaki, *Le 'monroïsme' japonais* (1935); Z.S.V., 4 (1934), pp. 596-608; Hyde in *A.J.*, 28 (1934), pp. 431-443; Long in *R.I. (Paris)*, 13 (1934), pp. 267-278; Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 623-654.

³ This point is perhaps not sufficiently appreciated by Loewenstein, *Political Reconstruction* (1916), pp. 14-85—a work otherwise notable for a valuable criticism of the traditional doctrine of non-intervention.

limitation upon States acting in their individual capacity in pursuance of their particular interests, it does not properly apply to remedial or preventive action undertaken by or on behalf of the organs of international society.¹ Accordingly, any apparent limitation of the right of intervention on the part of the latter must be interpreted restrictively in that sense. Although it is expressly laid down in the Charter of the United Nations that it does not authorise intervention with regard to matters which are essentially within the domestic jurisdiction of States,² the provision in question does not exclude action, short of dictatorial interference, undertaken with the view to implementing the purposes of the Charter. Thus with regard to the protection of human rights and freedoms—a prominent feature of the Charter—the prohibition of intervention does not preclude study, discussion, investigation and recommendation³ on the part of the various organs of the United Nations.⁴

¹ It will be noted that the successive affirmations, on the part of American States, of the prohibition of intervention refers to intervention by States acting, apparently, in their individual capacity. The Convention of 1933 on Rights and Duties of States signed at the Seventh International Conference of American States laid down that 'no State has the right to intervene in the internal and external affairs of another' (Article 8): Hudson, *Legislation*, vi. p. 623. In the Additional Protocol Relative to Non-Intervention, adopted in 1936 at the Inter-American Conference for the Maintenance of Peace, the Parties declared 'inadmissible the intervention of any of them . . . in the internal or external affairs of any other of the Parties' (Article 1): *International Conferences of American States, First Supplement, 1933-1940* (1940), p. 191. In the Act of Chapultepec adopted on March 3, 1945, the American States reaffirmed their condemnation of intervention

by a State in the internal or external affairs of another' (*A.J.*, 39 (1945), Suppl., p. 108). At the same time the main purpose of the Act was to give expression to the principle and the obligations of collective security in a manner which, but for its collective character, would be tantamount to intervention. And see the suggestive observations by Fenwick in *A.J.*, 39 (1945), pp. 645-663, on the decisive difference between individual intervention and collective action.

² See below, § 168f.

³ See below, p. 416 (c).

⁴ See below, § 310f. It will be observed that, apart from the above-mentioned principle of non intervention with regard to matters of domestic jurisdiction, the system of the Charter is based on collective intervention, in matters affecting international peace and security, in relation both to members and to non-members of the United Nations. See below, § 522a.

VII

INTERCOURSE

Grotius, ii c. 2, §§ 13 17 Vattel, ii, §§ 21-26 Hall, § 13 -Bluntschli, § 391 and p. 26 - Heffter, §§ 26, 33 Fauchille, §§ 265-269 -Sibert, pp. 282-298 Despagnet, § 163 - Pradier-Fodéré, iv, §§ 1899-1904 -Rivier, i, pp. 262-264 -Nys, ii, pp. 263-274 -Calvo, iii, §§ 1303-1305 -Fiore, i, § 370 - Martens, i, § 79 De Lauter, i, pp. 249, 250 Cruchaga, i, §§ 248-254 - Stowell, pp. 137 156 220 246 Fenwick, pp. 393 401 -Scelle, ii, pp. 68-82 -Baty, *International Law* (1909), chapters ii. and iii. (Penetration) - Kaufmann in *Hague Recueil*, vol. 55 (1935) (iv.), pp. 586 588 -Heilperin in *Hague Recueil*, 68 (1939) (n.), pp. 331-447 Quincy Wright in *A.S. Proceedings*, 1941, pp. 30 39.

§ 141. Many adherents of the doctrine of fundamental rights include therein also a right of intercourse for every State with all others.¹ This right of intercourse is said to comprise a right of diplomatic, commercial, postal, telegraphic intercourse, of intercourse by railway, a right for foreigners to travel and reside on the territory of every State, and the like. There is, in law, no such fundamental right of intercourse. All the consequences which are said to follow from the right of intercourse are not at all consequences of a right, but nothing else than consequences of the fact that intercourse between the States is a condition without which a Law of Nations would not and could not exist. Intercourse is therefore one of the characteristics of the position of the States in the community of nations. To that extent it may be maintained that intercourse is a presupposition of the International Personality of every State. But no special right or rights of intercourse between the States exist according to the Law of Nations.

§ 141a. It is because such special rights of intercourse do not exist that the States conclude treaties regarding matters of post, telegraphs, telephones, railways, and commerce. Thus Article 23 (c) ² of the Covenant of the League of Nations

Rights of Intercourse and Economic Co-operation.

¹ For the views of the scholastic writers on liberty of commerce see Cauty in *R.G.* 30 (1932), pp. 193 218

² In pursuance of that article an Organisation for Communications and Transit was established by the League, to which the Transit Section of the Secretariat corresponded.

The Conventions negotiated under the guidance of this Organisation relate to such matters as Freedom of Transit, Navigable Waterways of international concern and the right of States having no sea-coast to a maritime flag. See below, §§ 178 (Rivers), 238 (Maritime Flag), 190c

obliged members to make provision for securing and maintaining freedom of communications and of transit¹ and equitable treatment of the commerce of all other members of the League of Nations. Economic nationalism, stimulated by unsettled international conditions, did, notwithstanding the initiative of the League,² prevent the full development

(Ports). See also Charles de Visscher, *Le droit international des communications* (1924); Toulmin in *B.Y.*, 1922-1923, pp. 167-178; Hostie in *R.I.*, 3rd ser., 2 (1921), pp. 83-124; Hollander in *A.J.*, 17 (1923), pp. 470-488; Ripert in 52 (*lunet*) (1925), pp. 11-23; Haas in *Problems of Peace* (2nd ser., 1928), pp. 212-220; Kunz in *Z.A.R.*, 13 (1931), pp. 408 *et seq.* For the Statute of the Organisation see Hudson, *Legislation*, vol. in. p. 2106. See also Jenks in *B.Y.*, 18 (1937). On the various questions of international communications which came before the Permanent Court of International Justice see Hostie in *R.I. (Paris)*, 12 (1933), pp. 58-129, and 17 (1936), pp. 481-537. And see, generally, as to the rules of International Law in the matter of transit and communications, the same in *Hague Recueil*, vol. 40 (1932) (ii.), pp. 403-518; Leener, *ibid.*, vol. 55 (1936) (i.), pp. 5-81.

See also Convention on Motor Traffic of April 24, 1926: Treaty Series, No. 11 (1930), Cmd. 3510; *L.N.T.S.*, 108, p. 123; Hudson, *Legislation*, iii. p. 1859; *Répertoire*, iii. pp. 439-447. For the similar Convention signed at Washington by nineteen American States on October 6, 1930, see *Bulletin of the Pan-American Union*, 64 (1930), p. 1100. And see Convention on Road Traffic of April 24, 1926: *L.N.T.S.*, 97, p. 83; Hudson, *Legislation*, iii. p. 1872. See further the international conventions for facilitating motor traffic like the Convention of March 30, 1931, for the Unification of Road Signals, providing for the reduction of signs employed for regulating motor traffic to a minimum compatible with efficiency and indicating the inscriptions and signs on the signals: *L.N.T.S.*, 150, p. 247; the Convention, of the same date, on the Taxation of Foreign Motor Vehicles, providing for the exemption of private touring cars

from taxes or charges levied in the country visited: Treaty Series, No. 4 (1933), Cmd. 4246; *Br. and For. St. Papers*, 134, p. 444; Hudson, *Legislation*, v. p. 950; and the Agreement of March 28, 1931, to facilitate the procedure in the case of undischarged or lost triptychs: *L.N.T.S.*, 119, p. 47. And see below, p. 1022, n. 1. As to the postal, railway, and tele-communications conventions see below, Appendix, pp. 1019-1022.

A great number of agreements have been made for the purpose of facilitating travel by removing or modifying passport restrictions. See below, p. 676 n. 2.

¹ For an interpretation of this clause in connection with the closure of the railway traffic between Poland and Lithuania see Advisory Opinion of October 15, 1931 *P.C.I.J.*, Series A/B, No. 42, p. 119.

² See the Final Report of the Geneva Economic Conference held by the League in May 1927: Doc. C.E. 140. As to the World Monetary and Economic Conference of June and July 1933 see *Documents*, 1933, pp. 1-108; Guillaumet, *Les Problèmes douaniers internationaux et la Société des Nations* (1930); Winslow, *The League and Concerted Economic Action, General Special Studies*, ii. (1931), No. 2; van Woerden *La Société des Nations et le rapprochement économique international* (1932); Bresler, 'Trade Barriers and the League of Nations,' in *Foreign Policy Reports*, 7 (1931), No. 11; Staley, *Rare Materials in Peace and War* (1937). And see on international economic co-operation generally, Hudson in *Tynnesbury Survey*, 1930, pp. 443-496, 1931, pp. 162-242, 1932, pp. 1-41; *International Conciliation*, Pamphlets Nos. 267-271 (1931); Patterson in *Hague Recueil*, vol. 37 (1931) (iii.), pp. 419-521; Veiga-Simões in *Hague Recueil*, vol. 56 (1934) (iv.), pp. 752-830; Martin in *A.S. Proceedings*, 1934, pp. 44-72;

of the possibilities of that Article. Most States have kept up protective duties to exclude or hamper foreign trade in the interest of their home commerce, industry, and agriculture, and, also, their self-sufficiency in the event of war. In the periods following the First and Second World Wars they limited freedom of migration to insignificant dimensions when compared with that obtaining before 1914.¹ In thus interfering with the free flow of goods and persons States do not act in contravention of International Law. But it is being increasingly recognised that such interference, in its extreme form, is a dangerous source of international friction and that some measure of regulation by International Law is both desirable and feasible. The most important effort in this direction is the Havana Charter of the International Trade Organisation of 1947— a comprehensive instrument which (a) established a number of principles and obligations with regard to promoting international trade and removing restrictions thereon and (b) created, for that purpose, the International Trade Organisation.² In addition, with the

Cordell Hull and Molynux in *International Conciliation* (Pamphlet No. 311 June 1935) On international co-operation in currency matters see Rist, *La question de l'or* (1931), Canina in *Hague Recueil*, vol. 37 (1931) (m) pp. 209-317, Jéze, *ibid.*, vol. 38 (1931) (iv), pp. 471-536, Grizzotti, *ibid.*, vol. 40 (1934) (m), pp. 7-126; Raestad in *Nordisk T.A.*, 6 (1935), pp. 5-32, Rappard in *Hague Recueil*, vol. 61 (1937) (m) pp. 103-248. On international co-operation in the field of currency through standardising and stabilising agreements and international regulation of exchange control as well as through the International Monetary Fund see Nussbaum, *Money in the Law* (1950) pp. 502-546 and Mann *The Legal Aspects of Money* (2nd ed., 1953) pp. 337-445. See also *International Law Association Report*, 45 (1952), pp. 233-296. See also Hull, *International Monetary Co-operation* (1945); Rasminsky in *Foreign Affairs*, 22 (1944), pp. 588-604; J. H. Williams, *ibid.*, 23 (1944), pp. 38-54; Morgenthau *ibid.*, 23 (1945), pp. 182-195; Mann in *B.Y.*, 22 (1945), pp. 251-258; Pehle in *Yale*

Law Journal 35 (1946), pp. 1127-1139. And see Lemkin, *La réglementation des paiements internationaux* (1939); Hug in *Hague Recueil*, 79 (1951) (n.), pp. 515-712; and Nussbaum in *I.J.* 38 (1944) pp. 242-257. See also Appendix, pp. 1000-1008, below.

¹ See below, § 296

² See Fawcett in *B.Y.*, "1 (1947) pp. 376-385, and in *Year Book of World Affairs*, 1951, pp. 269-289. Bronz in *Harvard Law Review*, 62 (1949) pp. 1089-1123, Plaisant in *R.G.*, 54 (1950), pp. 161-224. For the text of the Havana Charter see *I.T.O.* 2 (1948), p. 283. The purpose of the Havana Charter and of the International Trade Organisation is to realise 'the aim set forth in the Charter of the United Nations particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development envisaged in Article 55 of that Charter.' The Havana Charter lays down a number of principles for the avoidance of unemployment and the achievement of full employment (Chapter II). In Chapter III it lays down rules con-

same object in view, a General Agreement on Tariffs and Trade was concluded between twenty-three countries in Geneva in October 1947. That Agreement, which embodies the relevant clauses of the Havana Charter, is designed to protect the trade of the countries which, in pursuance of the Agreement, undertook tariff reductions.¹ In contradistinction to the Havana Charter, which in many respects approximates statements of policy and purpose rather than legal obligations,² the Agreement on Tariffs and Trade constitutes a substantial limitation of the freedom of action of the Parties in the interest of international trade. In addition to this Agreement and the Havana Charter, the various specialised agencies of the United Nations (whose objects and constitution are set forth in the Appendix to this volume) provide a basis for international intercourse and co-operation in economic and other spheres. In setting up, within the framework of the Charter, the Economic and Social Council as one of the principal organs of the United Nations,³ its members gave expression to the importance of planned co-operation for the achievement of the required conditions of economic and social progress and development.

Consequences of Inter-course as a Presupposition of International Personality.

§ 142. Intercourse being a presupposition of International Personality, the Law of Nations favours intercourse in

concerning economic development and international investment. Chapter IV, which is the most important part of the Charter, is concerned with limitations imposed on international trade by tariffs, by quantitative restrictions on imports, and by discriminatory practices. It lays down the general principle of most-favoured-nation treatment between the Members of the Organisation as well as of the general progressive elimination of quantitative restrictions on imports and the absence of discrimination in relation to such restrictions as may continue; for the Charter provides for wide and elastic exceptions in this respect. The provisions on State trading, without referring expressly to, jurisdictional immunities of governments (see above, § 115a), lay down the general principle that State enterprises must follow the general practices of private trade.

The important Chapter V of the Charter lays down the principle that the parties ought in their legislation to ensure that private and public commercial enterprises shall, in the sphere of international trade, refrain from practices which restrain competition, limit access to markets or foster monopolistic control. As to the constitution and the objects of the International Trade Organisation see below, Appendix, pp. 998, 999. And see generally Alexandrowicz, *International Economic Organisation* (1953). On technical assistance to underdeveloped countries see Sharp in *International Organisation*, 7 (1953), pp. 342-379.

¹ (1947) Cmd. 7258.

² See Fawcett in *Year Book of World Affairs*, 1951, pp. 285-289.

³ See below, § 108m.

every way. The institution of legation serves the interest of intercourse between the States, as does the law relating to consuls. The right of legation¹ is held in the interest of intercourse, as is the right of protection over citizens abroad.² The freedom of the open sea,³ which has been universally recognised since the end of the first quarter of the nineteenth century, the right of every State to the passage of its merchantmen through the maritime belt⁴ of other States, and, further, freedom of navigation laid down by treaties on so called international rivers,⁵ are further examples of provisions made by the Law of Nations in the interest of international intercourse.

VIII

JURISDICTION

Hall, §§ 62, 75-80 Westlake, i pp 216 281 Lawrence, §§ 93 109—Phillimore, i, §§ 317 355 Brierly, pp 172 189 Iwas, i §§ 157 171—Wheaton, §§ 77 151 Moore, ii §§ 175 240 Hyde, i, §§ 218, 219, 238 243 Bluntschli, §§ 388 393 Heffter, §§ 34 39 Luchile, §§ 263 266 Rivier, i § 25 Nys, ii pp. 304 310 Fiore, i §§ 475 558 Praeg, §§ 25 45 Cruchaga, i, §§ 212 231—Suarez, i §§ 55 63 Schwarzenberger, pp 79 8 —Keith & Wheaton, pp. 260 275 Fischer Williams, *Chapters*, pp 209 231 —Beale in *Harvard Law Review*, 36 (1923), pp 241 262, and in *Cambridge Legal Essays* (1926), pp. 41 56—Wegner, *Über den Geltungsbereich staatlichen Strafrechts* (1930)—Mennacker, *Das Schutzprinzip*, etc. (1931), *Actes de la Conférence Internationale du droit pénal de 1925* (Rome, 1931) Beckett in *B.Y.*, 1925 pp 44 60, and *ibid.* 1927, pp 108 128 Cybichowski in *Haas & Recueil*, 1926 (ii), pp 264 382 Rousseau in *R.G.*, 37 (1930), pp. 420 460—Mercier in *R.L.*, 3rd ser., 12 (1911), pp 439 490 —Monaco in *Rivista*, 24 (1932), pp. 36 52, 161 183 Morelli, *ibid.*, 25 (1933), pp 382 411 Overbeck in *Schweizerische Zeitschrift für Strafrecht*, 47 (1933), pp 310 *et seq.* —Travers in *Reperaire*, iv pp 361 447 *Harvard Research* (1935), pp. 466 632 (a valuable exposition of the subject)

§ 143. As all persons and things⁶ within the territory of a State fall under its territorial supremacy, each State has jurisdiction over them. The Law of Nations, however, gives a right to every State to claim so-called extraterritoriality, and therefore exemption from local jurisdiction, chiefly for

¹ See below, § 360

² See below, § 319.

³ See below, § 259

⁴ See below, § 169.

See below, § 178.

⁶ For the jurisdiction of English

courts see Dicey, *Rules* 52 90, and Westlake, *Private International Law* (7th ed., 1925); and on the subject in general, Travers, *Le droit pénal international*, 5 vols. (1920-1922), and Donnedieu de Vabres, *Les principes modernes du droit pénal* (1928).

its Head,¹ its diplomatic envoys,² its men-of-war,³ and its armed forces⁴ abroad. And partly by custom and partly by treaty obligations, certain non-Christian States were restricted⁵ in their territorial jurisdiction with regard to foreign resident subjects of Christian Powers.

Relaxation of Territorial Supremacy in Favour of Allied Governments and Allied Armed Forces.

§ 144 During the Second World War the presence in Great Britain of a number of Governments of countries invaded by Germany as well as of allied armed forces gave rise to certain relaxations, for the benefit of such Governments and forces, of the principle of territorial supremacy. Thus members of the so-called Governments-in-exile⁶ were granted immunity from jurisdiction.⁷ In 1940, in the Allied Forces Act, military tribunals of allied Governments were given jurisdiction in regard to offences committed by members of their armed forces concerning discipline and internal administration.⁸ The sentences rendered by these tribunals were to be enforced by British authorities who were also authorised to render assistance to allied authorities in such matters as the apprehension of deserters. In 1941, in the Allied Powers (Maritime Forces) Act, provision was made for the establishment of allied maritime courts authorised to try offences committed by any persons on board an allied merchant vessel, by the crew of an allied merchant vessel in contravention of the merchant shipping law of the country in question, and by allied seamen in contravention of the mercantile conscription laws of their

¹ For details see §§ 348-353 and 356. The exemption of a State itself from the jurisdiction of another is not based upon a claim to extraterritoriality, but upon the claim to equality; see above, § 115.

² Details below, §§ 385-405.

³ Details below, §§ 450-451—an immunity which is extended by the law of some States to cover public ships engaged in trade (see below, § 451a). As regards the very limited extraterritoriality of merchantmen which are by distress compelled to enter a foreign port see below, § 190c.

⁴ Details below, § 445.

⁵ With minor exceptions, these restrictions have now been abolished. For details see below, §§ 318 and 440.

⁶ See Oppenheimer in *A.J.*, 36 (1912), pp. 566-595; Flory, *Le statut international des gouvernements réfugiés et le cas de la France libre* 1939-1945 (1952), and Mattern, *Die Exilregierung* (1953). And see, in particular, Barton in *B.Y.*, 27 (1950), pp. 207-217.

⁷ See below, p. 828.

⁸ See S.R. & O. 1940, No. 1817, with regard to the forces of the Allied Governments, and S.R. & O. 1940, No. 49, concerning the Free French Forces. These applied only to military and naval forces, but not to airmen, whose disciplinary offences were to be tried by mixed (British and Allied) courts-martial. See also below, § 445.

country.¹ However, the apprehension of the accused and the execution of the sentences was to rest with the British authorities, and British courts were given the power to decide whether in any particular case an allied maritime court had not overstepped its jurisdiction. Governments-in-exile were permitted to issue, though not to enforce, legislative and administrative decrees.² Finally, in the United States of America (Visiting Forces) Act, 1942, it was provided that, as a rule,³ no criminal proceedings shall be presented in the United Kingdom before any court in the United Kingdom against a member of the military or naval forces of the United States. This Act, which was not limited to matters of internal discipline, conferred a wide and exclusive jurisdiction upon military courts of the United States in Great Britain.⁴ All these relaxations of territorial supremacy were adopted in order to meet an exceptional situation in time of war. They showed that there is intrinsically no such degree of rigidity in the conception of territorial supremacy as to rule out reasonable adaptations thereof to exceptional circumstances.⁵ On the other hand, as shown by the various treaties concluded after the Second World War,⁶ they cannot properly be adduced as proof of the necessity for a general exemption of foreign armed forces from the jurisdiction of the receiving State.

§ 144a. It follows from the principle of territorial supremacy that States must not

¹ See Oppenheimer, *op. cit.*, pp. 593, 594; Chorley in *Modern Law Review*, 5 (1941), pp. 118-120; de Moor in *Law Quarterly Review*, 58 (1942), pp. 42-50; Jessup in *A.J.*, 36 (1942), pp. 653-657.

² See Drucker in *Czechoslovak Year Book of International Law*, 1942, pp. 46-59; McNair, *op. cit.*, pp. 369-377; Oppenheimer in *A.J.*, 36 (1942), pp. 578-588; Lourie and Meyer in *University of Chicago Law Review*, 11 (1943), pp. 28-48.

³ The Act makes provision for what is, in fact, a waiver of a privilege on the part of the United States.

⁴ See King in *A.J.*, 36 (1942), pp. 539-567; Schwellb, *ibid.*, 38 (1944), pp. 50-73; McNair in *Law Quarterly Review*, 60 (1944), pp. 358-360. And

perform acts of sovereignty
 see Fairman and King in *A.J.*, 38 (1944), pp. 258-277, with regard to the taxation of foreign armed forces. It will be noted that while the Allied Forces Act, 1940, in refraining from conceding any jurisdictional immunity for criminal acts wheresoever committed, fell short, in a sense, of the rule of international law applicable in the matter—see below, § 443—the Art relating to the United States went considerably beyond it. See the Exchange of Notes between Great Britain and the United States appended as a Schedule to the Act.

⁵ See below, § 171, on divisibility of territorial sovereignty, and § 203 on State servitudes.

⁶ See below, § 445.

Terri-
 torial
 Supre-
 macy and
 Enforce-
 ment of
 Foreign
 Public
 Law.

within the territory of other States.¹ For the same reason, while effect is as a rule given to private rights acquired under the legislation of foreign States²—a subject which falls within the domain of Private International Law³—the courts of many countries, including British and American courts, decline to give effect to the public law, as distinguished from private law, of foreign States. In particular they refuse to enforce foreign revenue laws as well as penal and confiscatory legislation of other States.⁴ To enforce

¹ See above, § 128.

² See above, § 115aa.

³ See above, § 1.

⁴ See *Folsott v. Ogden*, (1789) 1 H.Bl. 124, 135. As to revenue laws see *In re Visser: The Queen of Holland v. Drukker*, [1928] Ch. 877, and *Annual Digest*, 1927-1928, Case No. 1b; *Naim Molran v. Attorney General for Palestine* [1948] A.C. 351. But see *Albrecht in B.Y.*, 30 (1953), pp. 454-474, and *Mann in I.C.L.Q.*, 3 (1954), pp. 465-478. For a lucid discussion of this question in relation to foreign exchange regulations see *Mann The Legal Aspects of Money* (2nd ed. 1953), pp. 359 *et seq.*, 372 *et seq.* It seems that in *Kahler v. Midland Bank* [1950] A.C. 24 the House of Lords attributed extraterritorial effect to foreign exchange regulations (which two dissenting Law Lords considered to be of a confiscatory character). For a criticism of this decision see *Mann in Modern Law Review*, 13 (1950) p. 206 and *op cit.*, pp. 374-376. See also *Isay, Internationales Finanzrecht* (1934). As to the various aspects of recognition of foreign currency see *Neumeyer, Internationales Verwaltungsrecht* in (1930), and *Mann, The Legal Aspects of Money* (2nd ed., 1953), pp. 354-416 and in *B.Y.*, 26 (1949), pp. 278-281. And see generally *Schwarz, Die Anerkennung ausländischer Staatsakte* (1935) and *Fedozzi in Hague Recueil*, 27 (1929) (ii), pp. 145-240. See also above, § 115ab.

As to confiscatory legislation see *Banco di Vizcaya v. Don Alfonso de Bourbon y Austria*, [1935] 1 K.B. 140; *Annual Digest*, 1933-1934, Case No. 56. In this case the action was dismissed on the ground that judgment in favour of the plaintiffs would, in

effect, amount to the execution of a foreign penal law. However, although an English court will not give effect to a foreign penal law, it will refuse to enforce, as being contrary to public policy and international comity, contracts entered into mainly for the commission of a criminal offence in a foreign country. *Foster v. Driscoll* [1929] 1 K.B. 470. See also *Frankfurter v. Exner* [1947] 1 Ch. 629 and *Flesch v. Banque Nationale de la République d'Haiti* (1948) 77 N.Y.S. (2d) 41, *Annual Digest*, 1948 Case No. 8. And see *Seidl-Hohenveldern in Michigan Law Review* 49 (1951), pp. 851-868 and the same *Internationales Konfliktrecht und Intermunungsrecht* (1952). As to foreign enforcement of anti-trust laws see *Haight in Yale Law Journal*, 63 (1954), pp. 639, 654; *Whitney, ibid.*, pp. 655-662.

Notwithstanding the recognition of the Soviet Government by the United States the Courts in that country have refused to give extra-territorial effect to Russian confiscatory decrees as being contrary to public policy and fundamental legal notions as understood in the various States of the Union. See *Vladskazkazy Railway Co. v. New York Trust Co.* (1934), 363 N.Y. 369; *Annual Digest*, 1933-1934, Case No. 27; *United States v. Bank of New York and Trust Co.*, 77 F. (2d) 866; (1936) 296 U.S. 403; *Annual Digest*, 1933-1934, Case No. 29; *Moscow Fire Insurance Company v. Bank of New York and Trust Co.* (1939), 280 N.Y. 286; *Annual Digest*, 1938-1940, Case No. 53. In *United States v. Belmont* (1937), 301 U.S. 324; *A.J.*, 31 (1937), p. 637; *Annual Digest*, 1935-1937, Case No. 15, the decision of the Supreme Court affirm-

ing the right of the United States, under the so-called Litvinoff assignment, to the assets of a Russian company confiscated by the Soviet Government and deposited by the company in a New York bank, was largely based on the view that the assets had become vested in the Soviet Government in Russia, and not in the United States.

In a series of cases of which the leading one is *United States v. Pink* (1942), 315 U.S. 203 the courts in the United States gave effect to the confiscatory decrees of Soviet Russia for the exceptional reason that they referred to property covered by certain arrangements made in connection with the recognition of the Russian Government by the United States in 1933 and that that recognition, par taking of the nature of a high act of foreign policy, overruled considerations of public policy as understood by the individual States of the Union, prohibiting the application of foreign confiscatory decrees. For a criticism of that decision, which stretches the consequences of recognition in a manner somewhat alien to its purpose as generally understood, see Borchard in *A.J.*, 36 (1942), p. 275, and Jessup, *ibid.*, p. 282. On the other hand, Russian legislation, including confiscatory decrees, was given effect with regard to the operation of such legislation within Russian territory. *Dougherty v. The Fidelity Life Assurance Society* (1934), 266 N.Y. 71, *Annual Digest*, 1933-1934, Case No. 28. See also *Holzer v. Deutsche Reichsbahn Gesellschaft* (1938), 277 N.Y. 474; *Annual Digest*, 1938-1940, Case No. 71, for an example of recognition of contracts made under the law of a foreign country public policy notwithstanding. On the extraterritorial effect of confiscatory decrees in respect of ships abroad see *The El Condado* (No. 2), *Clay's List Law Reports*, 63 (1939), p. 83, *Annual Digest*, 1938-1940, Case No. 77, where it was held that the general principle denying extraterritorial effect to confiscatory decrees was applicable to foreign ships in British waters or in foreign waters outside the territory of the confiscating State. See, to the same effect, *The Jupiter* (No. 3), [1927] P. 122. For a suggestion of a dis-

inction between confiscatory and requisition decrees see the learned comment in *B.Y.*, 21 (1944), pp. 185 *et seq.*, especially by reference to *Lorentzen v. Lydden* [1942] 2 K.B. 202; 58 T.L.R. 178. On the other hand the United States Supreme Court held in *The Navemar* (1939), 304 U.S. 68; *Annual Digest*, 1938-1940, Case No. 68, that in view of the quasi-territoriality of ships, i.e. the doctrine that they are part of national territory, there was no room for applying to them the general principles relating to foreign confiscatory decrees. In *The Lissie* the Supreme Court of Canada, reversing the decision of the Court below held that it would be contrary to public policy for Canadian courts to enforce a foreign confiscatory decree purporting to have extraterritorial effect by seeking to reach in a Canadian port a merchant ship which was never in the possession of the foreign Government in question [1919] S.C.R. 530, *Annual Digest*, 1918, Case No. 50. For a clear presentation of the British and American practice in the matter in the course of the Spanish Civil War of 1936-1939 see Preuss in *A.J.*, 35 (1941), pp. 263-281, 36 (1942), pp. 37-55. See also Jaenicke in *Z.o.F.*, 9 (1939), pp. 354-362, Riesenfeld in *Minnesota Law Review*, 25 (1940), pp. 62 ff. See also *Anderson v. NV Transandine Handelmaatschappij* (1941), 31 N.Y.S. (2d) 184; 289 N.Y. 9; *Annual Digest* 1941-1942, Case No. 4; *Lorentzen v. Lydden*, [1942] 2 K.B. 202; *Annual Digest*, 1941-1942, Case No. 34; and other cases, in particular Cases Nos. 35, 36, 37, 55, 63 in the same volume relating to extra territorial decrees of the Governments in exile during the Second World War. But see *Bank voor Handel en Scheepvaart v. Stafford* [1951] 2 All E.R. 779 where the Court declined to follow *Lorentzen v. Lydden* as distinguishable by reference to the particular situation of an allied government in exile. It may be difficult to follow the suggestion which seems to underlie the former case, that the denial of extraterritorial effect to foreign legislation is the general rule and that therefore the question of the penal character of such legislation is irrelevant. See also

them would mean, in effect, to assist States in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy.

Jurisdiction over Citizens abroad.

§ 145. The Law of Nations does not prevent a State from exercising jurisdiction, within its own territory, over its subjects travelling or residing abroad, since they remain under its personal supremacy.¹ As every State can also exercise jurisdiction over aliens² within its boundaries, such aliens are often under two concurrent jurisdictions.

Jurisdiction on the Open Sea.

§ 146. As the open sea is not under the sway of any State, no State can exercise its jurisdiction there. But it is a rule of the Law of Nations that vessels, and the things and persons thereon, remain during the time they are on the open sea under the jurisdiction of the State under whose flag they sail.³ It is another rule of the Law of Nations that piracy⁴ on the open sea can be punished by any State, whether or not the pirate sails under the flag of a State. Further,⁵ a general practice seems to admit the claim of every maritime State to exercise jurisdiction over cases of collision at sea, whether the vessels concerned are or are not sailing under its flag. Again, in the interest of the safety of the open sea, every State has the right to order its men-of-war to ask any suspicious merchantmen they meet on the open sea to show the flag, to arrest foreign merchantmen sailing under its flag without an authorisation for its use, and to pursue into the open sea, and to arrest

McNair, *Legal Effects of War* (3rd. ed., 1948), pp. 358-382 and 433-447. In the course of the negotiations preceding the Allied Swedish Agreement of July 18, 1946, concerning German assets in Sweden, it was contended on behalf of the Allied Powers that as they were exercising sovereignty in Germany and as it was a rule of international practice to give effect to foreign decrees regulating the property of nationals if such decrees were consistent with the public policy of the foreign State, Sweden was bound to give effect to Allied decrees concerning the seizure of German property in Sweden. This argument was not accepted by Sweden. See *Bulletin of State Department*, 17 (1947), p. 165. See also Mann in *B.Y.*, 23 (1946),

pp. 354-359, on a similar Agreement with Switzerland of May 25, 1946. See Schindler in *Annuaire Suisse de droit international*, 3 (1946), pp. 65-94, on extraterritorial effect of confiscatory decrees.

¹ See *Blackmer v. The United States of America*, 284 U.S. 421; *A.J.*, 26 (1932), pp. 611-618; *Skarboe v. Florida* (1941), 313 U.S. 689; *A.J.*, 35 (1941), p. 569. *R. v. Holm*, decided in 1947 by the Appellate Division of the Union of South Africa: [1948] A.S.L.R. 925; *Annual Digest*, 1947, Case No. 33; Hackworth, *q.* §§ 133-138.

² See below § 317.

³ See below, §§ 260, 264.

⁴ See below, § 278.

⁵ See below, § 265.

there, such foreign merchantmen as have committed a violation of its law whilst in its ports or maritime belt.¹ Lastly, in time of war belligerent States have the right to order their men-of-war to visit, search, and eventually capture on the open sea all neutral vessels for carrying contraband, for breach of blockade, or for unneutral services to the enemy.²

§ 147. Many States claim jurisdiction with regard to certain acts committed by a foreigner in foreign countries.³ States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, forging bank-notes, and the like, or against its citizens, such as murder and arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the commission of such an act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of inflicting punishment. The question is, therefore, whether States have a right to exercise jurisdiction over acts of foreigners committed in foreign countries, and whether the home State of such an alien has a duty to acquiesce in the latter's punishment in case he comes into the power of these States. Some answer this question in the negative.⁴ They assert that at the time such criminal acts are committed the perpetrators are neither under the territorial nor under the personal supremacy of the States concerned; and that a State can only require respect for its laws from such aliens as are permanently or transiently within its territory.⁵ This is prob-

Criminal
Jurisdiction
over
Foreigners
in
Foreign
States.

¹ See below, § 266. As to unlawful seizures on high seas and in foreign territorial waters see Morgenthau in *B.Y.*, 29 (1952), pp. 265-282.

² See below, vol. II, §§ 368-417.

³ See Hall, § 62; Westlake, i, pp. 261-263; Lawrence, § 104; Taylor, § 191; Moore, ii, §§ 200 and 201; Phillimore, i, § 334; Beckett, *op. cit.*; *Harvard Research* (1935), pp. 484-508; *Preuss in Grotius Society*, 30 (1941), pp. 184-208.

⁴ This was the view expressed by the author. It was approved by Lord Finlay in his dissenting judgment in the *Lotus* case before the Permanent

Court in 1927, Publications of the Court, Series A, No. 10: see below, § 147a.

⁵ The Institute of International Law has studied the question at several meetings, and in 1883, at its meeting at Munich (see *Annuaire*, vii, p. 156), among a body of fifteen articles concerning the conflict of the Criminal Laws of different States, it adopted the following (Article 8):— 'Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when these acts contain an attack upon its social existence, or

ably the accurate view with regard to some cases. But it is not a view which, consistently with the practice of States and with common sense, can be rigidly adopted in all cases.¹ It cannot cover acts done abroad in preparation of and participation in common crimes committed or attempted to be committed in the country claiming jurisdiction ;

endanger its security, and when they are not provided against by the Criminal Law of the territory where they take place.' But it must be emphasised that this resolution has value *de lege ferenda* only. The question was also studied by the League Codification Committee in 1926, upon a Report by Brierly and Charles de Vischer, when the Committee came to the conclusion that, in view of the diversity of practice among States, 'international regulation of these questions by way of a general convention, although desirable, would encounter grave political and other obstacles': see *A.J.*, 20 (1926), Special Suppl., pp. 252-259, and comment by Woolsey in *A.J.*, 20 (1926), pp. 757-759. Some writers who deny the lawfulness of extraterritorial criminal jurisdiction over foreigners generally nevertheless concede it when, though the perpetrator is corporeally abroad, his criminal act takes effect within the territory of the State: see Judge Moore's dissenting judgment in the *Lotus* case, below, § 147a. See also Bruns in *Z.o.V.*, 1 (1929), pp. 50-56; Drost in *Z.J.*, 43 (1931), pp. 111-140; Cook in *West Virginia Law Quarterly*, 40 (1934), pp. 303-329. Subject to minor exceptions, British courts have no jurisdiction, by statute, to try criminal acts committed by aliens abroad. (One of these exceptions is Section 687 of the Merchant Shipping Act, 1894. See also *Joyce v. Director of Public Prosecutions* (1946), 62 T.L.R. 208—a case in which the accused was not an alien pure and simple but a person owing allegiance to the Crown—for an important qualification of the rule that English courts have no jurisdiction over aliens for crimes committed abroad. See Lauterpacht in *Cambridge Law Journal*, 9 (1947), pp. 342-348.

¹ In the case of Cutting, which gave rise to a dispute between Mexico and the United States of America, in-

tervention took place according to this view. In 1886 one A. K. Cutting, a citizen of the United States, was arrested in Mexico for an alleged libel against one Emigdio Medina, a subject of Mexico, which was published in the newspaper of El Paso in Texas. Mexico maintained that she had a right to punish Cutting, because according to her Criminal Law offences committed by foreigners abroad against Mexican subjects are punishable in Mexico. The United States, however, intervened, and demanded Cutting's release. Mexico refused to comply with this demand, but nevertheless Cutting was finally released, as the plaintiff withdrew his action for libel. Since Mexico likewise refused to comply with the demand of the United States to alter her Criminal Law for the purpose of avoiding a similar incident in the future, diplomatic practice cannot be said to have settled the subject. See Westlake, i. p. 252; Taylor, § 192; Calvo, vi. §§ 171-173; Moore, ii. § 201, and his *Report on Extra-territorial Crime and the Cutting Case* (1887); Rolin and Gamboa in *R.J.*, 20 (1888), pp. 559-577, and 22 (1890), pp. 234-250; Hyde, i. § 243. The case is fully discussed and the American claim is disputed by Mendelssohn Bartholdy, *Das räumliche Herrschaftsgebiet des Strafrechts* (1908), pp. 135-143. For the judgment of the Mexican Court see Scott, *Cases*, pp. 387-393; and see Judge Moore's comment in his judgment in the *Lotus* case before the Permanent Court, Series A, No. 10, at p. 93. The case of *Qirilo Pouble*—see Moore, ii. § 200, pp. 227-228—concerning which the United States at first was inclined to intervene, proved to be a case of a crime committed within Spanish jurisdiction. The case of *John Anderson*—see Moore, i. § 174, pp. 932-933—is likewise not relevant, as he claimed to be a British subject.

neither can it cover crimes injuring its subjects or serious crimes against its own safety.¹ With regard to counterfeiting currency, the right of such jurisdiction has now been expressly recognised.²

§ 147a. The question of criminal jurisdiction over an act causing a collision on the open sea came before the Permanent Court in 1927 in the *Lotus* case.³ A collision had occurred on the open sea between the French steamship *Lotus* and the Turkish steamship *Boz-Kourt*, resulting in the loss of the latter and the death of eight Turkish subjects. When the *Lotus* arrived at Constantinople, the Turkish Government instituted joint criminal proceedings against the captain of the Turkish vessel and the French officer of the watch on board the *Lotus*, and they were both sentenced to imprisonment. The French Government pro-

¹ In *Harvard Research*, *op cit.*, which contains an admirable exposition of the subject, the jurisdiction in the latter instance is limited to cases in which 'the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed' (p. 543). But, it will be noted, few States make it a punishable offence to commit high treason against foreign States. It would be unreasonable to deny to a foreign State the right to punish high treason provided, of course, that the act in question constitutes high treason according to generally recognised legal notions. There are now very few writers who deny absolutely the right of a State to punish aliens for crimes committed abroad. See also *Naim Mohan v. Attorney General for Palestine* [1948] A.C. 351. And see *In re a Dubor* (1948) 64 T.L.R. 446.

² The Convention on Suppression of Counterfeiting Currency of May 1, 1929, provides that States which recognise the principle of the prosecution of offences committed abroad shall punish foreigners who are guilty of that offence in the same way as if the offence had been committed in their country: C. 153. M. 69. 1929. II.; *L.N.T.S.*, 112, p. 371; Hudson, *Legislation*, iv. p. 2692. And see 25 and 26 Geo. 5, c. 25, amending in certain respects the Forgery Act, 1913, the Coinage Offences Act, 1861, and

the Extradition Act, 1870. See on that Convention Dupriez in *R.J.*, 3rd ser., 10 (1929), pp. 511-530; Garner in *A.J.*, 24 (1930), pp. 135-139; Pella and Donnedieu de Vabres in *Revue pénitentiaire et de droit pénal*, 1930, pp. 312-325, 325-344; Fitzmaurice in *I.J.*, 26 (1932), pp. 533-551; Meitgenberg in *Z.o.l.*, 3 (1932), pp. 76-94. See also Pella in *R.G.*, 24 (1927), pp. 673-768; Hackworth, n. § 159. For the Pan-American Convention, of June 19, 1935, on the Repression of Smuggling see Hudson, *Legislation*, vii. p. 100. And see generally as to mutual international assistance in combating criminality, the writer referred to in § 127a above.

³ Series A, No. 10, and (the arguments) Series C, No. 13 (n.); Salvioli in *Rivista*, 19 (1927), pp. 521-549; Brierly in *L.Q.R.*, 44 (1928), pp. 164-163; Berge in *Michigan Law Review*, 26 (1928), pp. 361-382; Noel Henry in *R.J. (Paris)*, 2 (1928), pp. 65-134; Donnedieu de Vabres, *ibid.*, pp. 135-165; Lapradelle, *Causes célèbres du droit des gens, l'affaire du Lotus* (1929); Verzijl in *R.J.*, 3rd ser., 9 (1928), pp. 1-32; Ruzé, *ibid.*, pp. 124-156; Mercier and Donnedieu de Vabres and others in *Annuaire*, 43 (1) (1950), pp. 295-365; Hanbury in *Grotius Society*, 37 (1952), pp. 171-185. And see the literature cited in vol. ii. p. 81, n. 2.

tested on the ground that Turkey had no jurisdiction over an act committed on the open sea by a foreigner on board a foreign vessel, whose flag State (it asserted) had exclusive jurisdiction as regards such acts. The dispute was referred by agreement to the Permanent Court, which held,¹ by the President's casting vote, that Turkey had 'not acted in conflict with the principles of International Law' in instituting the criminal proceedings, because (*inter alia*) the act committed on board the *Lotus* produced its effects on board the *Boz-Kourt* under the Turkish flag, and thus, as it were, on Turkish territory, whereupon Turkey acquired jurisdiction over its foreign perpetrator. The Court also expressed the opinion that there is no rule of International Law which prohibits a State from exercising jurisdiction over a foreigner in respect of an offence committed outside its territory. 'The territoriality of criminal law is . . . not an absolute principle of International Law, and by no means coincides with territorial sovereignty.'² The judgment of the Court, one of whose possible effects is to subject seamen to foreign criminal law of which they may have no knowledge, met with widespread criticism. A contrary rule was adopted in the Brussels Convention of 10 May 1952, relating to Penal Jurisdiction in Matters of Collisions or Other Accidents of Navigation.³

¹ There was a majority of seven to five Judges in favour of the precise ground of the judgment as stated above in the text.

² At p. 20.

³ See below, § 266. In January 1929 the League of Nations Advisory and Technical Committee for Communications and Transport considered a communication from the International Association of Mercantile Marine Officers expressing their concern about the decision of the Court as tending to

expose masters to double prosecutions. The matter was subsequently considered by the Joint Maritime Commission of the International Labour Organisation and the International Maritime Committee. See *Official Bulletin of the International Labour Office*, 13, pp. 67, 143, and 14, pp. 43, 56. International Maritime Committee, *Reports of the Antwerp Conference (1930) and the Oslo Conference (1933)*. And see Jessup in *A.J.*, 29 (1935), pp. 495-499.

CHAPTER III

RESPONSIBILITY OF STATES

I

ON STATE RESPONSIBILITY IN GENERAL

- Grotius in c. 17 & 20 and c. 21 § 2 Hall § 45 Moore vi §§ 979 1039 Hyde i §§ 266 309 Bluntschli § 380a Heffter §§ 101 104 Fauchille §§ 298 298 (20) Pradier Ferrer i §§ 196 210 Rivier n pp 40 44 Calvo in §§ 1261 1298 Fier i §§ 659 679 and Code §§ 96 615 Cavaglieri pp 348 364 Sibert pp 309 310 Schwarzenberger pp 217 237 Keiths Wheaton pp 421 437 Lennox pp 197 211 Ballardri Pallieri pp 518 529 Anzilotti pp 466 505 Cuggenheim pp 509 509 Harvard Draft Convention (and Comment), 1 J 23 (1929) April Special Number pp 133 215 Conference for the Codification of International Law *Bases of Discussion* in (cited as *Bases of Discussion* in) pp 10 107 121 152 Dunn *The Principles of International Law* (1932) pp 113 157 Tripel *Völkerrecht und Landesrecht* (1899) pp 424 381 Anzilotti *Lezioni generali della responsabilità dello stato nel diritto internazionale* (1902) Burckhardt §§ 73 130 Marin in *La responsabilità degli stati per gli atti dei loro rappresentanti* (1914) Schen *Die völkerrechtliche Haftung der Staaten aus unlautehen Handlungen* (1917) Strupp *Das völkerrechtliche Delikt in Stier und in Hauch des Völkerrechts* (1920) and Strupp *Die völkerrechtliche Haftung des Staates in bezug auf die Handlungen Privater* (1927) Burckhardt *Die völkerrechtliche Verantwortlichkeit der Staaten* (1924) — Charles de Vischer in *Bibliothèque Visserian* in (1924) pp 89 122 Dupuis in *Hague Recueil* 1924 i pp 350 358 Ralston §§ 231 344 403 471 556 698 Lauterpacht *Analyses* §§ 88 96 Ruegger Burckhardt, *Die völkerrechtliche Verantwortung des Staates für die auf seinem Gebiete begangenen Verbrechen* (1924) Deconnere Ferrandière, *La responsabilité internationale des États à raison des dommages causés par les étrangers* (1927) Eagleton, *The Responsibility of States in International Law* (1928)—Dumas, *Responsabilité internationale des États à raison des crimes ou des délits commis sur leur territoire au préjudice d'étrangers* (1930), and in *Hague Recueil* vol 36 (1931) (ii) pp 187 259 Dunn, *The Protection of Nationals* (1932) Roth, *Das völkerrechtliche Delikt* (1932) Soldati, *La responsabilità des États dans le droit international* (1934)—Arató, *Die völkerrechtliche Haftung* (1937) Freeman, *The International Responsibility of States for Denial of Justice* (1939) Jessup, *A Modern Law of Nations* (1948) pp 94 122 Jischuck *Die Verantwortlichkeit des Staates nach Völkerrecht* (1952) (in relation to the Nuremberg trials) Cheng *General Principles of Law as Applied by International Tribunals* (1953) pp 161 53 Anzilotti in RG 13 (1906) pp 529 and 245 309 Foster in AJ, 1 (1907) pp 4 10 Bar in RI 2nd ser. 1 (1899) pp 464 481—Arns in 4 J 7 (1913) pp 724 765 Goubel *ibid* 8 (1914) pp 802 852 Peaslee, *ibid* 10 (1916) pp 328 336 Eagleton in 1 J 10 (1925) pp 293-314—Heulborn in ZO 7 (1927) pp 1 10 Charles de Vischer in RI 3rd ser. 8 (1927), pp 245 272 Borchard in ZO 1 1 (1929) pp 222 250 and in AJ,

24 (1930), pp. 517-540—Hoijer in *R.J. (Paris)*, 4 (1929), pp. 577-602—Hille in *R.J.*, 3rd ser., 10 (1929), pp. 531-571—Eagleton in *Z.V.*, 15 (1930), pp. 337-358—Kelsen in *Z.S.R.*, 12 (1932), pp. 481-608—Salvioli in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 96-103—Strupp, *ibid.*, vol. 47 (1934) (i.) pp. 557-567—Basdevant, *ibid.*, vol. 58 (1936) (iv.), pp. 656-675—Lauterpacht, *ibid.*, vol. 62 (1937) (iv.), pp. 339-370—Starke in *B.Y.*, 19 (1938), pp. 104-117—Friedmann, *ibid.*, pp. 118-150—Cohn in *Hague Recueil*, 68 (1939) (ii.), pp. 200-324—Ago, *ibid.*, pp. 419-545—Biscottini in *Rivista*, 34 (1942), pp. 3-43—Puento in *Tulane Law Review*, 18 (1944), pp. 408-436—Froeman in *A.J.*, 40 (1946), pp. 121-147—Berlia in *Etudes Georges Scelle* (1950), pp. 875-894.

Nature
of State
Responsi-
bility.

§ 148. It is often maintained that a State, as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a State towards its subjects.¹ Since a State can abolish parts of its Municipal

¹ In English courts the defence known as 'Act of State' cannot be pleaded by the Crown or a Government official against a British subject (*Entick v. Carrington* (1765), 19 State Trials 1030, *Walker v. Baird*, [1892] A.C. 491) or against a friendly alien in the United Kingdom (*Johnstone v. Pedlar*, [1921] 2 A.C. 262); but it is a valid defence against an alien resident abroad (*Buron v. Denman* (1848) 2 Ex. 167). Whether or not 'Act of State' is only a valid defence against an alien resident abroad if the injury is done abroad, is a question which cannot be regarded as definitely decided (*Johnstone v. Pedlar*, *supra*, at p. 271; *Commercial and Estates Co. of Egypt v. Board of Trade*, [1923] 1 K.B., at pp. 290, 297). See Harrison Moore, *Act of State in English Law* (1906). There is, however, a class of case in which even a British subject is unable to obtain a remedy against the Crown, namely, when the Act of the Crown complained of was done in exercise of the royal prerogative in the annexation of foreign territory, such Acts being 'Acts of State' and not within the jurisdiction and control of municipal courts: *Secretary of State for India v. Kamachee Boye Sahaba*, 13 Moo. P.C. 22; *Doss v. Secretary of State for India* (1875) 5 L.R., 10 Eq. 500; *Cook v. Sprigg*, [1899] A.C. 672; *West Rand Central Gold Mining Co. v. Rex*, [1905] 2 K.B. 391; *Sobhuza II. v. Miller*, [1926] A.C. 518. See above, p. 160, n. 3, with

regard to State succession. As to Act of State pleaded by a foreign Government sued in its own courts see *Finck v. Egyptian Minister of the Interior* in *B.Y.*, 1926, pp. 219-220, and the *Egyptian Debt Case* in *L.Q.R.*, 42 (1926), pp. 3-5, and see above, p. 160, n. 3. As to France see *Trotabas in Revue critique de législation et de jurisprudence*, 45 (1926), pp. 342-351. See also Duez, *Annuaire de l'Institut international de droit public*, 2 (1931) pp. 54 *et seq.*; the same, *Les actes de gouvernement* (1935); with special reference to interpretation of treaties: Dickinson in *Hague Recueil*, vol. 40 (1932) (ii.), pp. 350-371; Schloesser, *Les actes diplomatiques considérés comme actes de gouvernement* (1933); Haurion, *Précis de droit administratif* (12th ed., 1933), pp. 420 *et seq.*; Audinet in *Sirey*, 1930, 2, p. 163; Rosenmark in *Académie diplomatique*, 1931, pp. 158 *et seq.*; Mestre in *Hague Recueil*, vol. 38 (1931) (iv.), pp. 264 *et seq.*; Schreuer in *Z.S.V.*, 4 (1934), pp. 700-705. See also Wade in *B.Y.*, 15 (1934), pp. 98-112; Holdsworth in *Columbia Law Review*, 41 (1941), pp. 1313-1331, and Lauterpacht, *The Function of Law*, pp. 387-390. For a criticism of the attitude of courts in relying exclusively on the Executive, especially in questions of recognition, see Jaffe, *Judicial Aspects of Foreign Relations* (1933) and Mann in *Grotius Society*, 29 (1943), pp. 143-170. See also below, § 357a, on the conclusiveness of the statements of the Executive.

Law and can make new Municipal Law, it can always avoid legal, although not moral, responsibility by a change of Municipal Law. The position is different with regard to the external responsibility of a State. Responsibility in that sphere attaches to every State as an International Person.¹ State responsibility concerning international duties is therefore a *legal* responsibility. For a State cannot abolish or create International Law in the same way that it can abolish or create Municipal Law. Every neglect of an international legal duty constitutes an international delinquency,² and the injured State can, subject to its obligations of pacific settlement, through reprisals or even war compel the delinquent State to fulfil its international duties. State responsibility is now in a general way recognised in time of war by Article 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, which stipulates. 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

§ 149. If we examine the various international duties out of which the responsibility of a State may arise, we find that it is necessary to distinguish two different kinds of State responsibility. They may be named 'original' in contradistinction to 'vicarious' responsibility. 'Original' responsibility is borne by a State for its own—that is, for its Government's actions, and such actions of the lower agents or private individuals as are performed at the Government's command or with its authorisation. But States have to bear another responsibility besides that just mentioned. For States are, according to the Law of Nations, in a sense responsible for certain acts other than their own—namely, certain unauthorised injurious acts of their agents, of their subjects, and even of such aliens as are for the time living within their territory. The responsibility of States for acts other than their own is a 'vicarious' responsibility. Since the Law of Nations is primarily though not exclusively— a law between States only, it must make every

Original
and
Vicarious
State
Responsibility.

¹ See above, § 113.

² See below, § 151.

State in a sense responsible for certain internationally injurious acts committed by its officials, subjects, and such aliens as are temporarily resident on its territory.¹

Difference
between
Original
and
Vicarious
Responsi-
bility.

§ 150. It is, however, obvious that original and vicarious State responsibility are essentially different. Whereas the one is responsibility of a State for a neglect of its own duty, the other is not. A neglect of international legal duties by a State constitutes an international delinquency. The responsibility which a State bears for such a delinquency is especially grave. Also, the State is, in general, liable to pay compensation for injurious acts of its officials which, although unauthorised, fall within the normal scope of their duties. On the other hand, the vicarious responsibility which a State bears requires it chiefly, in addition to an apology, to compel those officials or other individuals who have committed internationally injurious acts to repair as far as possible the wrong done, and to punish, if necessary, the wrongdoers. When a State complies with these requirements and pays such compensation as is appropriate in the circumstances, no blame falls upon it on account of such injurious acts. But of course, in case a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto vicarious responsibility turns *ipso facto* into original responsibility.

II

STATE RESPONSIBILITY FOR INTERNATIONAL DELINQUENCIES

See the literature quoted above at the commencement of § 148

Concep-
tion of
Inter-
national
Delin-
quencies

§ 151. An international delinquency is any injury to another State committed by the Head or Government of a State in violation of an international legal duty.

¹ The distinction between original and vicarious responsibility, which was first made, in 1905, in the first edition of this treatise, is approved by Borchard, § 74, but rejected by Hohsen, *op. cit.*, pp. 40-42, and by Strupp, *Das völkerrechtliche Delikt*

(1920), pp. 32-35; and in favour of the American-Mexican Claims Commission in the *L.M.B. James* case: *A.J.*, 21 (1927), pp. 362-371, and *Annual Digest*, 1925-1926, Case No. 158. See also Verdross in *Z.d.R.*, 21 (1941), pp. 283-309.

Equivalent to acts of the Head and Government are acts of officials or other individuals commanded or authorised by the Head or Government. The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to criminal act in the generally accepted meaning of the term.¹

International delinquencies in the technical sense of the term must not be confused with so-called 'Crimes against the Law of Nations.'² These, in the terminology of the criminal law of various States, are such acts of individuals against foreign States as are rendered criminal by these codes. They include, in particular, those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations. They also include crimes like piracy on the high seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent.

An international delinquency must, further, not be confused with discourteous or unfriendly acts. Although such acts may be met by retorsion,³ they are not illegal and therefore not delinquent acts.

§ 152. An international delinquency may be committed by any State, be it a full sovereign, half sovereign, or part sovereign State. Yet half sovereign States can commit international delinquencies in so far only as they have an international status and corresponding international duties of their own. And even then the circumstances of each case decide whether the delinquent has to account for its neglect of an international duty directly to the wronged State, or whether it is the full sovereign State (suzerain,⁴ federal,⁵ or protectorate-exercising State), to which the

Subjects
of Inter-
national
Delin-
quencies

¹ See below, §§ 156a and 156b

² See *Harvard Research* (1935), pp 573-592; Kiremoff in *Revue de droit international*, 9 (1932), pp 226 et seq

³ See vol. II, § 29.

⁴ For a discussion of the question whether, and, if so, when, a suzerain is responsible for the delinquencies

of its vassal, see Award in *Brown's* claim, American and British Claims Arbitration Tribunal, in *B.Y.*, 1924, pp 210-221, and *A.J.*, 19 (1925), pp 193-206.

⁵ See Donot, *De la responsabilité de l'état fédéral à raison des actes des états particuliers* (1912), where a

delinquent State is attached, that must bear a vicarious responsibility for the delinquency. On the other hand, such States as are without any international status whatever, as, for example, the member-States of the United States of America, because all their possible international relations are absorbed by the United States as such, cannot commit an international delinquency. Thus an injurious act against France committed by the Government of the State of California in the United States of America would not be an international delinquency in the technical sense of the term, but merely an internationally injurious act for which the United States of America must bear a vicarious responsibility.¹ An instance of this is to be found in the conflict² which arose in 1906 between Japan and the United States of America, on account of the segregation of Japanese children by the Board of Education of San Francisco, and the demand of Japan that this measure should be withdrawn, The Government of the United States at once took the side of Japan, and endeavoured to induce California to comply with the Japanese demands.³

State
Organs as
Subjects of Inter-
national
Delin-
quencies.

§ 153. Since States are juristic persons, the question

number of important cases are discussed. See also Stoke, *The Foreign Relations of the Federal State* (1931), pp. 133-174; Gammans in *A.J.*, 8 (1914), pp. 73-80; Cohen in *Z.V.*, 8 (1914), pp. 134-153; Borchard, § 82; Schoen, *op. cit.*, pp. 100-107; and *Annuaire*, 18 (1900), p. 255.

¹ For a number of Awards upon the responsibility of a Federal State in regard to the contracts of its member-States see Rakton, §§ 601-607; as to the responsibility of the United States for the repudiated debts of the Southern States see Randolph in *A.J.*, 26 (1931), pp. 63-82; and see above, § 89; and Germany's acceptance of responsibility for the failure of the Bavarian Government in October and November 1922 to prevent attacks upon the members of an Inter-Allied Control Commission, discussed by Strupp in *Strupp, Wört.*, ii. p. 247. See also Resolution of the Institute of International Law in *A.J.*, 22 (1928), Special Suppl., at pp. 331, 332, which holds a Federal State, and,

within limits, a protecting State, responsible for the conduct of a member-State and a protected State and lays down expressly that the Federal State cannot invoke the provisions of the Federal Constitution in order to avoid liability. And see *Bases of Discussion*, iii. p. 122, where the British Government accepted as good law the rule formulated by the Institute. And see *ibid.*, p. 124, for the Swiss reply to the effect, *inter alia*, that were a Swiss Canton to adopt a measure incompatible with International Law the Federal authorities would, under the Constitution, insist on its repeal. See also Sibert in *R.G.*, 44 (1937), pp. 544-548. And see above § 89a.

² See Hyde in *The Green Bag*, xix. (1907) pp. 38-49; Root in *A.J.*, 1 (1907), pp. 273-286; Barthélemy in *R.G.*, 14 (1907), pp. 636-686; Woolsey in *A.J.*, 15 (1921), pp. 55-59.

³ For some similar acts of State legislatures and executives see Buell in *A.J.*, 17 (1923), pp. 29-49.

arises—Whose internationally injurious acts are to be considered State acts and therefore international delinquencies? To which the answer must be, first: all such acts as are performed by the Heads of States or by the members of a Government acting in that capacity, so that their acts appear as State acts; secondly, all acts of officials or other individuals which are either commanded or authorised by Governments; and, further, all acts committed by Heads of States or members of a Government outside their official capacity, simply as individuals who act for themselves and not for the State, are not international delinquencies.¹ The States concerned must certainly bear a vicarious responsibility for all such acts, but for that very reason these acts do not, in the first instance, amount to international delinquencies.

§ 153a. As States are the normal subjects of International Law, they—and they only—are, as a rule, subjects of international delinquencies. On the other hand, to the extent to which individuals are made subject to international duties—and, consequently, of International Law—they are also subjects of international delinquencies. This is the case not only with regard to piracy and similar topics of limited compass.² In particular, the entire law of war is based on the assumption that its commands are binding not only upon States but also upon their nationals, whether members of their armed forces or not.³ To that extent no innovation was implied in the Charter annexed to the Agreement of August 8, 1945, for the punishment of the Major War Criminals of the European Axis inasmuch as it decreed individual responsibility for war crimes proper and for what it described as crimes against humanity. For the laws of humanity,⁴ which are not dependent upon positive enactment,

Individuals as Subjects of International Delinquencies.

¹ See below, §§ 158-159. On the question of the responsibility of international organisations and, in particular, of the United Nations see Eagleton in *Hague Recueil*, 76 (1950) (i.), pp. 387-421.

² See below, §§ 272-280, as to piracy. And see § 340h as to slave trade.

³ See vol. II, §§ 233-237c. See also Lauterpacht in *B.Y.*, 21 (1944), pp.

63-88, and Wright in *A.J.*, 39 (1945), pp. 257-285. And see below, § 445; and Levy in *University of Chicago Law Review*, 2 (1945), pp. 313-332. See also Guggenheim, pp. 512-519, 538-552.

⁴ Article 6 of the Charter provided that there 'shall be individual responsibility' for 'crimes against peace,' 'war crimes,' and 'crimes

are binding, by their very nature, upon human beings as such. In this category there must be included the declaration, in the above-mentioned Charter of August 8, 1945, of individual responsibility for crimes against the peace, i.e., for the crime of aggressive war. In its Judgment of September 30, 1946, the Nuremberg International Tribunal set up in conformity with the Charter rightly pronounced its provisions relating to individual responsibility to be declaratory of an inescapable principle of International Law. The Tribunal said:

'It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'¹

The increasing complexities of modern international relations, in particular having regard to the unlimited potentialities of scientific weapons of destruction, may call for far-reaching extensions of individual responsibility expressly declared by International Law.² It is mainly in this connection that proposals have been put forward for the establishment of an international criminal court.³

against humanity' . . . *A.J.*, 30 (1945), Suppl., p. 259; Cmd. 6668 (1945). See also the Indictment of October 18, 1945: Cmd. 6696 (1945).

¹ *Transcript of Proceedings*, p. 16,878; *A.J.*, 41 (1947), p. 220. See also Schneeberger in *Georgetown Law Journal*, 35 (1947), pp. 481-489, and Kelsen in *International Law Quarterly*, 1 (1947), pp. 153-171.

² Thus it is possible that treaties providing for the international control of atomic energy as a method of warfare may impose directly duties upon individuals and declare their violation by individuals to be an international crime.

³ See vol. II, §§ 570a and 570b for a discussion of and the literature on the subject. See also Glaser, *Introduction à l'Etude du droit international pénal* (1954); Liang in *A.J.*, 45 (1951),

pp. 514-525; Donnedieu de Vabres and others in *Annuaire*, 41 (1) (1952), pp. 361-457; Pella in *R.G.*, 56 (1952), pp. 357-459; the same in *Revue critique de droit international privé*, 1952, pp. 337-459; Wright in *A.J.*, 46 (1952), pp. 60-72; Wehberg in 'Gegenwartsprobleme,' *Laun Festschrift* (1953), pp. 379-394; Glaser in *Revue de droit pénal*, 1953, pp. 283-330. In 1950 the General Assembly set up a Committee of representatives of seventeen member States charged with the task of drafting proposals and conventions relating to the establishment of an international criminal court. For an analysis of the report of the Committee see Wright in *A.J.*, 46 (1952), pp. 60-72, and Liang, *ibid.*, pp. 73-88. For the proposed statute see *A.J.*, 46 (1952), Suppl. p. 1. In 1953 another Committee revised the

§ 154. An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence.¹ Therefore, an act of a State committed by right, or prompted by self-preservation in necessary self-defence, does not constitute an international delinquency, however injurious it may actually be to another State.² The *Corfu Channel* case between Great Britain and Albania provided an instructive example of the affirmation of the principle that there is no liability without fault. The Court held that a State cannot be held liable for an injury suffered by a foreign State for the mere reason that the injury occurred on the territory of the former State. The Court said: 'It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosion of which the British warships were victims. . . . This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.'³

Requirement of Malice or Culpable Negligence.

§ 155. International delinquencies—a term applying both to wrongs consisting of breaches of treaties and to wrongs independent of treaty—may be committed in regard to different objects. Thus a State may be injured—in regard

Objects of International Delinquencies

draft for final submission to the General Assembly (for text see *I.N. Bulletin*, 15 (1953), p. 196). The draft provides for the establishment of an international criminal court 'to try natural persons accused of crimes generally recognised under International Law' (Article 1). Such persons may be 'constitutionally responsible rulers, public officials, or private individuals' (Article 25).

¹ There is an increasing tendency among modern writers to reject the theory of absolute liability and to base the responsibility of States upon fault: see discussion in Lauterpacht, § 62, and also *Annuaire*, 33 (1927), pp. 455-562, upon Strisower's Report, and *A.J.*, 21 (1927), pp. 720-724, and *ibid.*, 22 (1928), Special Suppl., pp. 330-333. But see Borchard in *Z.Z.V.*, 1 (1929), pp. 224-227. See also Starke in *B.Y.*, 19 (1938), pp.

104-117; Ago in *Scritti giuridici in onore di Santi Romano* (1939), pp. 3-32; Guggenheim, pp. 352-560; Cheng, *General Principles of Law as Applied by International Tribunals* (1953), pp. 218-232; Sperduti in *Comunicazioni e Studi*, 3 (1950), pp. 79-104.

² Although violations of the rights of a State prompted by self preservation in necessary self-defence are not international delinquencies because there is no *mens rea*, they nevertheless—see above, § 129—remain violations. They can therefore be repelled, and indemnities may be demanded for damage done. But Schoen (*op. cit.*, pp. 115-118) denies this.

³ *I.C.J. Reports*, 1949, p. 18. However, see above, p. 291, n. 4, as to the admissibility of circumstantial evidence for the possible benefit of the injured State.

to its independence through unjustified intervention; in regard to its treaty rights through an act violating a treaty; or in regard to its right of protection over citizens abroad through any act that violates the person or the property of one of its citizens abroad.

Non-pay-
ment of
Contract
Debts and
Damages.

§ 155a. An international delinquency which during recent years has received a considerable amount of attention is the non-payment by a State of money due under contract to other States, or to the nationals of other States upon the demand of their State, whether the indebtedness may have arisen from a loan or from some other contract.¹ The limitation placed upon the use of armed force for the recovery of contract debts by Hague Convention No. 2 of 1907 has already been discussed.² The Governments of a number of Central and South American Republics frequently insert in contracts with the nationals of foreign States a clause (known as the 'Calvo clause') whereby the foreign national agrees that any claim or dispute arising under the contract shall be disposed of by the local tribunals and shall not be the subject of 'international reclamation,' thereby purporting to renounce any claim upon his home State for its protection. 'Calvo clauses,' for the forms vary, have been

¹ See Hyde, §§ 303, 304; Fauchille, § 298 (17); Ralston, §§ 90-103; Eagleton, *The Responsibility of States in International Law* (1928), pp. 157-176; Domke, *Internationaler Schutz von Anleihegläubigern* (1934); Feller, *The Mexican Claims Commissions, 1923-1934* (1936), pp. 173-200; Nussbaum in *Yale Law Journal*, 44 (1934), pp. 53-89 (on the comparative and international aspects of the abrogation of the gold clause in the United States). See also the correspondence between Great Britain and France concerning the payment of French Bonds held by British subjects, Cmd. 3779 (1931); Fischer Williams in *Bibliotheca Visseriana*, ii. (1924) pp. 1-85, and the same essay in *Hague Recueil*, 1923, pp. 293-361; Jéze in *Hague Recueil*, 1926 (iv.), pp. 165-223, and *ibid.*, 53 (1935) (iii.), pp. 381-432; Thompson in *A.S. Proceedings*, 1934, pp. 136-145; Manton, *ibid.*, pp. 146-155. As to changes in currency systems see Sulkowski, *Hague Recueil*,

vol. 29 (1929) (iv.), pp. 5110 and Mann, *The Legal Aspects of Money* (2nd ed., 1953), pp. 445-463. And see the cases of Serbian and Brazilian Loans in France before the Permanent Court: Series A Nos. 20 and 21. And see above, § 137, on financial intervention. On the question of the Inter-Allied Debts after the First World War see *International Conciliation* (Pamphlet No. 287, February 1933), and Gideonse and Brant, *ibid.* (Pamphlet No. 294, November 1933); Donker Curtius in *Theorie du droit*, vi. (1937) pp. 37-50; and, in particular, Stopford in Tuynbee, *Survey* 1932, pp. 97-172; Wheeler-Bennett, *The Wreck of Reparations* (1933). See also the United States Act of April 13, 1934, prohibiting financial transactions with defaulting States: *Documents*, 1934, p. 191. And see *ibid.*, pp. 194-211, for the correspondence between the United States and the debtor States.

² See above, § 135.

discussed by a number of international tribunals and with varying results. It is believed that while they may often have the legal effect of ousting the jurisdiction of an international tribunal until the remedies of the local courts have been exhausted, nevertheless the weight of authority is against the validity of so much of a 'Calvo clause' as purports to make an individual renounce the right which International Law confers, not upon him but upon his home State, of protecting him against treatment which contravenes the rules of International Law.¹

§ 155aa. The responsibility of a State may become involved as the result of an abuse of a right enjoyed by virtue of International Law.² This occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage. Thus international tribunals have held that a State may become responsible for an arbitrary expulsion of aliens.³ The Permanent Court of International Justice expressed the view that, in certain circumstances, a State, while technically acting within the law, may actually incur liability by abusing its rights although, as the Court said, such an abuse cannot be presumed.⁴ Individual Judges of the

Abuse of Rights.

¹ See Hyde, § 305, and in *I.J.*, 21 (1927), pp. 298-303; Ralston, §§ 70-89; Borchard, §§ 371-378, and in *A.J.*, 20 (1926), pp. 538-540; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 456-496; Bullington, *ibid.*, 22 (1928), pp. 66-68; Feller, *ibid.*, 27 (1933), pp. 461-468; Summers in *R.I. (Paris)*, 7 (1931), pp. 567-581, and 12 (1933), pp. 229-233; Ténékidès in *R.G.*, 43 (1936), pp. 270-284; Borchard in *Annuaire*, 36 (i.) (1931), pp. 357-398; Lipstein in *B.Y.*, 22 (1945), pp. 130-145; Freeman in *A.J.*, 10 (1946), pp. 120-147. See also the *North American Dredging Co.'s claim* before the American Mexican Mixed Claims Commission, in *A.J.*, 20 (1926), pp. 800-809, and *Annual Digest*, 1925-1926; and *Mexican Union Railway (Limited) case*, decided in February 1930 by the

British-Mexican Claims Commission: *Annual Digest*, 1929-1930, Case No. 129.

² See Lauterpacht, *The Function of Law*, pp. 286-306; Scerni, *L'abuso del diritto nei rapporti internazionali* (1930); Selez, *La notion de l'abus du droit dans le droit international* (1939); Kras, *L'abus de droit en droit international* (1953); Cheng, *General Principles of Law as Applied by International Tribunals* (1953) pp. 121-136; Politis in *Hague Recueil*, vol. 6 (1925) (i.), pp. 1-109; Leibholz in *Z.o.V.*, 1 (1920), pp. 77-125; Schlochauer in *Z.V.*, 17 (1933), pp. 373-384; Salvati in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 66-69; Guggenheim *ibid.*, 71 (1949) (i.), p. 249-254.

³ See below, §§ 323, 324. And see Boeck in *Hague Recueil*, vol. 18 (1927) (iii.), pp. 627-640.

⁴ *Free Zones of Upper Savoy and the District of Gex*: Series A, No. 24,

International Court of Justice have repeatedly referred to it¹; probably it is implied in the frequent judicial affirmation of the obligation of States to act in good faith.² The conferment and deprivation of nationality is a right which International Law recognises as being within the exclusive competence of States; but it is a right the abuse of which may be a ground for an international claim.³ The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle.⁴ The maxim, *sic utere tuo ut alienum non laedas*, is applicable to relations of States no less than to those of individuals; it underlies a substantial part of the law of tort in English law and the corresponding branches of other systems of law⁵; it is one of those general principles of law recognised by civilised States which the Permanent

p. 12, and Series A/B, No. 46, p. 167. See also the case of *Certain German Interests in Polish Upper Silesia*: Series A, No. 7, p. 30.

¹ See e.g. Judge Azevedo in the *Admission* case (*I.C.J. Reports*, 1948 pp. 79, 80); Judge Alvarez in the *Admission (General Assembly)* case (*I.C.J. Reports*, 1950, p. 15). See also Judge Anzilotti in the *Electricity Company of Sofia* case, Series A/B, No. 77, p. 88.

² See the Joint Dissenting Opinion in the *Admission* case (*I.C.J. Reports*, 1948, pp. 91, 92). And see the Opinion of the Court itself in that case for the statement that with regard to the conditions of admission of new members the Charter did not forbid the taking into consideration of any factor it was possible 'reasonably and in good faith' to connect with the conditions laid down in the Charter.

³ See the *Minutes of the First Committee of the Hague Conference on Codification of International Law*, 1930, pp. 20 and 197. And see Rundstein in *Z.V.* 16 (1931), pp. 41-45, and § 293, below.

⁴ See below, § 179a. And see §§ 174 and 197f.

⁵ On abuse of rights generally see Gutteridge in *Cambridge Law Journal*, 5 (1932), pp. 22-45. For an instance of conventional regulation of a nuisance committed by private persons and affecting injuriously the

territory of a neighbouring State see the Convention of April 15, 1935, between Canada and the United States for the settlement of difficulties arising out of the complaint of the United States that fumes discharged from the smelter of the Consolidated Mining and Smelting Company in British Columbia were causing damage to the State of Washington: *U.S. Treaty Series*, No. 983; *A.J.*, 30 (1936), Suppl., p. 163. In the *Trail Smelter Arbitration* arising out of this Agreement it was held, in 1941, that under international law no State has a right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another. *Annual Digest*, 1938-1940, Case No. 315. And see the Report in the same matter of the International Joint Commission between Canada and the United States of February 28, 1931: *A.J.* 25 (1931), p. 540. When the International Law Commission adopted in 1953 a draft Article on Fisheries which provided, *de lege ferenda*, that States shall be under a duty to accept regulations prescribed by an international authority as essential for the purpose of protecting fishing resources against waste or extermination, it stated that the prohibition of abuse of rights is supported by judicial and other authority (*Report of the Commission*, Fifth Session, 1953).

Court is bound to apply by virtue of Article 38 of its Statute. However, the extent of the application of the still controversial ¹ doctrine of the prohibition of abuse of rights is not at all certain. It is of recent origin in the literature and practice of International Law, and it must be left to international tribunals to apply and develop it by reference to individual situations.

§ 155b. A State which puts forward a claim before a National claims commission or other international tribunal must be in a position to show that it has *locus standi* for that purpose.² The principal, and almost the exclusive, factor creating that *locus standi* is the nationality of the claimant, and it may be stated as a general principle ³ that from the time of the

Nationality of Claims.

¹ See e.g. Balladore Palieri, p. 287, (Cavaglieri, *Nuovi studi sull'interdetto* (1928), pp. 42-52. According to Article 33 of the Treaty of April 18, 1951 constituting the European Coal and Steel Community (see above, p. 186) the Court set up by the Community has jurisdiction, *inter alia* in appeals by member-States against decisions or recommendations of the High Authority on account of abuse of power.

² On the nature of the claim put forward by a State on behalf of its nationals see the Judgment of the Permanent Court of International Justice of September 13, 1928, in the *Case concerning the Factory at Chorzów* Series A, No. 17, pp. 25-29, *Annual Digest*, 1927-1928, Case No. 170. See also Borchard in *Yale Law Journal* 43 (1933-1934), pp. 365-371, for a survey of other relevant cases.

³ See Hurst in *B.Y.*, 1926, pp. 163-182; Hyde, §§ 275, 280, Ralston, §§ 291-348; Lambie in *A.J.*, 24 (1930), pp. 264-278; Borchard in *Annuaire*, 36 (1) (1931), pp. 277-356; Witenberg in *Hague Recueil*, vol. 41 (1932) (3), pp. 14-50; Borchard in *R.I.*, 3rd ser., 14 (1933), pp. 421-467; Ch. de Visscher, *ibid.*, 17 (1930), pp. 481-484, *Bases of Discussion*, III, pp. 140-145; Sibert in *R.G.*, 44 (1937), pp. 514-520; Sinclair in *B.I.*, 27 (1950), pp. 125-144. With regard to the nationality of corporations see below, p. 642, n. 3. As to protection of shareholders in foreign companies see Mervyn Jones in *B.Y.*, 26 (1949),

pp. 225-256. The principle stated above has not been followed invariably, and exceptional cases exist in which a State has been allowed to support a claim on the joint basis of the claimant's domicile within its territory and of his having made a declaration of intention to acquire its nationality see Hyde, § 275, and Ralston, § 300. See also the observations of Fitzmaurice in *B.Y.*, 17 (1936), pp. 104-110, in connection with the *Im Alone* case in which the owners of the ship, which the Commissioners held to have been illegally sunk, were nationals of the defendant State. See also *Annual Digest*, 1933-1934, Case No. 86 (at pp. 205, 206). As to the two cases - *Martin Koszta* and *August Piepenbrink* - of the successful assertion by the United States of America of a right of protection over persons who were not its nationals see Wharton, II, § 175; Moore, III, §§ 490, 491; Martens, *Causés célèbres*, v, pp. 583-599; Borchard, § 250. But see Hyde, I, § 396, who cites a passage in Moore, III, p. 844, which makes it clear that the claim to protect was based upon Koszta's admission to American protection *ad interim* by the American Consul and Chargé d'Affaires at Constantinople by the grant of a passport or safe-conduct in accordance with the recognised usage in Turkey. See also the case of *Edward Wilson v. Germany* in *A.J.*, 19 (1925), pp. 810-815, and *Annual Digest*, 1925-1926, Case No. 198. As to the *August*

occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward. The rule thus stated is subject to exceptions in cases in which a treaty lays down obligations of the contracting parties with regard to the treatment of individuals as in the case of protection of minorities, trusteeship agreements or human rights generally.¹ In such cases, any of the contracting parties having a general interest in the observance of the treaty may bring an international claim which may, in effect, be a claim in the interest of persons who are not their nationals. This applies, in particular, to treaties concerning the treatment of stateless persons.² Similarly, the rule as to the nationality of claims does not necessarily apply to claims on behalf of so-called protected persons³ who, while not nationals of a State, are in its service.⁴ Moreover, it must be noted that while normally States only can advance an international claim such capacity is not necessarily or invariably limited to States. Thus in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* the International Court of Justice held that as the United Nations is a subject of International Law and is capable of possessing international rights and duties,⁵

Piepenbrink case see A.J., 9 (1915), Suppl., pp. 353-360. For an affirmation of the rule as to the nationality of claims see the Judgment of the Permanent Court of International Justice of 1939 in the *Panevezys-Saldutiskis Railway Case*: Series A/B, No. 76, at p. 16. But see the Dissenting Opinion of Judge van Eysinga pointing to the consequences of the adoption of that rule in cases of changes of sovereignty with the result that the new State would be unable to espouse the claims of some of its nationals (at p. 35). It may be regarded as established that the rule *actio personalis moritur cum persona*—now abolished in English law—is not recognised by international tribunals: see the *Dujay case*, decided by the United States-Mexican Claims Commission on April

8, 1929, *Annual Digest*, 1929-1930, Case No. 107.

¹ See above, p. 232, and below, p. 714.

² See below, § 313.

³ See below, § 295.

⁴ It is probably with reference to these and similar cases that the International Court of Justice observed, in the *Reparation for Injuries case* (I.C.J. Reports, 1949, p. 181) with regard to the rule that diplomatic protection can be exercised only by the national State that 'there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.'

⁵ See above, p. 22, and below, § 522a. See also Eagleton in *Hague Recueil*, 76 (1950) (i.), pp. 346-387.

it has the capacity to maintain its rights by bringing international claims.¹ Also, there is nothing to prevent States from conferring an international right of action upon other international organisations and even individuals by granting them a right of direct access to international tribunals. They have done so, in isolated cases, to a limited extent.²

§ 155c. The principle of extinctive prescription, that is, Bar by the bar of claims by lapse of time, is recognised by International Law. It has been applied by arbitration tribunals (Extinctive Prescription) in a number of cases.³ However, it is desirable that the application of the principle should remain flexible and that no attempt should be made to establish fixed time limits.⁴ Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification, as one of

¹ *J.C.J. Reports*, 1949, pp. 179, 181-184. The Court pointed out that unless the United Nations possessed capacity to bring an international claim it could not obtain reparation for a breach by a Member of its international obligation. It held that the United Nations must be deemed to possess the powers which, although not expressly provided for in the Charter, must be regarded as implied in it for the reason that they are essential to the performance of the task of the United Nations.

² See below, p. 638.

³ See Verykios, *La prescription en droit international public* (1934), pp. 129-193; Ralston, §§ 683-698, and particularly the *Gentini* case in § 687; Fauchille, §§ 856-857 (3), and the Report of Politis and Charles de Visscher in *Annuaire*, 32 (1925), pp. 1-24; the *Williams* case in Moore, *Arbitrations*, iv, pp. 4179-4203; Lauterpacht, *Analogies*, § 129, Cavaglieri in *Rivista*, 3rd ser., 5 (1926), pp. 169-204; Witenberg, *La procédure et la sentence internationales* (1937), pp. 138-143, and in *Hague Recueil*, vol. 41 (1932) (iii.), pp. 27-35; Sørensen in *Nordisk T.A.*, 3 (1932), pp. 161-170; Borghard in *Annuaire*, 36 (i.) (1931), pp. 435-441; King in *B.Y.*, 15 (1934), pp. 82-97. See also the decision of the Graeco-Bulgarian Mixed Arbitral Tribunal of February 14, 1927, in *Sarropoulos v. Bulgarian State*,

Recueil T.A.M., 7 (1927), p. 47; *Annual Digest*, 1927-1928, Case No. 173, and the *Look* case, decided on June 3, 1927, by the United States and Mexican Claims Commission: *ibid.*, Case No. 174. The apparent rejection of the principle of extinctive prescription by the Hague Court of Arbitration in the *Pious Fund* case in 1902 (Scott, *Reports of the Hague Court of Arbitration* (1916), pp. 3-17) had not been generally followed: see remarks in the *Gentini* case, *supra*. The League Codification Committee studied prescription in 1928. As to cases where the conduct of the injured person precludes a claim on his behalf see Witenberg in *Hague Recueil*, vol. 41 (1932) (iii.), pp. 63-69. See also *Bases of Discussion*, in pp. 125-135. It has been held that the fact that a State denies to certain categories of its nationals the full status or privileges of citizenship (see below, § 155d) does not affect its rights in the matter of claims by or in respect of the individuals in question. See e.g. *Kahane v. Pariri and the Austrian State*, *Annual Digest*, 1929-1930, Case No. 131. And see Wilson in *A.J.*, 33 (1939), pp. 146-148. On nationality and war claims see Hanna in *Columbia Law Review*, 45 (1945), pp. 301-344.

⁴ Thus it resembles the *laches*, or acquiescence, of English Equity rather than the statutory limits governing Common Law claims.

the main justifications of the principle is to avoid the embarrassment of the defendant by reason of his inability to obtain evidence in regard to a claim of which he only becomes aware when it is already stale¹; and a protest at the time of the occurrence of the delinquency has been held to prevent time from running against the claim for its redress.²

The
Plea of
Non-Dis-
crimina-
tion.

§ 155d. It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations.³ For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilisation, and that a State which fails to measure up to that standard incurs international liability.⁴

¹ Ralston, §§ 688-695.

² *Ibid.*, § 696. Although normally individual claimants are bound by the actions of their Governments who take up and put forward their claims against a foreign State, it was held in the case of the *Cayuga Indian Claims* before the American-British Claims Arbitration Tribunal in 1926, upon the analogy of the exemption in English-speaking countries of persons under disability from the operation of statutes of limitation, that 'dependent Indians not free to act except through the appointed agencies of a sovereignty which has a complete and exclusive protectorate over them' ought not to be prejudiced by the delay on the part of Great Britain in pressing their claim.

For the Award see *A.J.*, 20 (1926), pp. 574-594, and *Annual Digest*, 1925-1926, Case No. 181. In this case the claim dated from about 1810. It is difficult to see why the principle of this decision should not apply in favour of an individual claimant who, having exhausted any private

remedies, duly notified to his own Government a claim against a foreign State and asks for help.

Estoppel. As to the availability of the plea of estoppel (including *res judicata*) in International Law see Lauterpacht, *Analogies*, §§ 87-89, and arbitrations there cited; McNair in *B.Y.*, 1924, pp. 31-37; Holohan in *Boston University Law Review*, 14 (1934), pp. 78 *et seq.*; Friede in *Z.o.V.*, 5 (1935), pp. 517-546.

³ See above, § 24.

⁴ See *Robert's Claim* before the American-Mexican Claims Commission: *Annual Digest*, 1925-1926, Case No. 166. As to the effect on aliens of State legislation in the political sphere see Preuss in *Grotius Society*, 20 (1934), pp. 85-106, and the same in *A.J.*, 29 (1935), pp. 206-218 (as to Germany). As to the execution in Germany in 1934 of Van der Lubbe, a Dutchman, found guilty of taking part in the burning of the German *Reichstag* on February 27, 1933, and sentenced to death under a retro-active law, see Van Hamel in *Iowa*

The position is more difficult with regard to the treatment of the property of aliens as compared with that of nationals.¹

Law Review, 10 (1933-1934), pp. 237-243. See also Kuhn in *A.J.*, 33 (1939), pp. 338-341 and, in particular, Roth, *The Minimum Standard of International Law Applied to Aliens* (1949).

¹ See Borchard, §§ 21, 44, 51, 75, 393; Lunet, *Consultations par les sociétés étrangères d'assurances sur la vie établies en Italie*, etc. (1912); Wehberg, *Das Völkerrecht und das italienische Staatsversicherungsgesetz* (1912); Strupp, *Das völkerrechtliche Delikt* (1920), pp. 118-121, and the bibliography on p. 63; Stowell, *Intervention in International Law* (1931), pp. 154-162; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 497-570; Hackworth, iii. § 285; Lauterpacht in *Hague Review*, vol. 62 (1937), (iv.), pp. 345-348; Sibert in *R.G.*, 44 (1937), pp. 520-544; De Boeck in *R.G.*, 20 (1913), pp. 365-371; Audinet, *ibid.*, pp. 5-9; Anzilotti in *Rivista*, 14 (1921-1922), pp. 177-179; Fachiri in *B.J.*, 6 (1925), pp. 159-171, and *ibid.*, 10 (1929), pp. 32-35; Verdross in *Z.o.R.*, 4 (1925), pp. 320-333, and in *Hague Recueil*, vol. 37 (1931) (iii.), pp. 357-376; Vallotton in *Ostrecht*, 1. (1927), pp. 1230-1234; Kaufmann, *ibid.*, pp. 1256-1260; Lapradelle, *ibid.*, pp. 1262-1272; Bullington in *A.J.*, 21 (1927), pp. 694-706, and in *A.S. Proceedings*, 1933, pp. 103-109; Scelle in *R.G.*, 34 (1927), pp. 403-407; Rolin in *R.I.*, 3rd ser., 8 (1927), pp. 441-446; *A.S. Proceedings*, 1927, pp. 38-48; Dunn in *Columbia Law Review*, 28 (1928), pp. 161-180; Fischer Williams in *B.J.*, 9 (1928), pp. 1-30; Herz in *A.J.*, 35 (1911), pp. 243-262; Freeman in *A.J.*, 40 (1946), pp. 120-147. For extracts from municipal laws on the confiscation of private property see Anderson in *A.J.*, 21 (1927), pp. 525-533. See also the following arbitral and judicial decisions: *Norway v. United States*, before the Hague Court of Arbitration: *A.J.*, 17 (1923), pp. 287-290, 362-399; P.O.I.J., Series A. No. 7 (*Polish Upper Silesia*), at p. 33; *ibid.*, Series B, No. 6 (*Settlers of German Origin in Poland*), at pp. 23, 24; *Peter Pázmány University Case*; *ibid.*,

Series A/B, No. 61, p. 243; *Hopkins' claim*, before the American-Mexican Claims Commission, *A.J.*, 21 (1927), p. 161, and *Annual Digest*, 1925-1926, Case No. 167; (*obiter*) *Refund of Canadian Duties Case*, before the British-American Claims Commission (1926), *Nielsen's Report*, p. 368, and *Annual Digest*, 1925-1926, Case No. 168; and the *Standard Oil Company Tankers Case* (1926), Arbitration between the United States and the Reparation Commission: *B.Y.*, 8 (1927), p. 156, *A.J.*, 22 (1928), p. 404, and *Annual Digest*, 1925-1926, Case No. 169.

With special reference to Mexican legislation see Dunn, *The Diplomatic Protection of Americans in Mexico* (1933), pp. 332-381, and in *Columbia Law Review*, 28 (1928), pp. 166-180; Gaither, *Expropriation in Mexico* (1940); Gordon, *The Expropriation of Foreign-Owned Property in Mexico* (1941); Kerr in *Illinois Law Review*, 22 (1927-1928), pp. 613-634; Bullington in *A.J.*, 22 (1928), pp. 50-69; Hyde, *ibid.*, 32 (1938), pp. 759-766, and 33 (1939), pp. 108-112. See *ibid.*, Suppl., pp. 181-207, for the official correspondence; also in *Documents*, 1938 (1.), pp. 426-471. See also Friede in *Z.o.R.*, 9 (1939), pp. 31-54; Kunz in *New York University Law Quarterly Review*, 17 (1940), pp. 327-344. And see Agreement of February 7, 1946, between Great Britain and Mexico regulating compensation in respect of expropriated petroleum properties and providing for the appointment of experts: Cmd. 6768.

For the dispute between Hungary and Roumania regarding the application to Hungarian nationals of a Roumanian agrarian law see *Off. J.*, 1927 and 1928 (indexes); *La réforme agraire en Roumanie* (2 vols., 1927 and 1928), and *La réforme agraire roumaine devant la justice internationale* (1928) (collections of opinions of lawyers); and Deák, *The Hungarian-Roumanian Land Dispute* (1928).

The Greek Government agreed in 1927 and 1928 to repurchase the expropriated landed properties held by British subjects at prices to be fixed by free negotiation between the Greek

The rule is clearly established that a State is bound to respect the property of aliens. This rule is qualified, but not abolished, by two factors: the first is that the law of most States permits far-reaching interference with private property in connection with taxation, measures of police, public health, and the administration of public utilities. The second modification must be recognised in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation.

Repara-
tion as a
Conse-
quence of
Inter-
national
Delin-
quencies.

§ 156. The principal legal consequences of an international delinquency are reparation of the moral and material wrong done.¹ The merits and the conditions of the special cases

Government and the owners. For the Exchange of Notes see Treaty Series, No. 16 (1929), Cmd. 3347.

For a discussion of the subject by reference to problems which arose after the Second World War see Binchedler, *Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht* (1950); Re, *Foreign Confiscations* (1951); Friedman, *Expropriation in International Law* (1953); Wortley in *Grotius Society* 33 (1947), pp. 25-36; Doman in *I.L.Q.*, 3 (1950), pp. 323-342; Fawcett in *B.Y.*, 27 (1950), pp. 368-375; Drucker in *Grotius Society*, 36 (1950), pp. 75-114 and in *I.C.L.Q.*, 2 (1953), pp. 391-396; Wehberg in *Festschrift für Nauiakaly* (1950), pp. 125-145; Lapradelle and others in *Annuaire*, 43 (1) (1950), pp. 42-132; Van Hecke in *I.L.Q.*, 4 (1951), pp. 344-357; Guttridge in *I.C.L.Q.*, 1 (1952), pp. 14-28; Schwarzenberger in *Current Legal Problems*, 5 (1952), pp. 295-323. See also Agreement between the United Kingdom and Yugoslavia of December 23, 1948; Treaty Series, No. 2 (1949), Cmd. 7600, and Agreement between the United Kingdom and France of April 11, 1951, concerning

Terms of Compensation for British Interests in French Nationalised Gas and Electricity Undertakings; Treaty Series, No. 34 (1951), Cmd. 8224.

¹ See Schoen, *op. cit.*, pp. 122-143; Strupp, *op. cit.*, pp. 208-222; Stowell, pp. 557-599; Engleton, *The Responsibility of States in International Law* (1928), pp. 182-205; Dunn, *The Protection of Nationals* (1932), pp. 172-187; Laro, *Die Rechtsfolgen völkerrechtlicher Delikte* (1932); Reutzer, *La réparation comme conséquence de l'acte illicite en droit international* (1938); Personnaz, *La réparation du préjudice en droit international public* (1938); Kelsen in *Z.o.R.*, 12 (1932), pp. 481-608; Rice in *A.J.*, 28 (1934), pp. 246-254; *Basics of Discussion*, iii, pp. 146-152. 'It is a principle of international law that the breach of an international engagement involves an obligation to make reparation in an adequate form' (*Chorzów Factory case*, *P.C.I.J.*, Series A, No. 9, p. 21; to the same effect *Interpretation of Peace Treaties case*, *I.C.J.*, 1950, p. 228). The term 'international engagement' includes any duty under International Law.

are, however, so different that it is impossible for the Law of Nations to prescribe once and for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such acts as are necessary for reparation of the wrong done. What kind of acts these are depends upon the merits of the case. It is obvious that there must be pecuniary reparation¹

¹ *Measure of Damages and Interest.* Great diversity of practice at present prevails amongst international tribunals upon these matters, and any general rules which might be laid down at present would need to be qualified by many exceptions.

(a) *Measure of Damages.* Although pronouncements can be found both in text-books and in awards to the effect that International Law does not sanction the award of 'consequential damages' such as loss of possible business profits (*lucrum cessans*), a formidable array of awards is in existence which give damages of this nature. For an analysis of a large number of cases upon the measure of damages see Ralston, §§ 435-474, Lauterpacht, *Analogue*, §§ 65, 66, and, in particular, Marjorie Whiteman, *Damages in International Law*, 3 vols. (1937-1943) (a comprehensive work). See also the preliminary administrative decisions of the German-American Mixed Claims Commission (see *A.J.*, 18 (1924), pp. 175-186, and *B.Y.*, 1924, pp. 222-225), *Janca's* claim before the American-Mexican Claims Commission: *A.J.*, 21 (1927), pp. 362-371. An authoritative exposition of and decision on the measure of damages will be found in the Judgment of the Permanent Court of International Justice of September 13, 1928, in the *Case concerning the Factory at Chorzów*: Series A, No. 17, pp. 31, 46-48. See also Roth, *Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten* (1934); Wise in *A.J.*, 17 (1923), pp. 245-261; Yntema in *Columbia Law Review*, 24 (1923-1924), pp. 511-527; Hauriou in *R.G.*, 31 (1924), pp. 203-231; Spiropoulos in *Z.J.*, 35 (1925-1926), pp. 59-134; Strupp, *Das völkerrechtliche*

Delikt (1920), pp. 211-213; Brierly in *B.Y.*, 1928, pp. 42-49; Hyde in *A.J.*, 22 (1928), pp. 140-142; Anzilotti, pp. 517-533; Eagleton in *Yale Law Journal*, 39 (1929), pp. 52-75; Salvio in *Hague Review*, vol. 28 (1929) (iii.), pp. 235-276; Bouvé in *R.I.*, 3rd ser., 11 (1930), pp. 660-680; Feller, *Mexican Claims Commission, 1921-1934* (1936), pp. 290-307; Freeman, *The International Responsibility of States for Denial of Justice* (1934), pp. 571-603; Sibert, pp. 317-328; Cheng, *General Principles of Law as Applied by International Tribunals* (1953) pp. 233-253.

(b) *Interest.* It is the general principle of international tribunals to award interest, at rates which vary according to the prevailing circumstances, from the date when a debt or other liquidated demand became due, or when the injury complained of occurred, or from the date of the judgment or award (as, for instance, in the *Wimbledon* by the Permanent Court, Series A, No. 1); there may, however, have been conduct on the part of the claimant which disentitles him to the award of interest. See cases discussed in Ralston §§ 210-230, 439, 443, 467, 650, and Lauterpacht, §§ 63, 64; Eagleton, *op. cit.*, pp. 203-205; Feller, *op. cit.*, pp. 308-311, and, in particular, Marjorie Whiteman, *Damages in International Law*, vol. iii. (1943), pp. 1913-2006. See also the *Russian Indemnity* case before the Hague Court of Arbitration in 1912 in Scott, *Hague Court Reports* (1916), pp. 98-323, and the discussion of the award of interest upon the debt by Strupp in *Z.V.*, 6 (1912), pp. 353-566, Anzilotti in *Rivista*, 7 (1913), pp. 53-67, and Lapradelle-Politis, ii. p. 981.

for material damage¹; and at least a formal apology² on the part of the delinquent will in every case be necessary. This apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged State, the despatch of a special embassy bearing apologies, and the like. A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, and for delinquencies which arise merely from culpable negligence.

If the delinquent State refuses reparation for the wrong done, the wronged State can, consistently with any existing obligation of pacific settlement, exercise such means as are necessary to enforce adequate reparation. Among the legal questions with regard to which the Permanent Court is authorised to exercise jurisdiction, if the parties agree thereto, are included 'the nature or extent of the reparation to be made for the breach of an international obligation.'³

Penal
Damages.

§ 156a. It is often maintained that, having regard to the sovereignty of States, their responsibility for international delinquencies is limited to such reparation for wrongs committed by them as does not exceed the limits of restitution⁴. This view hardly accords either with principle or with practice. It is true that international tribunals have held that penal or vindictive damages cannot be awarded against States.⁵ However, in the majority of these decisions the

¹ Thus, according to Article 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, a belligerent party which violates these laws shall, if the case demands, be liable to make compensation.

² For an example of the cumulation of these means of redress see the Japanese Note of December 14, 1937, to the United States concerning the sinking by Japanese aircraft of the United States gunboat *Panay* and three American vessels in the course of the hostilities in China. Japan expressed her profound regret at the incident, presented sincere apologies, promised indemnification for all losses, and undertook 'to deal appropriately'

with those responsible for the incident and to issue instructions with a view to preventing similar incidents in the future: *Documents*, 1937, pp. 757-767.

³ Article 36 of the Statute.

⁴ See e.g. Kaufmann in *Illegue Recueil*, vol. 54 (1935) (iv.), pp. 466-471, and §§ 150, 151, and 156 of the fourth and preceding editions of this treatise.

⁵ See e.g. the *Lusitania* case, decided in November 1923 by the American-German Mixed Claims Commission: *Annual Digest*, 1923-1924, Case No. 113. See also the Award in the case of *Portugal v. Germany*, decided in June 1930; *Annual Digest* 1929-1930, Case No. 126.

tribunals were guided in this matter by the limitations of the arbitration agreement.¹ On the other hand, international tribunals have in numerous cases awarded damages which must, upon analysis, be regarded as penal. Such punitive damages have been awarded, in particular, for the failure of States to apprehend or effectively to punish persons guilty of criminal acts against aliens.² The practice of States and tribunals shows other instances of reparation, indistinguishable from punishment, in the form of pecuniary redress unrelated to the damage actually inflicted.³

156b. The responsibility of States is not limited to res-
titution or to damages of a penal character. The State, Criminal
Responsi-
bility of
States. and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilised countries. Thus if the Government of a State were to order the wholesale massacre of aliens resident within its territory the responsibility of the State and of the individuals responsible for the ordering and

¹ In the case of the *Carthage*, decided on May 6, 1913, the Permanent Court of Arbitration, while refusing to award the sum of one franc for the offence against the French flag, held that the establishment of the fact that a State had failed to fulfil its obligations 'constitutes in itself a serious penalty': Scott, *Hague Court Reports* i, p. 335.

² See e.g. *Janes' case*, in *Annual Digest*, 1925-1926, Case No. 158, and comment thereon by Brierly in *B.Y.*, 9 (1928), pp. 42 *et seq.*, in particular p. 49. See also Rice in *A.J.*, 28 (1934), pp. 246-254; Briggs in *Essays in Political Science in Honor of W. W. Willoughby* (1937), pp. 339-353; Lauterpacht in *Hague Recueil*, vol. 62 (1937) (iv.), pp. 349-357.

³ See e.g. the decision of the Council of the League of December 14, 1925, *Off. J.*, 7 (1926), p. 172, awarding to Bulgaria the payment of ten million levas by Greece as reparation for material and moral damage in addition to compensation for damage to movable property. In the *P'm*

Alone case, decided on January 5, 1935, the Commissioners recommended that the United States, in addition to formally acknowledging the illegality of its conduct and apologising to the Canadian Government therefor, should pay to Canada the sum of \$25,000 'as a material amend in respect of the wrong': *A.J.*, 29 (1935), p. 331. Hyde, *ibid.*, p. 300, adduces reasons why this case cannot be regarded as a precedent for awarding penal damages against a State in respect of a public claim. See also the *Martini* case between Italy and Venezuela, decided on May 3, 1930, where the arbitrators held, as part of the Award, that certain obligations incurred as the result of a manifestly unjust decision of a Venezuelan Court must be expressly declared to be annulled. No payment was ever made in pursuance of that decision, but the Tribunal was of the view that as an illegal act had been committed the consequences of that act must be expressly effaced: *Annual Digest*, 1929-1930, Case No. 93.

the execution of the outrage would be of a criminal character. The preparation and launching of an aggressive war - now that resort to war as an instrument of national policy has been condemned and renounced in solemn international engagements¹—must be placed within the same category.²

There are no international judicial decisions laying down and applying the principle of criminal responsibility of States. This is largely due to the absence of international tribunals endowed with the requisite jurisdiction. But traditional International Law, in permitting war and reprisals as a means of redress against a State deemed guilty of a violation of international law, sanctioned coercive action not necessarily limited to mere compensation for a wrong received. The sanctions of Article 16 of the Covenant of the League and of the corresponding provisions of the Charter of the United Nations³ are, in part, of a penal character in relation to what may properly be described as the crime of war.⁴ The universal recognition as part of International Law of rules penalising war crimes by individuals responsible for violations of the laws of war⁵ affords another instance of the recognition of criminal responsibility of States. For war criminals are, as a rule, guilty of acts committed not in pursuance of private gain and lust but on behalf of and as organs of the State.

Undoubtedly, the repression, by means appropriate to the seriousness of the offence, of criminal conduct of collect-

¹ See vol. II. §§ 52*fe*-52*l* as to the General Treaty for the Renunciation of War. See also Article 2 (4) of the Charter of the United Nations.

² In 1927 the Eighth Assembly of the League of Nations adopted a Resolution in which war of aggression was described as an international crime: Records of the Eighth Assembly, Plenary Meetings, p. 84. A resolution of the Sixth Pan-American Conference declared wars of aggression to be a 'crime against the human species': *A.J.*, 22 (1928), pp. 356, 357. See also Lauterpacht in *B.Y.*, 21 (1944), p. 81.

³ Chapter VII of the Charter.

⁴ Article 6 of the Charter annexed to the Agreement of August 8, 1945, for the Punishment of the Major War Criminals provided that among the crimes coming within the jurisdiction of the Tribunal there shall be '(a) Crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.' *A.J.*, 39 (1945), Suppl., p. 260. *Cmd.* 6668.

⁵ Vol. II. § 251.

ive units raises difficulties of a legal and ethical nature inherent in the notion of collective responsibility and punishment. Yet it is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation. Moreover, the extreme drastic consequences of criminal responsibility of States are capable of modification in the sense that such responsibility is additional to and not exclusive of the international criminal liability of the individuals guilty of crimes committed in violation of International Law.¹

III

STATE RESPONSIBILITY FOR ACTS OF STATE ORGANS

See the literature quoted above at the commencement of § 148, and especially Moore, vi. §§ 998-1018 Borchard, §§ 75-81 and 127-130 - Schoen, *op. cit.*, pp. 80-122 Marinoni, *La Responsabilit  degli Stati per gli Atti dei loro Rappresentanti* (1914) Strupp, *Das v lkerr chtliche Delikt* (1920), pp. 67-88 Eagleton, *State Responsibility in International Law* (1928), pp. 44-75 - Harvard Draft Convention (and Comment), *A.J.*, 23 (1929), April Special Number, pp. 145-158 Jescheck, *Die Verantwortlichkeit der Staatenpartei nach dem V lkerr cht* (1952) Schloch in *Hague Recueil*, vol. 46 (1935) (iv.), pp. 103-114.

§ 157. States must bear vicarious responsibility for all internationally injurious acts of their organs. As, however, these organs are of different kinds and of different position, the actual responsibility of a State for acts of its organs

Responsibility varies with Organs concerned.

¹ For it must be borne in mind that individuals are subjects of international law not merely as beneficiaries of rights. They are also subject to international duties not only in exceptional situations as blockade runners, pirates or war criminals, but also, more generally, in their capacity as organs of the State. The modern tendency to treat individuals as subjects of international law must not be identified with one-sided emphasis upon enjoyment of

rights arising from International Law. At the same time it is clear that unless the criminal responsibility of States is to be reduced to the vanishing point of law, its enforcement must be placed in the hands of impartial international agencies operating within the orbit of a politically organised international society. See also above, § 153a. For the literature on the establishment of an international criminal court see above, §§ 127a, 154, and in particular, vol. II, § 257.

varies with the agents concerned. It is therefore necessary to distinguish between internationally injurious acts of Heads of States, of members of a Government, of diplomatic envoys, of parliaments, of judicial functionaries, of administrative officials, and of military and naval forces.

Inter-
nationally
Injurious
Acts of
Heads of
States.

§ 158. Such internationally injurious acts as are committed by Heads of States in the exercise of their official functions are not our concern here, because they constitute international delinquencies, which have been discussed above (§§ 151-156). But a monarch can, like any other individual, commit in his private life many internationally injurious acts. The position of the Head of the State, who is, within and without his State, neither under the jurisdiction of a court of justice, nor under any kind of disciplinary control, makes it a necessity for the Law of Nations to impose a certain vicarious responsibility upon States for internationally injurious acts committed by their Heads in private life. Thus, for instance, when a monarch during a stay abroad commits an act injurious to the property of a foreign subject and refuses adequate reparation, his State may be requested to pay damages on his behalf.

Inter-
nationally
Injurious
Acts of
Members
of Govern-
ments.

§ 159. As regards internationally injurious acts of members of a Government, a distinction must be made between such acts as are committed by the offenders in their official capacity, and other acts. Acts of the first kind constitute international delinquencies, as stated above (§ 153). But members of a Government can in their private life perform as many internationally injurious acts as private individuals, and we must ascertain therefore what kind of responsibility their State must bear for such acts. Now, as members of a Government have not the exceptional position of Heads of States, and are therefore under the jurisdiction of the ordinary courts of justice, there is no reason why their State should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

§ 160. The position of diplomatic envoys who, as representatives of their home State, enjoy the privileges of extraterritoriality, gives, on the one hand, a very great importance to internationally injurious acts committed by them on the territory of the receiving State, and, on the other hand, excludes the jurisdiction of the receiving State over such acts.¹ The Law of Nations therefore makes the home State in a sense responsible for all acts of an envoy injurious to the State or its subjects on whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged State. Thus, for instance, a crime committed by the envoy on the territory of the receiving State must be punished by his home State, and in special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologise or express its regret for his behaviour, or to pay damages. Such injurious acts as an envoy performs at the command or with the authorisation of his home State, constitute international delinquencies for which the home State bears original responsibility, and for which the envoy cannot personally be blamed.

§ 161. As regards the internationally injurious activity of parliaments, it must be kept in mind that, important as may be the part parliaments play in the political life of a nation, they do not belong to the agents which represent the State in its international relations with other States. Therefore, however injurious to a foreign State the activity of a parliament may be, it can never constitute an international delinquency.² On the other hand, the State bears full international responsibility for such legislative acts of parliaments as are contrary to International Law and as have been finally incorporated as part of its Municipal Law.³

§ 162. Internationally injurious acts committed by judicial functionaries in their private life are in no way different from such acts committed by other individuals. But these functionaries may in their official capacity commit such

See below, §§ 386-388, 391.

See details in Borchard, § 75.

¹ See, for a careful study of the subject, Sibert in *R.G.*, 48 (1941-1945), Justice, pp. 5-34. And see above, § 22.

acts, and the question is how far the vicarious responsibility of a State for acts of its judicial functionaries can reasonably be extended in face of the fact that in modern civilised States these functionaries are almost entirely independent of their Government.¹ Undoubtedly, in case of such denial² or undue delay of justice by the courts as is internationally injurious, a State must find means to exercise compulsion against such courts. And the same applies to an obvious and malicious act of misapplication of the law by

¹ Wharton, ii. § 230, contains abundant and instructive material on this question. For the assassination in Switzerland in May 1923 of Vorovski, the chief Russian delegate to the Lausanne Conference, and the subsequent acquittal of the person accused of the crime see Toynbee, *Survey*, 1924, pp. 258, 259. And see Garner in *B.Y.*, 10 (1929), pp. 181-189. When in July 1943 the Supreme Court of Eire gave a judgment affirming jurisdiction over certain Latvian and Estonian vessels of which Soviet Russia claimed to be the owner, the Russian Government, in a communication addressed to the High Commissioner for Eire in London, protested against the judgment as being illegal and placed the responsibility for it on the Government of Eire: *Irish Law Times*, 75 (1941), p. 215.

² See Borchard, §§ 127-130; and in *Z.ö.V.*, 1 (1929), pp. 242-247. The term 'denial of justice' is also applied to unjust action or inaction by the Executive: see Ralston, §§ 115, 116. See also *A.S. Proceedings*, 1927, pp. 27-38; Strupp, *Das völkerrechtliche Delikt* (1920), pp. 70-85; Dunn, *The Protection of Nationals* (1932), pp. 146-156; the same, *The Diplomatic Protection of Americans in Mexico* (1933), pp. 190-273; Moussa, *L'étranger et la justice nationale* (1934); Feller, *The Mexican Claims Commissions, 1923-1934* (1936), pp. 128-154; Eugathiadès, *La responsabilité internationale de l'état pour les actes des organes judiciaires et le problème du déni de justice en droit international* (1937); Freeman, *The International Responsibility of States for Denial of Justice* (1938) (a scholarly and ex-

haustive work); Eagleton in *A.J.*, 22 (1928), pp. 538-559; Dumas in *R.I.*, 3rd ser., 10 (1929), pp. 277-307; Hoijer in *R.I. (Paris)*, 5 (1930), pp. 115-146; Fitzmaurice in *B.Y.*, 13 (1932), pp. 93-114; 'Ch de Visscher in *Hague Recueil*, vol. 52 (1935) (n.), pp. 360-440; Lassitzyn in *A.J.*, 30 (1936), pp. 632-646; Spagel in *A.J.*, 32 (1938), pp. 62-81; Tenérides in *R.G.*, 46 (1939), pp. 373-389; Puente in *Michigan Law Review*, 43 (1944), pp. 383-406; Sibert in *R.G.*, 48 (1) (1941-1945), pp. 5-34. In a number of cases international tribunals have held that the non-execution or remission of a sentence on the culprit or the granting of an amnesty constitutes a denial of justice to the injured alien: see e.g. the *Putnam* case, the *West* case, and the *Mallén* case, all decided in 1927 by the United States Mexican General Claims Commission. *Annual Digest*, 1927-1928, Cases Nos. 141, 143, 144. See also *ibid.*, 1933-1934, Case No. 94, where, in the *Adams* case, the United States-Panama Claims Commission awarded damages to the claimant on the ground that the offender had received inadequate punishment. The same Commission awarded damages on account of an amnesty granted to the offender: *Denham* case, *ibid.*, Case No. 95. In the *Solomon* case, decided in 1933 by the United States-Panama Claims Commission, damages were awarded to the claimant on the ground that his conviction by a Panamanian court had been due to the fact that the court was unduly influenced by local feeling: *ibid.*, 1933-1934, Case No. 93. In fact, the term 'denial of justice' is at times used to cover all international injuries affecting aliens: see e.g. Hyde, § 281.

the courts which is injurious to another State. But if a court observes its own proper forms of justice and nevertheless makes a materially unjust order or pronounces a materially unjust judgment, matters become so complicated that there is hardly a peaceable way in which the injured State can successfully obtain reparation for the wrong done, unless the other party consents to bring the case before a court of arbitration.¹

§ 162a. It is a recognised rule that an international tribunal will not entertain a claim put forward on behalf of an alien on account of alleged denial of justice unless the person in question has exhausted the legal remedies available to him in the State concerned.² So long as there has been no final pronouncement on the part of the highest competent authority within the State, it cannot be said that justice has been definitely denied and that a valid international claim has arisen. The substance of this rule, usually referred to as the 'local remedies' rule, is frequently included in conventions providing for obligatory jurisdiction of international tribunals. However, failure to exhaust the 'local remedies' will not constitute a bar to a claim if it is clearly established that, in the circumstances of the case,

Exhaustion of
Local
Remedies

¹ For the interesting case of the *Costa Rica Packet*, decided in 1891, between Holland and Great Britain, see Blex in *R.I.*, 28 (1896), pp. 452-468; Regelsperger in *R.G.*, 4 (1897), pp. 735-745; Valéry in *R.G.*, 5 (1898), pp. 57-66; Moore, i, § 148. See also Ullmann, *De la responsabilité de l'état en matière judiciaire* (1911); Borchard, § 81; Otken in *R.I. (Genera)*, 4 (1926), pp. 33-42. The whole correspondence on the subject and the award are printed in Martens, *N.R.G.*, 2nd ser., 23 (1898), pp. 48, 715, and 808. See also the *Cheveau* case, decided in 1931, between Great Britain and France: *A.J.*, 27 (1933), p. 153; *Annual Digest*, 1931-1932; Hudson in *A.J.*, 26 (1932), pp. 804-807.

² *Rules of Discussion*, iii, pp. 130-139; Eagleton, *The Responsibility of States in International Law* (1928), pp. 95-124, and in *R.I.*, 3rd ser., 11 (1930), pp. 643-659, and *ibid.*, 16

(1935), pp. 504-526; Dunn, *The Protection of Nationals* (1932), pp. 156-159; Witenberg, *La procédure et la sentence internationales* (1917), pp. 153-155, and in *Hague Recueil*, vol. 41 (1932) (iii.), pp. 50-56; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 403-455; Borchard in *Zo F.*, 1 (1929), pp. 233-242; the same in *Annuaire*, 35 (2) (1931), pp. 424-435, and in *A.J.*, 28 (1934), pp. 720-733; Fachiri in *B.Y.*, 12 (1931), pp. 95-106, and *ibid.*, 17 (1936), pp. 19-36; Friedmann in *R.I.*, 3rd ser., 14 (1933), pp. 318-327; Ténékidès, *ibid.*, pp. 514-535; Ago in *Archivio di diritto pubblico*, vol. iii, (2) (1938) pp. 181-249. See also the dispute between Persia and Great Britain in 1932 and 1933 concerning the Anglo-Persian Oil Company's Concession in Persia: Toynbee, *Survey*, 1934, pp. 224-247; Verzijl and others in *Annuaire*, 45 (1954).

an appeal to a higher municipal authority would have had no effect, for instance, when the supreme judicial tribunal is under the control of the executive organ whose acts are the subject-matter of the complaint,¹ or when the decision complained of has been given in pursuance of an unambiguous municipal enactment with the result that there is no likelihood of a higher tribunal reversing the decision or awarding compensation or, as a rule, when the injury to the alien is the result of an act of the government as such.²

Inter-
nationally
Injurious
Acts of
Adminis-
trative
Officials
and Milit-
ary and
Naval
Forces.

§ 163. Internationally injurious acts committed in the exercise of their official functions by administrative officials and military and naval forces of a State without that State's command or authorisation, are not international delinquencies, because they are not State acts. But a State bears a wide and altogether unrestricted³ vicarious responsibility for such acts because its administrative officials and military and naval forces are under its disciplinary control, and because all acts of such officials and forces in the exercise of their official functions are *prima facie* acts

¹ See e.g. *Brown's case*, decided on November 23, 1923, by the British-American Claims Arbitral Tribunal: *Annual Digest*, 1923-1924, Case No. 35.

² See the Award of March 1933 given by Undén, Arbitrator, in the dispute between Greece and Bulgaria concerning the *Interpretation of Article 181 of the Treaty of Neuilly*: *A.J.*, 28 (1934), p. 787. See the Award of Bagge, Arbitrator, of May 9, 1934, in the dispute between Great Britain and Finland: *Annual Digest*, 1933-1934, Case No. 91. For comment thereon see Borchard in *A.J.*, 28 (1934), pp. 729-733; Berkett in *Hague Recueil*, 50 (1934) (iv.), pp. 198-303; Freeman, *op. cit.*, pp. 423-434; and Fachiri, *op. cit.* See also *Z.S.V.*, 4 (1934), pp. 671-684. And see *Inter-ocean Transportation Company of America v. The United States of America*: *Annual Digest*, 1935-1937, Case No. 115 (at pp. 272-274), on purely illusory remedies. The interpretation given to the Calvo Clause (see above, § 155a) in some cases—e.g. *Mexican Union Railway case*: *Annual Digest*, 1929-1930, Case

No. 129 substantially reduces the operation of that Clause to a condition of observing the local remedies rule.

³ Borchard (§ 77) objects to this statement. In the *Zafiro* case (1925) the American-British Claims Arbitration Tribunal based the liability of the United States for looting by the Chinese crew of a British supply ship attached to the American fleet upon the culpable lack of control by the officers: see *A.J.*, 20 (1926), pp. 385-390, and *Annual Digest*, 1925-1926, Case No. 161. See also the *Diaz* case, decided by the United States-Panama Claims Commission (*Annual Digest*, 1933-1934, Case No. 100), where the United States was held responsible for damage caused by trespassing American sailors engaged in exercises off the coast. For a criticism of the decision see Borchard in *A.J.*, 29 (1935), p. 101. And see the decision given in December 1931 by the United States Court of Claims in *Royal Holland Lloyd v. The United States*, *A.J.*, 26 (1932), pp. 399-419, which, at p. 410, relies on the statement in the text.

of the State.¹ Therefore, a State has, first of all, to disown and disapprove of such acts by expressing its regret or even apologising to the Government of the injured State; secondly, damages must be paid² where required; and, lastly, the offenders must be punished according to the merits of the special case.

As regards the question what kind of acts of administrative officials and military and naval forces are of an internationally injurious character, the rule may safely be laid down that such acts are internationally injurious as would constitute international delinquencies if committed by the State itself, or with its authorisation.³

It is of importance to quote again here Article 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, which stipulates that a State is responsible for all acts committed by its armed forces. The hostilities between the Chinese and Japanese forces round Shanghai in 1932 raised the question as to the responsibility for damage done to aliens by the forces of a State in the territory of another State in circumstances not amounting to war. The British Government informed both parties to the dispute that it must hold each side responsible for any loss to British life and property caused by their respective armed forces (see statement by Sir John Simon on February 18, 1932, 261 H.C. Deb 5 s., col 1831). On principle it is not irrelevant in such cases to inquire into the legality of the action taken by a State in the territory of another State. See Wright in *A J*, 26 (1932), pp 536-590. In February 1938 the United States announced that it would attribute to Japan responsibility for damage caused to United States nationals or property by Japanese armed forces in China. For a criticism of that announcement see Borchard in *A J*, 32 (1938), p 534, n. 4. But see Lauterpacht in *Legal Problems in the Far Eastern Conflict* (ed by Wright, 1941), pp 153-156.

² Grotius, II. c. 17, § 20, denies this: 'Neque vero si quid milites, aut terrestres, aut nautici, contra imperium amicus noniusent, reges teneri.' It has been held that a State is responsible for the injurious

acts of soldiers on leave. *Bellon case*, decided on June 18, 1929, by the French Mexican Claims Commission. *Annual Digest*, 1929-1930, Case No. 104. But see the *Gordon case*, *ibid.* Case No. 103, where Mexico was held not liable for injuries caused by army doctors engaged in private target practice (United States Mexican Claims Commission, October 8, 1930).

³ Some instructive cases may be quoted as examples.

(1) On November 26, 1905, Hasmann, a member of the crew of the German gunboat *Panther* (see *RG*, 13 (1906), pp 200-206), at that time in the port of Itajahy in Brazil, failed to return on board his ship. The commander of the *Panther* sent a search party, comprising three officers in plain clothes and a dozen non-commissioned officers and sailors in uniform, on shore for the purpose of finding the whereabouts of Hasmann. This party, during the following night, penetrated into several houses, and compelled some of the residents to assist them in their search for the missing Hasmann, who, however, could not be found. He voluntarily returned on board the following morning. As the search violated Brazilian territorial supremacy, Brazil lodged a complaint with Germany, who, after an inquiry, disowned the act of the commander of the *Panther*, formally apologised for it, and punished the commander of the *Panther* by relieving him of his command.

(2) Another example occurred in 1904, when the Russian Baltic fleet, on its way to the Far East during

But it must be specially emphasised that a State never bears any responsibility for losses sustained by foreign subjects through *legitimate* acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home State has no right to request that they should be treated otherwise than as the law of the land authorises the State to treat its own subjects.¹ Therefore, since the Law of Nations does not prevent a State from expelling aliens, the home State of an expelled alien cannot, as a rule,² request the expelling State to pay damages for the losses sustained by him through having to leave the country. Therefore, further, a State need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war,³ insurrection,⁴ riot, or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like.

IV

STATE RESPONSIBILITY FOR ACTS OF PRIVATE PERSONS

See the literature quoted above at the commencement of § 148, and especially Moore, vi. §§ 1019-1031 Borchard, §§ 86-96—Schoen, *op. cit.* pp. 63-80. See also Arias in *A.J.*, 7 (1913), pp. 724-765—Goebel in *A.J.*, 8 (1914), pp. 802-852—Strupp, *Das volkerrechtliche Delikt* (1920), pp. 89-108—Jess, *Politische Handlungen Privater gegen das Ausland und*

the Russo-Japanese War, fired upon the Hull fishing fleet off the Dogger Bank. See below, vol. ii. § 5.

(3) In December 1915, during the First World War and at a time when the United States was still neutral, an Austrian submarine fired upon an American merchantman, flying the American flag, in the Mediterranean. The United States Government demanded an apology for this 'deliberate insult to the flag of the United States,' punishment of the submarine commander, and reparation for the damage done (*A.J.*, 10 (1916), Special Suppl., p. 306). For some other cases see the former editions, § 163.

For an instance of State responsibility for acts of soldiers in breach of

duty see Youmans' claim before the American-Mexican Claims Arbitration Tribunal in *A.J.*, 21 (1927), pp. 571-579; *Annual Digest*, 1925-1926, Case No. 162

¹ Provided, however, that such law does not violate essential principles of justice. See below, § 320.

² See below, § 323, for the qualification of the right to expel aliens.

³ But see above, p. 363, n. 1.

⁴ See, for instance, the *Luzon Sugar Refining Co.'s* claim before the British-American Claims Commission in *A.J.*, 20 (1926), p. 391, and *Annual Digest*, 1925-1926, Case No. 164. As to Responsibility for acts of Insurgents and Rioters see below, § 167

das Völkerrecht (1923)—Eagleton, *State Responsibility in International Law* (1928), pp. 76-94, 125-156—Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (1949)—Harvard Draft Convention (and Comment), *A.J.*, 23 (1929), April, Special Number, pp. 188-196—Monaco in *Rivista*, 18 (1939), pp. 3-30, 193-261—Conference for the Codification of International Law *Bases of Discussion*, in C 75, M 69, 129. V. pp. 93-121.

§ 164. As regards State responsibility for acts of private persons, it is first of all necessary not to confuse the original with the vicarious responsibility of States for internationally injurious acts of private persons. International Law imposes the duty upon every State as far as possible to prevent its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. A State which either intentionally and maliciously or through culpable negligence does not comply with this duty commits an international delinquency for which it has to bear original responsibility. But it is in practice impossible for a State to prevent all injurious acts which a private person might commit against a foreign State. It is for that reason that a State must, according to International Law, bear vicarious responsibility for such injurious acts of private individuals as it is unable to prevent.

Vicarious
in contra-
distinction
to
Original
State
Responsi-
bility for
Acts of
Private
Persons.

§ 165. Whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unrestricted, their vicarious responsibility for acts of private persons is only relative. For their sole duty is to exercise due diligence to prevent internationally injurious acts on the part of private persons, and, in case such acts have nevertheless been committed, to procure satisfaction and reparation for the wronged State, as far as possible, by punishing the offenders and compelling them to pay damages where required. Beyond this limit a State is not responsible for acts of private persons; there is in particular no duty for a State itself to pay damages for such acts if the offenders are not able to do it. If, however, a State has not exercised due diligence it can be made responsible and held liable to pay damages.¹

Vicarious
Responsi-
bility for
Acts of
Private
Persons
relative
only.

¹ See Borchard, § 87. See the Question put to, and Answer given by, the Commission of Jurists appointed

by the Council of the League after the Janina-Corfu affair in 1923: 'Fifth Question: In what circum-

Municipal
Law as to
Offences
against
Aliens.

§ 165a. It is a consequence of the vicarious responsibility of States for acts of private persons that their criminal offences against aliens' (such offences being indirectly offences against the respective foreign States because the latter exercise protection over their subjects abroad), and especially against the Heads and diplomatic representatives of foreign States,¹ must be punished according to the ordinary law of the land, and that the civil courts of justice of the land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such country.

Responsi-
bility for
Acts of In-
surgents
and
Rioters

§ 165b. The vicarious responsibility of States for acts of insurgents and rioters² is the same as for acts of other private individuals. Therefore only in case a State by exercising due diligence could have prevented, or immediately crushed, an insurrection or riot, can it be made responsible for acts of insurgents and rioters.³ In other

stances and to what extent is the responsibility of a State involved by the commission of a political crime [*scilicet*, against foreigners] in its territory? *Reply*: The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest, and bringing to justice of the criminal. The recognised public character of a foreigner, and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance upon his behalf.' See *B.Y.*, 1924, pp. 179-181; *A.J.*, 18 (1924), pp. 536-544; Charles de Visser in *R.I.*, 3rd ser., 5 (1924), pp. 389-396. For an example of redress for the death of a consular representative at the hands of a mob see Stowell in *A.J.*, 18 (1924), pp. 768-774. See also the Russian case *In re Dobrovolsky and Goukovitch*, *Annual Digest*, 1927-1928, Case No. 255. As to the measure of damages payable by a State for neglect to punish offenders for injury to foreigners see Hyde in *A.J.*, 22 (1928), pp. 140-142; *Janes'* claim before

the American Mexican Arbitration Claims Tribunal in *A.J.*, 21 (1927), pp. 362-380; and Briefly in *B.Y.*, 1928, pp. 42-49. And see above, § 156 (n.). See also above, § 154, the *Corfu Channel* case, on the question of the responsibility of a State by reference to the mere fact that the wrongful act has occurred on its territory. On the responsibility of Israel for the murder on September 17, 1948, of Count Bernadotte while acting under the authority of the United Nations see Wright in *A.J.*, 43 (1949), pp. 95-104.

¹ See also below, § 386.

² See Goebel in *I.J.*, 8 (1914), pp. 802-852, who supplies valuable material, but differs from the view expressed in the text. See also the details given by Borchard, §§ 89-90. As to the responsibility of States for the acts of general and local *de facto* Governments see Spiropoulos, *De facto-Regierung im Völkerrecht* (1926), pp. 177-188; Borchard, §§ 84, 85, and in *A.J.*, 20 (1926), pp. 541, 542; Woolsey, *ibid.*, pp. 543-549; Evatt in *Australian Law Journal*, 9 (1935-1936), Suppl., pp. 9-25; and Gross and Houghton quoted below, p. 387, n. 2. See also above, § 75A.

³ See, for instance, the decision of the Claims Arbitral Tribunal in

cases the duty of the State concerned is only to punish according to the law of the land, as soon as peace and order are re-established, such insurgents and rioters as have committed criminal injuries against foreign States. The point need not be mentioned at all were it not for the fact that, in several cases of insurrection and riots, claims have been made by foreign States against the local State for damages for losses sustained by their subjects through acts of insurgents or rioters,¹ and that some assert that such claims are justified by the Law of Nations. The correct view is, it is believed, that the responsibility of States does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters, provided due diligence was exercised by the State concerned.² Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots no less than the risk of the outbreak of other calamities. When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals and claim damages from the latter before the courts of justice. The responsibility of a State for acts of private persons injurious to foreign subjects reaches only so far that its courts must be accessible to the latter for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal. And in States—as, for instance, France—which have such Municipal Laws as make the town or the county where an insurrection or riot has taken place responsible for the pecuniary loss sustained by individuals during those events, foreign subjects must be allowed to claim damages from the local

the case of the *Home Missionary Society, A.J.*, 15 (1921), pp. 294-297; *Annual Digest*, 1919-1922, Case No. 117.

¹ That is, on the basis of absolute liability and without alleging negligence or denial of justice.

² See Rivier, *ii.* p. 43; Brusa in *Annuaire*, 17, pp. 96-137; Bar in *R.I.*, 2nd ser., 1 (1899), pp. 464-481; Goebel, *op. cit.*, Strupp, *Das völk. rechtliche Delikt* (1920), pp. 89-96;

Eagleton, *The Responsibility of States in International Law* (1928), pp. 124-156; Houghton in *Minnesota Law Review*, 14 (1929-1930), pp. 251-269; Gross in *Z.o.R.*, 13 (1933), pp. 375-407; Berlia in *R.G.*, 44 (1937), pp. 51-66; Pilestá Costa in *Revista de derecho internacional*, 34 (1938), pp. 105-235; Sylvan in *A.J.*, 33 (1939), pp. 78-103, and the same, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (1939).

authorities for losses of such a kind. But the State itself never has by International Law a duty to pay such damages.¹

The practice of the States agrees² with this rule as laid down by the majority of writers. Although in a number of cases several States have paid damages for losses of this kind, they have done it not through compulsion of law, but for political reasons. In most cases in which damages have been claimed for such losses, the States concerned have refused to comply with the request.³ As such claims had, during the second half of the nineteenth century, frequently been made against American States which have repeatedly been the scene of insurrections several of these States in commercial and similar treaties which they concluded with other States have expressly stipulated⁴ that they are not responsible⁵ for losses sustained by foreign subjects on their territory through acts of insurgents and rioters.⁶

¹ See Garner in *A.S. Proceedings* (1927), pp. 49-63, who is in substantial agreement with this section, except that he considers that, when mob violence is directed against aliens *as such*, the State should make reparation, whether or not it has shown due diligence. In fact, in *Sarropoulos v. Bulgarian State* the Græco-Bulgarian Mixed Arbitral Tribunal held that the State is responsible if the riots were directed against foreigners *as such*: *Annual Digest*, 1927-1928, Case No. 162. See also the decision of the French-Mexican Mixed Claims Commission in the *George Pinson* case, of October 19, 1928, qualifying the rule that a State is not responsible for damage suffered by aliens in the course of civil war: *Annual Digest*, 1927-1928, Case No. 169. According to the British view, clearly stated in *Bases of Discussion*, iii. p. 109, the Government against which the insurrection is directed is not responsible unless: (a) that Government were negligent and might have prevented the damage; (b) they pay compensation to their own nationals or other foreigners in similar cases; (c) the rebellion has

been successful and the insurgent party has been installed in power.

² Goebel (*op. cit.* pp. 819-831) asserts that the practice of the States has undergone a change, but it is doubtful whether this is so.

³ See the cases in Calvo, iii. §§ 1283-1290.

⁴ See, for instance, Martens, *N.R.G.*, 2nd ser., 9, p. 474 (Germany and Mexico); 15, p. 810 (France and Mexico); 19, p. 831 (Germany and Colombia); 22, p. 308 (Italy and Colombia). A list of such treaties is given by Arias in *A.J.*, 7 (1913), pp. 755, 756, 759, 760, and Borchard, p. 244 (n.).

⁵ The question of responsibility for losses of foreign citizens during a revolution is treated with excellent judgment by Hyde in his paper on 'Mexico and the Claims of Foreigners,' in *Illinois Law Review* (January 1911), 8, No. 6. See also Hyde, §§ 299B-302.

⁶ See also the *Règlement* proposed by the Institute of International Law, *Annuaire*, 18 (1900), pp. 254-256, which would not confine liability to cases of negligence or denial of justice, and two *varuz* expressed by

the Institute, *ibid.*, pp. 253 and 256, deprecating the practice of concluding treaties of reciprocal irresponsibility for injury to foreigners and recommending resort to international commissions of inquiry and arbitration in such cases; see below, vol. II. § 14 (n.), and see the Convention of December 5, 1930, between Great Britain and Mexico in which the latter agreed to compensate *ex gratia* British subjects for losses suffered in the course of Mexican revolutions from 1910 to 1920: Treaty Series, No. 22 (1931), Cmd. 3846. And see the Convention

of November 19, 1926, between the same parties: Treaty Series, No. 11 (1928), Cmd. 3085. The reports of the decisions of that Commission were published in 1931 and 1933 by H.M. Stationery Office.

See also the scholarly treatise by Feller, *The Mexican Claims Commissions, 1923-1931* (1936), pp. 155-172, and a series of decisions given by Verzijl as President of the French-Mexican Claims Commissions and reported in *Annual Digest*, 1927-1928 and 1929-1930.

CHAPTER IV

THE LEGAL ORGANISATION OF THE INTERNATIONAL COMMUNITY

I

THE PRINCIPLES OF INTERNATIONAL ORGANISATION

As to problems of international organisation in general see. Ruyssen in *Hague Recueil*, 67 (1939) (1), pp. 125-224—Guggenheim, *L'Organisation de la société internationale* (1914)—Röpke, *Die Gesellschaftskrisis der Gegenwart* (1942)—the same, *Civitas humana* (1944)—the same, *Internationale Ordnung* (1945)—Bourquin, *Vers une nouvelle société internationale* (1945)—Sturzo, *Nationalism and Internationalism* (1946)—Ewing, *The Individual, the State, and World Government* (1947)—Jessup, *The International Problem of Governing Mankind* (1947)—Dickinson, *Law and Peace* (1951), pp. 1-31—Schiffer, *The Legal Community of Mankind* (1954)—Wright in *Yale Law Journal*, 55 (1946), pp. 870-888—Laswell, *ibid.*, pp. 889-909—Goodrich, *ibid.*, pp. 950-964.

General
inter-
national
Organisa-
tion and
Inter-
national
Law.

§ 166. The historic idea of a 'general international organisation'¹—an idea prominent in the legal and political thought of the last three centuries—connotes an association of States of potentially universal character for the ultimate fulfilment of purposes which, in relation to individuals organised in political society, are realised by the State. The achievement of these purposes, which are outlined below,² is as essential to the Law of Nations as it is to the internal law of the State. Failing their accomplishment, or an attempt at their accomplishment, International Law must be deemed to dwell in the realm of a twilight existence in which its very claim to be considered as a system of law is precarious and controversial. To that extent, which is fundamental in its scope and nature, the cause of International Law is identical with that of a general political organisation of mankind as distinguished from organs of international administration and co-operation for particular purposes. For it is only under the shelter of and through such general organisation endowed with overriding and coercive power for creating, ascertaining

¹ On the origins of the term 'international A.J., 39 (1945), pp. 803-806. And see national organisation' see Potter in above, p. 83, n. 1. ² See § 166a.

and enforcing the law that International Law can overcome its present imperfections. For this reason it is proper that the constitution of international society—such as was embodied in the Covenant of the League of Nations and is now embodied in the Charter of the United Nations—should be studied by reference to its approximation to these essential objects of any political society under the rule of law.

§ 166a. The essential objects of a general political organ-
 isation of States cannot differ radically from those normally
 pursued by the State. They cannot be confined to the
 obligation to abstain from recourse to violence or to par-
 ticipation in the collective effort to suppress unlawful resort
 to force. They must cover, if they are to be effective in the
 long run, both the duty of States to submit their disputes
 with other States for determination in accordance with law
 and the legislative competence of the organised society of
 States to modify and to supplement existing law by reference
 to the requirements of justice and social progress. For law
 which is static and unalterable tends to become an instru-
 ment of oppression and, after a time, a danger to peace.
 Finally, although International Law is primarily a law
 regulating the rights and duties of sovereign and independent
 States, the political organisation of mankind must give
 effect to the most fundamental of all legal and political
 principles, namely, that the individual human being is the
 ultimate unit of all law. This means that it must be con-
 sidered an essential purpose of the organised society of
 States to assist in securing— and, in the long run, to secure
 —the freedom of the individual, in all its aspects, by means
 of comprehensive and enforceable obligations binding upon
 the members of the Organisation.

§ 166b. None of the essential objects of international
 organisation can be secured without the surrender of what
 are often regarded as vital attributes of the sovereignty of
 States in the international sphere. These include the
 faculty to resort to war or, if the latter has been prohibited
 or renounced, the legal power to determine with finality the
 legitimacy of resort to war in alleged self-defence; the right
 to refuse to submit disputes for binding adjudication in

The Objects of the Political Organisation of Mankind.

State Sovereignty and International Organisation.

accordance with law ; the right to decline to accept changes in the law validly decreed by the appropriate organs of the international community ; and the right of the State to consider the treatment—and the well-being—of the inhabitants of its territory as a matter falling exclusively within its domestic jurisdiction and not subject to effective control on the part of the organised international community. In proportion as the international organisation of States sanctions and perpetuates these rights it falls short of the fulfilment of the true purposes of its being—although such fundamental deficiency may not be inconsistent with the performance of tasks of considerable importance and usefulness. It may be a matter of controversy whether those rights, the abandonment of which is essential to the fulfilment of the true function of a political organisation of States, are inherent in a rationally conceived notion of the sovereignty of the State. The adoption of the view that they are inseparable from sovereignty as generally understood leads, of necessity, to the conviction that an adequate organisation of the society of States must safeguard the true independence and the very survival of States by means of a curtailment of their sovereignty, and that it must therefore be supranational in character. That conclusion found no expression in the Covenant of the League of Nations ; neither is its cogency acknowledged to any appreciable extent in the Charter of the United Nations. This does not mean that it cannot serve as a rational standard of human endeavour in what is the crucial aspect of human relations.

The Uni-
versality
of the
Inter-
national
Organis-
ation of
States.

§ 166c. It follows from the nature of the purpose of the international organisation of States conceived as the supreme organ of International Law and as an embodiment of the ultimate solidarity of interests of all States, that it must be universal in character. This means not only that the international organisation must be open to all members of the international community. It means also that its membership must be compulsory upon all States, and that there must be no legal possibility either of withdrawal from or of expulsion from the organisation. Such compulsory membership, when coupled with the comprehensive obligations

enshrined in the constitution of the Organisation and with the duty to abide by any future extension of these obligations decreed by the competent organs of the Organisation, unavoidably implies a far-reaching derogation from the sovereignty of States. This is the main reason why it was not adopted in the Covenant of the League of Nations¹ and why it does not form part of the Charter of the United Nations.² It must nevertheless be considered as an imperative postulate of the universality, of the effectiveness and of the moral authority of International Law and of the transcending unity of the human race.

§ 167. An international political organisation of States fulfilling the purposes set out above³ and based on the principle of compulsory membership of all independent members of the international community must be regarded at present as the principal political goal, of compelling urgency, incumbent upon human society. On the achievement of that aim depends not only whether the State, thus rendered secure from external danger, will be in the position to fulfil its own supreme function of enabling its members to realise their duty to obtain, through freedom, the highest degree of development of their faculties as moral beings. Inasmuch as the accomplishment of that end is bound up with the elimination of war, the view is gaining ground—and the connection seems inescapable—that upon it depends the very survival of the State and probably of civilised humanity as such. For, with the advent of the atomic age, the destruction of civilised life in consequence of war is no longer a controversial assessment of probable and indirect results of the upheavals and losses caused by hostilities.⁴

¹ See below, § 167b.

² See below, § 168c.

³ See above, § 166a.

⁴ For the Resolution of the First General Assembly of the United Nations on the establishment of a Commission to deal with the problems raised by the discovery of atomic energy see *Records of the First Assembly (First Session)*, p. 559. For the Declaration on Atomic Energy of November 15, 1945, by the Heads of

the Governments of the United States, Canada and Great Britain see *A.J.*, 40 (1946), Suppl., p. 48. See also Borcard, *ibid.*, pp. 161-165, for support of a proposal which, if accepted, would amount to 'an international government for the sole purpose of controlling the atomic bomb' (p. 164). See also Turlington, *ibid.*, pp. 165-167, and Potter, *ibid.*, 30 (1945), pp. 788-790. And see above, § 80b, for attempts at the creation of supra-national authorities in Europe.

It is, of necessity, controversial whether the effective political organisation of mankind must be a matter of gradual evolution or whether the component factors of the final structure are so interdependent that the one cannot be successfully achieved without a parallel development, *pari passu*, in other fields. Thus there may be substance in the view that the renunciation and prohibition of war cannot be effective without the unqualified recognition of the rule of law as expressed in the principle of obligatory jurisdiction of international tribunals. For, it may be said, the renunciation and prohibition of resort to force must remain unreal if States are not assured of alternative means of obtaining effective recognition at least of their legal rights through impartial adjudication by legal tribunals endowed with compulsory jurisdiction. Further, there are many who believe that the obligatory rule of law may, in the long run, prove precarious and impracticable unless organised international society can alter and supplement existing rules of law by way of international legislation overriding, if necessary, the opposition of a dissenting minority of States. For, as already stated,¹ in the absence of such legislative powers the rule of law itself may become a source of injustice and oppression. But, in turn, international legislation may not be practicable until States have agreed to make it feasible by renouncing the mechanical principle of equality in voting power and substituting for it a basis of representation less artificial and less repugnant to the prospects of effective legislative action.²

It is thus probable that only simultaneous progress in all these spheres may render possible the establishment of an organisation of States capable of realising the aims which reason and experience alike proclaim as indispensable for the development of an international society under the effective rule of law. Such simultaneous progress was not

¹ See above, § 166a.

² So great are the difficulties inherent in the discovery and the formulation of a practicable standard of representation based on a variety of factors that there has been a tendency to abandon serious attempts in that direction. Yet it must be regarded as one of the most important tasks of

the science of International Law to encourage and to undertake such attempts. For a helpful, though largely historical, enquiry see Sohn in *A.J.*, 40 (1946), pp. 71-79. And see, in particular, Wellington Koo, Jr., *Voting Procedures in International Political Organisations* (1947). And see above, § 116a.

attempted in the Covenant of the League of Nations. Neither has it been attempted in the Charter of the United Nations. However, the intrinsic value of rational principles of international organisation is not impaired by the fact that they have not, as yet, found recognition in positive law. On the contrary, it is a legitimate function of the science of International Law to attempt to assess the merits of any given general international organisation of States by reference to the abiding purposes of humanity and to the ultimate goal of a supra-national legal ordering of mankind rather than to rationalise any existing imperfections by representing them as realistic or as inescapably determined by a supposed fundamental difference between States and individuals. There can be little hope of true progress in the international sphere unless the essential identity of canons of law, reason, and morality applicable alike to States and individuals, of whom States are composed and by whom they are governed, is accepted as the fundamental standard of conduct.

At the same time it must be realised that the primary object of the science of International Law is to give an account of the law as actually adopted by States. This task will be attempted in Section III of this Chapter, which is devoted to the Charter of the United Nations. The Covenant of the League of Nations has now ceased to be part of the law.¹ However, in a time of transition it may be of assistance for the comprehension of the new international organisation if an account is given of the law underlying the system which preceded it. For this reason Section II of this Chapter continues to be devoted to an exposition, in an abridged form, of the Covenant of the League of Nations.

§ 167a. In addition to the general organisation of international society as represented, successively, by the League of Nations and the United Nations, the needs of international co-operation and administration have brought into existence specialised organisations of States endowed with separate organs of their own.² These organisations have been created

Specialised
Organs
of International
Administration
and Co-operation.

¹ See below, p. 401, n. 1.

² On international organisation and administration generally see Fauchille, §§ 914-928 (22); Anzilotti, pp. 179-

182, and in *Rivista*, 8 (1914), pp. 156-164; Nys, n. pp. 311-318; S. Basdevant in *Répertoire*, x, pp. 704-717; Moynier, *Les bureaux inter-*

by multilateral treaties which lay down their constitution and define their objects and the composition of their organs. Some of these organisations conduct their activities as so-called specialised agencies of the United Nations, in close co-operation with one another and the United Nations.¹ While the United Nations constitutes essentially the political organisation of mankind, the various organisations of States devoted to specific objects represent what may for the sake of convenience be described as international government on a functional basis. Apart from the International Labour Organisation (see below, §§ 340f-340gh), the more important of these organisations are the World Health Organisation, the United Nations Educational, Scientific and Cultural Organisation, the Food and Agriculture Organisation of the United Nations, the International Monetary Fund, the International Bank for Reconstruction and Development, the International Civil Aviation Organisation, the International Postal Union and the International Telecom-

nationaux des unions universelles (1892); Poincard, *Les unions et ententes internationales* (2nd ed., 1901); Neumeyer, *Internationale Verwaltungswesen*, i. (1910), ii. (1922), iii. (1927); Reinsch, *Public International Unions* (1911); Sayre, *Experiments in International Administration* (1919); Kunz, *Die Staatenverbindungen* (1929), pp. 373-401; N. L. Hill, *International Administration* (1931); Baldoni, *Le unioni internazionali di Stato* (1931), and in *Rivista*, 23 (1931), pp. 352-385, 464-489; Eagleton, *International Government* (1932); Ruth Masters, *Handbook of International Organizations in the Americas* (1945); Ranshofen-Wertheimer, *The International Secretariat* (1945); Eagleton, *International Government* (revised ed., 1948); Potter, *Introduction to the Study of International Organization* (5th ed., 1948); Leonard, *International Organization* (1951); *Annuaire*, 30 (1923), pp. 97-173, 348-381; Butler and Maccooby, *The Development of International Law* (1928), ch. xvi; Reinsch in *A.J.*, 1 (1907), pp. 579-623, and *ibid.*, 3 (1909), pp. 1-45; Neumeyer in *R.G.*, 18 (1911), pp. 492-499, and in *R.I.* (Geneva), 2 (1924), pp.

16-40, 139-144, 343-362; Guillaux in *R.G.*, 22 (1915), pp. 5-127; Ottolenghi in *Rivista*, 17 (1925), pp. 313-357, 461-499; Delisle Burns in *B.Y.*, 1926, pp. 51-72; Kaufmann in *Hague Recueil*, 1924 (ii), pp. 181-290; Rapsard-Mirabelli, *ibid.*, 1925 (ii), pp. 345-390, and in *Z.O.*, 7 (1927), pp. 11-21; Ruffin in *Hague Recueil*, 1926 (ii), pp. 471-499; Gascon y Marin, *ibid.*, 34 (1930) (iv), pp. 5-72, and vol. 41 (1932) (iii), pp. 725-795 (with special reference to the status of international officials); Negulesco, *ibid.*, vol. 51 (1935) (i), pp. 583-688; Dendias, *ibid.*, vol. 63 (1938) (i), pp. 243-358; Friedmann in *Modern Law Review*, 6 (1943), pp. 185-208; Schmitthoff in *Grotius Society*, 30 (1944), pp. 165-183; Jenks in *B.Y.*, 22 (1945), pp. 11-72 and in *Hague Recueil*, 77 (1950) (ii), pp. 29-89; *Yale Law Review*, 30 (1945), pp. 4 et seq. (a symposium); see also Sohn, *Cases and Other Materials on World Law* (1950), and *International Organization* (a quarterly, appearing since 1947 and containing, among others, a survey of current developments in various international organizations).

¹ See below, § 168r.

munication Union. The objects and the constitutions of these and some other organisations are described in the Appendix at the end of this volume. Some of them, such as the International Postal Union, are a continuation of so-called Unions created by general treaties before the First World War. They represent more integrated agencies of international co-operation and organisation than the various, permanent or temporary, international commissions created for special purposes.¹

The creation of functional international machinery on a vast scale has created a new problem of co-ordinating the activities of the different international organisations. Such co-ordination has been facilitated by the fact that, while the various international organisations derive their powers from independent grants of authority from their members contained in their own constituent instruments, the Charter of the United Nations and the constituent instruments of the

¹ The following are examples of these Commissions. (1) The American Canadian International Fisheries Commission, instituted according to Article 1 of the Treaty of Washington of April 11, 1908 (see Treaty Series (1908), No. 17), and the similar Commission as the result of the Convention for the Preservation of the Halibut Fishery of March 2, 1923. (2) The American-Canadian International Joint Commission concerning boundary waters, instituted by Articles 7-12 of the Treaty of Washington of January 11, 1909; see Treaty Series (1910), No. 23, Mackay in *A.J.*, 22 (1928), pp. 292-318, and Chubb, *The International Joint Commission between the United States of America and the Dominion of Canada* (1932). (3) The Permanent Mixed Fisheries Commission between the United States, Canada, and Newfoundland, instituted in consequence of the award of the Hague Court of Arbitration in the *North Atlantic Fisheries* case, see Agreement of July 20, 1912, *Hertie's Treaties*, 27, p. 1095, Article 1. (4) As to other Fisheries Commissions see below, §§ 284-285b. As to the Permanent Commissions and Councils of the Food and Agriculture Organisation see below, p. 997. (5) The International Boundary Com-

mission between the United States and Mexico established by the Treaty of March 1, 1889. Its powers were enlarged by the Treaty of February 3, 1944, relating to the 'Utilization of Waters of Certain Rivers.' See Timm, *The International Boundary Commission, United States and Mexico* (1941), and Ruth Masters, *Handbook of International Organizations in the Americas* (1945), pp. 199-211. (6) Anglo-American Caribbean Commission set up on March 9, 1942, for the purpose of encouraging and strengthening social and economic co-operation between the United States of America and its possessions and bases in the Caribbean and Great Britain and British colonies in the same area. See *First Report of the Commission* (Washington, 1943), and Ruth Masters, *op cit.*, pp. 15-22. (7) The South Seas Regional Commission established in 1943 by an agreement between Australia and New Zealand: Cmd. 6513 (1943); *A.J.*, 38 (1944), Suppl., pp. 193-200. As to the International Commission of the Light-house at Cape Spatol, established by the Convention of March 31, 1865, see Stuart in *A.J.*, 24 (1930), pp. 770-776; Marchegiano, *ibid.*, 25 (1931), pp. 339-347.

specialised agencies provide the necessary framework for co-ordination by co-operative action.¹

Impact
of Inter-
national
Organ-
isations
upon
Inter-
national
Law.

§ 167aa. Although the technical character of the specialised organisations of States suggests that an account of their constitutions need not be included in the body of a treatise devoted mainly to rules and principles of general International Law as embodied in custom or treaty, these organisations are not without instruction for the development of International Law as such. Thus it is characteristic of the new machinery that unanimity has ceased to be a normal requirement for decisions of international organisations. Some form of majority voting is now usual. Whereas in the past one of the central problems of international organisation was to overcome the hampering effects of the rule of unanimity, the no less urgent problem at the present day is to prevent majority decisions, arrived at without taking into account the legitimate interests of the minority or of the organisation as a whole, from replacing negotiation in regard to questions which, in the first instance, only negotiation can settle in a satisfactory way. Similarly, in most international organisations the mechanical application of the doctrine of equality of representation and of voting power has given way to a variation of representation in accordance with such factors as the size, population and importance of the members in question in any particular sphere. In some cases, *e.g.* in the constitutions of the International Postal Union and the World Health Organisation, the rule that sovereign States only can be members of international organisations has been modified by the admission to membership of territories which are not sovereign States. There have also taken place important developments in international legislative procedure. While nothing in the nature of an international legislature with general or overriding powers has developed or seems probable, organised international legislative procedures now exist for a number of important subjects, notably labour, health, aviation, telecommunications and postal matters. Within the framework

¹ See below, § 168r, and Jenks in *Hayes Recueil*, 77 (1950) (II), pp. 157-301, and in *B.Y.*, 28 (1951), pp. 29-89.

of some of these organisations Governments have accepted a wide range of obligations to report on various fields of national activity, thus recognising a degree of international concern in questions hitherto regarded as being exclusively within the domestic jurisdiction of States.¹ Occasionally such obligations have been accepted with regard to treaties not ratified by the State concerned.² Finally, widespread recognition has been given to the legal capacity of international organisations as bodies entitled to acquire rights and discharge obligations under both International and Municipal Law.³ Taken cumulatively, these

¹ See generally on international supervision: Kaasik, *Le contrôle en droit international* (1933); Berthoud, *Le contrôle international de l'exécution des Conventions collectives* (1946); and Kopelmanas in *Hague Recueil*, 77 (1950) (ii), pp. 59-147.

² See above, § 340ff.

³ For a detailed bibliography on the international personality of public international organisations see Jenks in *B.Y.*, 22 (1945), p. 267, n. 1. See also Lauterpacht, *International Law and Human Rights* (1950), pp. 12-19, and, in particular, Sohn, *Cases and Materials on World Law* (1950), pp. 4-6. For an early case bearing on the subject see the interesting decision of the Italian Court of Cassation of February 26, 1931, in which it was held that Italian courts had no jurisdiction in actions brought by the officials of the International Institute of Agriculture against the Institute: *International Institute of Agriculture v. Profili*, *Annual Digest*, 1929-1930, Case No. 254. The Court distinguished between two kinds of international unions: those which are subject to the jurisdiction of municipal courts and those, like the International Institute of Agriculture, which are not. The Court held that the Institute was an international juristic person endowed with full autonomy to the exclusion of the substantive or adjective law of the country in which it is situated. See *Rivista*, 23 (1931), pp. 389-391 and *Z.S.V.*, 4 (1934), pp. 165-167 (with a bibliography). In *Godman v. Winterston and Others* the English Court of Appeal dismissed an action brought

against the defendants as representing the Inter-Governmental Committee established by the Conference at Evian in 1938 in connection with the problem of refugees from Germany. The Court held that as the defendants were a committee of representatives of sovereign States the action was one against sovereign States and could not, therefore, be entertained: *The Times* newspaper, March 13, 1940. The Diplomatic Privileges (Extension) Act, 1944 (7 & 8 Geo. 6, ch. 44), Section 1 (2) (a), gave the Crown the power to provide that an international organisation shall have the legal capacities of a body corporate. See below, § 417a. For a suggestion that these provisions were merely declaratory see Jenks in *B.Y.*, 22 (1945), p. 273. Some of the public international organisations, such as the International Labour Organisation (Art. 39), have been endowed with 'full juridical personality.' In others the recognition of their international personality is qualified by reference to the functions of the organisation. Thus the Constitution of the Food and Agriculture Organisation of the United Nations provides that 'The Organisation shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution' (Art. 15). On national subsidies to international organs see Myers in *A.J.*, 83 (1939), pp. 318-331; on 'Some Legal Aspects of the Financing of International Institutions' see Jenks in *Grotius Society*, 28 (1941), pp. 87-132. On the personnel of international administra-

developments represent an advance in international organisation which is bound to exercise an impact on the future development of International Law as a whole.¹

II

THE LEAGUE OF NATIONS

I. MEMBERSHIP AND GENERAL CHARACTER OF THE LEAGUE

Scelle, i. pp. 246-287, ii. pp. 491-512 Oppenheim, *The League of Nations and its Problems* (1919)—Scelle, *Le pacte des nations et sa liaison avec le traité de paix* (1919), and the same, *La Société des Nations* (1922)—Bourgeois, *Le pacte de 1919 et la Société des Nations* (1919), and the same, *L'œuvre de la Société des Nations* (1923)—Breschi, *La Società delle Nazioni* (1920)—Larnaude, *La Société des Nations* (1920)—Klaus, *Vom Wesen des Völkerbundes* (1920)—Munch (editor), *Les origines et l'œuvre de la Société des Nations*, i. (1923), ii. (1924)—Schucking and Wehberg *Die Satzung des Völkerbundes*, 2nd ed. (1924)—Garner, *Developments*, pp. 618-651—Hoyer, *Le pacte de la Société des Nations* (1926)—Wehberg *Grundprobleme des Völkerbundes* (1926) and *Die Völkerbundsatzung* (1926)—Redslob, *Théorie de la Société des Nations* (1927)—Gonsiorowski *La Société des Nations et le problème de la paix*, 2 vols. (1927)—Ray, *Commentaire du Pacte de la Société des Nations* (1930), with Supplements (1931-1935)—Juggenheim, *Der Völkerbund in seiner politischen und rechtlichen Wirklichkeit* (1932)—Munn, *Völkerbund und Staat* (1932)—Webster and Herbert, *The League of Nations in Theory and Practice* (1933)—Fischer Williams, *Some Aspects of the Covenant of the League of Nations* (1934)—Yepes and Pereira da Silva, *Commentaire théorique et pratique du Pacte de la Société des Nations*, vol. i. (1934); vol. ii. (1935), vol. iii. (1939)—Van Vollenhoven, *The Law of Peace* (translated from the Dutch, 1936) pp. 160-259—Zimmern, *The League of Nations and the Rule of Law* (1936)—Schwarzenberger, *The League of Nations and World Order* (1936)—Baldoni, *La Società delle Nazioni* (1936)—Goppert, *Der Völkerbund* (1938) (a comprehensive work)—Kelsen, *Legal Technique in International Law: A Textual Critique of the League Covenant* (1939)—*Repertoire of Questions of General International Law before the League of Nations, 1920-1940* (prepared by Schiffrin, Geneva Research

tion see Basdevant (Suzanne), *Les fonctionnaires internationaux* (1931); N. L. Hill in *American Political Science Review*, 1929, pp. 972-988.. And see above, § 167g. As to the independent position of international officials see Schwebel in *B.Y.*, 30 (1953), pp. 71

et seq. As to private organisations see Cromwell White, *The Structure of Private International Organisations* (1933), and Schrag, *International Idealvereme* (1936).

¹ See Jenks in *Grotius Society*, 37 (1952), pp. 23-49.

(Centre, 1942)—Ranshofen-Wertheimer, *The International Secretariat* (1945)—Schwarzenberger, *Power Politics* (2nd ed., 1951), pp. 291-307—Walters, *A History of the League of Nations*, 2 vols. (1952)—Oppenheim in *R.G.* 26 (1919), pp. 234-244—Grosch in *Zeitschrift für die gesamte Staatswissenschaft*, 76 (1921), pp. 217-267—Huber in *Z.V.*, 12 (1923), pp. 1-18—Rolin in *R.I.*, 3rd ser., 2 (1921), pp. 225-242; *ibid.*, 3 (1922), pp. 171-194, 336-364—Paulus in *R.G.*, 30 (1923), pp. 525-555—Corbett in *B.Y.*, 1924, pp. 119-148—J. Nisot in *Clunet*, 55 (1928), pp. 329-339—*Annuaire*, 30 (1923), pp. 22-96, 307-347—Fischer Williams in *International Law Association's Thirty-fourth Report* (1927), pp. 675-695—Del Vecchio in *Hague Recueil*, vol. 38 (1931) (iv.), pp. 545-645—Lévi in *Théorie du droit* vii. (1932-1933) pp. 53-85—Campagnolo, *ibid.*, x. (1936) pp. 125-133—Genet in *R.I.F.*, 1 (1936), pp. 29-39, 149-158—McKinnon Wood in *Minnesota Law Review*, 28 (1943), pp. 43-63—Rappard in *Hague Recueil*, 7 (1947) (ii.), pp. 114-223—Niemeyer in *International Organization*, 6 (1952), pp. 537-558. See also Aufrecht, *Documentary Guide to the League of Nations*, 1920-1946 (1947).

§ 167ab. The League of Nations owed its existence, in the first instance, to private initiative. Soon after the First World War had broken out, a group of men in England, under the chairmanship of Viscount Bryce, combined for the purpose of working out a draft scheme of a League for the avoidance of war, and they published, in February 1915, *Proposals for the Avoidance of War*, with a prefatory note by Viscount Bryce. A similar movement arose in the United

How the
League
arose.¹

¹ See also Marburg, *World Court and League of Peace* (1915), Publication No. 20 of the American Society for the Judicial Settlement of International Disputes; Marburg, *League of Nations* (1917), 2 vols.; Smuts, *The League of Nations, A Practical Suggestion* (1917); Schucking, *Internationale Rechtsgarantien* (1918); Stallybrass, *A Society of States* (1918); Lawrence, *Lectures on the League of Nations* (1919); Ward, *Securities of Peace* (1919); Lammarsch, *Woodrow Wilson's Friedensplan* (1919); *What Really Happened at Paris, The Story of the Peace Conference, 1918-1919* (1921), ed. by House and Seymour; Lango, Scelle, and Schucking in Munch, *Les origines et l'œuvre de la Société des Nations*, i. pp. 1-160; Baker, *Woodrow Wilson and the World Settlement* (1922), i. pp. 270-339; Kunz, *Die Entstehungsgeschichte des Völkerbundpaktes* (1924); Schücking und Wehberg, pp. 1-26; Rothbarth in *Strupp, Wört.*, iii. pp. 174-

181; Lalouel in *R.G.*, 29 (1922), pp. 152-222; Florence Wilson, *The Origins of the League Covenant* (1928); Miller, *The Drafting of the Covenant*, 2 vols. (1928); *La Conférence de la Paix et la Société Internationale* (1929, Paris, Les Éditions Internationales); Marburg, *The Development of the League of Nations Idea* (2 vols., 1932); Noble, *Policies and Opinions at Paris, 1919* (1936), pp. 99-152; Wehberg in *Friedenswarte*, 39 (1939), pp. 177-202. For the original British plan of the League of Nations, the 'Phillimore Report' submitted to the British Cabinet and described as the basic document used by President Wilson in the preparation of the Covenant, see Baker, *Woodrow Wilson and the World Settlement* (1922), iii. pp. 67-78; for the final British draft see *ibid.*, pp. 130-143; for the Official French draft, *ibid.*, pp. 152-162. For earlier schemes of world peace see above, § 42.

States of America, where in June 1915 was founded 'The League to Enforce Peace,' under the chairmanship of ex-President William H. Taft.

At the Peace Conference a number of drafts were considered, and the Covenant was fully adopted by the Conference on April 28, 1919. It formed Part I. of the Treaties of Peace with Germany, Austria, Hungary, and Bulgaria. This formal association of the Covenant with a particular peace settlement was subsequently subjected to criticism, and in September 1938 the Nineteenth Assembly adopted a resolution recommending the ratification of a Protocol amending various Articles of the Covenant with a view to its separation from the treaties of peace.¹

The
Member-
ship of
the
League.

§ 167b. According to Article 1 of the Covenant, the League was to consist of original members, and of such members as were to be admitted later.

Original Members.—The original members of the League were, strictly speaking, those of the States² and Dominions enumerated in the 'Annex to the Covenant, either as 'Signatories of the Treaty of Peace' or as 'States invited to accede to the Covenant,' which did in fact accede without reservation to the Covenant on or before March 20, 1920.

Non-Original Members.—Paragraph 2 of Article 1 provided that—

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission

¹ *Off. J.*, Sp. Suppl., No. 182, p. 29. See also von Tabouillot in *Z.o.V.*, 7 (1937), pp. 16-37; Kelsen in *The World Crisis* (Geneva, 1938), pp. 133-159; Engel, *League Reform* (Geneva Research Centre, August 1940), pp. 89-109; Hudson in *A.J.*, 33 (1939), pp. 138-145. For the report of the special committee on the subject see C. 494. M. 335. 1937. VII. *

² The United States was named in the treaties as an original member of the League; but it did not ratify any of them, and it never became a member. On the relation of the

United States to the League of Nations see Garner, *American Foreign Policies* (1928), pp. 183-213; Cooper, *American Consultation in World Affairs* (1934); Bortolli in *Michigan Law Review*, 27 (1928-1929), pp. 607-636; Darling in *Canadian Historical Review*, 10 (1920), pp. 196-211; Hubbard in *International Conciliation* (Pamphlet No. 274, November 1931); and see the annual contributions on this subject to *Geneva Special Studies*. See also Schmeckebier, *International Organisations in which the United States Participates* (1935) § Fleming, *The United States and World Organisation* (1938).

is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval, and air forces and armaments.

In accordance with this provision a number of States were subsequently admitted to the League. Applications for admission by Armenia, Azerbaidjan, Georgia, Liechtenstein, and the Ukraine were refused in 1920.¹

Termination of Membership could arise (i) by voluntary withdrawal under Article 1 (3), or (ii) by expulsion² under Article 16 (4) for violation of the covenants of the League,

¹ An application by Monaco was withdrawn, and an application by San Marino was not proceeded with and, by implication refused: *Records of Second Assembly, Plenary Meetings*, pp. 685-686. Applications for admission were first examined by a Committee of the Assembly upon the following lines: (i) Is the application for admission in order? (ii) Is the Government applying for admission recognised *de jure* or *de facto*, and by which States? (iii) Is the applicant a nation with a stable government and settled frontiers? (iv) Is it fully self-governing? (v) What has been its conduct, including both acts and assurances, with regard to (a) its international obligations; (b) the prescriptions of the League as to armaments? *Records of First Assembly, Committees*, ii. p. 159. Much information regarding the position of a number of States who applied for admission is given by Hudson in *A.J.*, 18 (1924), pp. 436-458, and in the *Records of the Fifth Committee of the First and the Sixth Committee of the Second Assemblies* appointed to investigate applications for admission. With regard to question (v) above, the insistence of the First Assembly upon the importance of the obligations under minorities clauses in treaties (see below, § 340b 340d) should be noted: *Records of First Assembly, Plenary Meetings*, pp. 568, 569. See also upon the admission of States to the League: Friellander in *B.Y.*, 1928, pp. 84-100; Hudson in *A.J.*, 20 (1935), pp. 109-

115; and, with regard to Mexico, Turkey, and Iraq respectively, *ibid.*, 26 (1932), pp. 114, 813, and 27 (1933), p. 113; Giraud in *R.G.*, 43 (1936), pp. 197-222. For a survey of the membership of the League see Hudson in *B.Y.*, 16 (1935), pp. 130-152. See also Strub, *Die Mitgliedschaft im Völkerbund* (1927).

² The right of the Council to expel a member was not limited to cases of violation of Articles 12, 13, and 15. In May 1934 the British representative expressed the view that as Liberia had failed to comply with Article 23 (b) of the Covenant (in which the members of the League undertook to secure just treatment to the native inhabitants of the territories under their control), the League would be entitled to consider her expulsion under Article 16, paragraph 4 (*Off. J.*, 1934, p. 511). See also Ray, *Commentaire*, pp. 505-535; Strub, *Mitgliedschaft im Völkerbund* (1927), pp. 96-98; Jenks in *B.Y.*, 16 (1935), pp. 155-167; Gretschaninow in *Z.d.I.*, 5 (1935), pp. 174-178 (with a bibliography on the Liberian question). As to the expulsion of Soviet Russia in 1940 see vol. ii, § 52e; Balossini, *La perte de la qualité de membre de la S. de N.* (1945); Gross in *A.*, 39 (1945), pp. 35-44. And see the Report of a Sub-Committee on Amendments to the Covenant on the liability to expulsion of members who are in arrears with their contributions (*Off. J.*, 1927, p. 508).

or (iii) by lapse consequent upon dissent from amendments under Article 26.

Article 1 (3) ¹ provided that—

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

Legal
Nature
of the
League.

§ 167c. The question of the legal nature of the League was a matter of considerable controversy.² The predominant opinion was that the League, while being a juristic person *sui generis*,³ was a subject of International Law⁴ and an International Person side by side with the several States. In its essence the League was nothing else than the organised international community.⁵ Not being a State, and neither owning

¹ See Schücking-Wehberg (3rd ed., 1931), i. p. 373; Rousseau in *R.G.*, 41 (1934), pp. 295-322; Burns in *A.J.*, 29 (1935), pp. 40-50. As to the interpretation of Article 1 (3) in connection with arrears of contributions see *B.Y.*, 19 (1938), pp. 218-221. And see generally on the effect of the failure to fulfil the financial obligations to the League, Myers in *A.J.*, 32 (1938), pp. 48-152.

² See, e.g., an article entitled 'What is the League of Nations?' in *B.Y.*, 1924, pp. 119-148, by Corbett, who regards the League 'as a Confederation. Redtslob, *Théorie de la Société des Nations* (1927), and in *Problems of Peace* (6th ser., 1930), pp. 1-14; Knubben, *Die Subjekte des Völkerrechts* (1928), p. 387; Kunz, *Staatenverbindungen* (1929), p. 505; Verdross, *Verfassung*, p. 111; and probably the majority of other writers are of the same opinion. So also are Schücking and Wehberg, pp. 103-111, who regard it as a Federation of States. See also Kraus, *Vom Wesen des Völkerbundes* (1920). Fischer Williams in *International Law Association's Thirty-fourth Report* (1927), pp. 675-695, and *Some Aspects*, etc. (1934), pp. 38-44, likens it to a corporation, and considers it to possess corporate personality derived from International Law. For a similar view see Rappard, *The Geneva Experiment* (1931), pp. 10-35. See also Cavaglieri, pp. 144-147; Möller, *Die Rechtsnatur des*

Völkerbundes (1927); Schubert, *Völkerbund und Staatsverantwortung* (1929); Martin in *R.I. (Paris)*, 3 (1929), pp. 403-431; Del Vecchio in *Haec Recueil*, 38 (1931) (iv.), pp. 545-645.

³ See Larnaude, *La Société des Nations* (1920), p. 4; Huber in *Z.V.*, 12 (1923), pp. 370, 371; Scelle in *R.G.*, 28 (1921), pp. 125-127; Briery, p. 77.

⁴ Distinct from the status of the League in International Law was the status assigned to it by the Municipal Law of any State in whose jurisdiction that question became relevant. For instance, Swiss Municipal Law granted to the League the status of a foreign independent State, so that it could sue in Swiss courts but could not be sued without its consent. On the status of the League of Nations as a personality in private law, including the capacity of being registered as a property owner, see Schroder, *Die Grundbuchfähigkeit des Völkerbundes* (1932). See also Liermann in *Z.V.*, 15 (1930), pp. 20-47. On the question whether for the purposes of English law the League of Nations was a charity see Lyons in *B.Y.*, 27 (1930), pp. 434-439.

⁵ Not a mere international administrative union (*Zweckverband*) such as the Postal Union. See Wegner, *Geschichte des Völkerrechts* (1936), p. 328, and Rapisardi-Mirabelli in *Z.S.R.*, 7 (1927), pp. 11-21. And see Drünkler, *Die internationale juristische Person als völkerrechtliche Körperschaft*

territory nor ruling over citizens, the League did not possess sovereignty in the sense of State sovereignty. However, being an International Person *sui generis*, the League was the subject of many rights which, as a rule, can only be exercised by sovereign States. For instance, the League possessed the so-called right of legation ¹; was able to exercise sovereign rights over such territories as were not under the sovereignty of any State (as it did for a time in the Saar Basin) ²; was able to intervene between two disputing member-States, ³ and, exceptionally, in the internal affairs of a member-State ⁴; was able to exercise a protectorate over a weak State (Danzig) ⁵; and was, perhaps, able to declare war ⁶ and make peace.⁷

II. THE CONSTITUTION OF THE LEAGUE

See the literature cited above, § 167ab.

§ 167d. The two principal political organs of the League were the Assembly and the Council, assisted by the permanent Secretariat. There were, in addition, two institutions organically connected with the League but enjoying a high degree of independence. These were the International Labour Organisation and the Permanent Court of International Justice. An account of them is given in other parts of this treatise. The Assembly and the Council were assisted in their task by technical organisations and by permanent and temporary advisory commissions. The three technical organisations were: (1) the Economic and Financial

(1933), and Zimmern, *The League of Nations and the Rule of Law* (1936), pp. 277-285.

¹ See below, §§ 358-362. And see Ray, *op. cit.*, p. 252, and Genet in *R.I.*, 3rd ser., 16 (1935), pp. 527-556. On the permanent delegations of various States at Geneva see Shatzky, *ibid.*, pp. 75-99, 736-764; Genet, *ibid.*, pp. 556-573; Potter in *Geneva Special Studies*, No. 8 (1930); Tobin in *American Political Science Quarterly*, 48 (1933), pp. 481-512. The League did not send diplomatic representa-

tives, but maintained offices or correspondents in a number of capitals.

² See below, § 171 (6).

³ See below, vol. II, § 52d.

⁴ For example, in the case of certain States to protect minorities; see below, §§ 340b-340e.

⁵ See above, § 93.

⁶ See below, vol. II, § 66a (n.).

⁷ On the question of making treaties see below, § 494.

Organisation¹; (2) the Organisation for Communications and Transit²; (3) the Health Organisation.³

The principal administrative organ of the League was the Secretariat (see below, § 167g).

Amend-
ments
to the
Covenant.

§ 167dd. According to Article 26, amendments to the Covenant of the League were to take effect when ratified by the member-States represented in the Council and by a majority of the member-States represented in the Assembly.⁴ No such amendment bound any member of the League which signified its dissent therefrom, but the dissenting State ceased to be a member of the League.⁵

The
Assembly

§ 167e. The Assembly was really the Conference of the members of the League. According to Article 3, each member of the League could send three representatives to the Assembly, but no member had more than one vote. The Assembly met at least once a year,⁶ and more frequently if required.

¹ See on this and other organisations Greaves, *The League Committees and World Order* (1931); Morley, *The Society of Nations* (1932), pp. 238-260.

² See above, p. 321, n. 2, and Haas in *Répertoire*, iv. pp. 2-13.

³ See Blayac, *L'Organisation d'Hygiène de la Société des Nations* (1932); Blankenstein, *L'Organisation d'Hygiène de la Société des Nations* (1934). See also below, p. 977.

⁴ See Schücking and Wehberg, pp. 764-781; Rolin in *R.I.*, 3rd ser., 3 (1922), pp. 171-184; Paulus in *R.G.*, 30 (1923), pp. 532-537; Kidd in *Geneva Special Studies*, v. Nos. 7-8 (1934); Meriggi in *Z.ö.R.*, 16 (1936), pp. 487-521.

⁵ Practice showed that it is difficult to induce States to agree to and ratify amendments of importance. As to amendments already ratified or proposed see Rhoads, *Amendments of the Covenant of the League of Nations Adopted and Proposed* (1935); Rolin in *R.I.*, 3rd ser., 2 (1921), pp. 57-60, 225-242, and *ibid.*, 3 (1922), pp. 171-194, 330-364; Paulus in *R.G.*, 30 (1923), pp. 525-555; Hudson in *H.L.R.*, 38 (1925), pp. 903-953. See vol. ii. § 52p on the proposed amendments arising out of the Treaty for the Renunciation of War. On the proposed revision of the Covenant

in 1936 following upon the failure to apply the Covenant in the Italo-Abyssinian dispute see *New Commonwealth Quarterly*, 2 (1936), pp. 111-241; *The Future of the League of Nations*—the Record of a Series of Discussions held at Chatham House (1936); Yepes and da Silva, *La Question de la Réforme du Pacte de la Société des Nations* (1937); Le Brun Kerja, *Les projets de réforme de la Société des Nations* (1938); Engel, *League Reform, an Analysis of Official Proposals and Discussions, 1936-1939* (*Geneva Research Studies*, 1940); Wolgast in *Z.V.*, 20 (1936), pp. 436-466; Potter in *Geneva Special Studies*, vii. No. 7 (1936); Ray in *R.I.*, 3rd ser., 17 (1936), pp. 225-256; Barandon in *Z.ö.V.*, 7 (1937), pp. 1-14; Kelsen in *R.G.*, 44 (1937), pp. 625-680 and 45 (1938), pp. 5-43, 161-240, 521-566; Moeller in *Acta Scandinavica*, 10 (1939), pp. 30-57. For the replies of Governments see *Off. J.*, 1936, Special Suppl. No. 158.

⁶ On the organisation of the work of the Assembly see Prevost, *Les Commissions de l'Assemblée de la Société des Nations* (1937). See also Burton, *The Assembly of the League of Nations* (1940). On the 'bureau' of the Assembly see Prevost in *R.I.*, 3rd ser., vol. 20 (1939), pp. 501-518. On

Functions.—As regards the sphere of action of the Assembly, the Covenant (Article 3) laid down that 'the Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.' However, it is apparent ¹ that all such matters were excluded from the sphere of action of the Assembly as were by the Covenant exclusively reserved for the sphere of action of the Council.

Of the many functions performed by the Assembly and the Council: (a) some were exclusively reserved for the Assembly, and (b) others were reserved for the Council; (c) others, again, required the co-operation of these two organs; while (d) with regard to others the Assembly's competence was either concurrent with or alternative to that of the Council.²

Methods of Voting—The Assembly could validly take a decision by means of at least four kinds of votes, the choice of which depended upon the nature of the decision ³; these four kinds were: (a) the unanimous vote 'of all the Members of the League represented at the meeting' ⁴ (Article 5)—that was *prima facie* the rule; (b) the vote of a simple 'majority of the Members of the League represented at the meeting,' which applied to all 'matters of procedure' ⁵ . . . including the appointment of Committees' of investigation

the General Committee and other auxiliary committees of the Assembly see Calderwood in *A.J.*, 38 (1911), pp. 74-91.

¹ The question was discussed how far the Assembly and the Council were respectively bound by each other in *intra vires* decisions; see Schucking und Welberg, pp. 261-270, and Index (p. 60) of *Records of the Fourth Assembly*. It occasionally happened that some power or function was assigned by a treaty to 'the League' simply, without specifying which organ; for instance, Articles 1 (2), 23 (c and d), and 24 of the Covenant, and Articles 49, 102, 289 (para. 4), 336, 337, 338 (para. 1), 376, 377, 379, 386 of the Treaty of Peace with Germany, amongst others.

² Upon the legal effect of the decisions of the Assembly and of the

Council see Schindler, *Die Verbindlichkeit der Beschlüsse des Völkerbundes* (1927); Ray, *op. cit.*, pp. 151-155, Brierly in *B.Y.*, 16 (1936), p. 160.

³ See Fischer Williams in *A.J.*, 19 (1925), pp. 475-488, Hill, *ibid.*, 22 (1928), pp. 319-329, Riches, *The Unanimity Rule and the League of Nations* (1933), pp. 91-118.

⁴ There was no provision for a quorum in the Assembly. See on this question Riches, *op. cit.*, pp. 42-50. But the Rules of Procedure of the Council (Rule 6) provided that at least a majority of the members of the Council must be present at the opening of the meeting and that the meeting must be adjourned whenever a majority ceases to be present.

⁵ For some comment on this expression see McNair in *B.Y.*, 1926, at p. 10.

(Article 5); (c) a vote of a two-thirds majority,¹ which was required in the case of certain of the items of business mentioned above in this paragraph and in certain less important matters in which it was required by the Rules of Procedure of the Assembly²; (d) a majority vote (as under Article 15, paragraph 10, or Article 26), but including the votes of all the members represented on the Council. But an important inroad upon the general principle of unanimity was made by the adoption by the Assembly of the rule that a decision which can be described as consisting of a *vœu*, however we may translate that word—'recommendation,' 'wish,' 'hope,' 'opinion,' or 'view'—did not require unanimity and that a simple majority would suffice.³

The
Council.

§ 167f. *Membership*.—The Council could be described as being, for most purposes, the Executive of the League. Its size depended, in the first instance, upon Article 4. It consisted eventually of the following classes of members: (i) the *permanent members*, namely, those Great Powers who were members of the League; the Council could, with the approval of the majority of the Assembly, name other permanent members; (ii) the *eleven non-permanent members*, of whom normally three were elected each year and for three years: this group can be subdivided into (a) non-permanent and not re-eligible until the expiry of three years from the conclusion of their terms of office, and (b) non-permanent but declared by a majority of two-thirds of the members of the Assembly voting to be immediately re-eligible.⁴

¹ It was not always clear, when the Covenant speaks of a majority of the Assembly or of the Council, either simple or two-thirds, whether a majority of the members represented at the meeting in question or of all the members of the League was intended. Article 5 specially mentions 'the members of the League represented at the meeting.' See Stone in *B.Y.*, 14 (1933), pp. 29-31.

² Document C. 356. M. 168. 1923. V.

³ See Fischer Williams, *op. cit.*, at p. 479; Schindler, *Die Verbindlichkeit der Beschlüsse des Völker-*

bundes (1927); Stone in *B.Y.*, 14 (1933), pp. 35-37; Schücking and Wehberg (3rd ed., 1931), pp. 511, 512. The French words *invitation*, *recommendation* were also used instead of *vœu*.

⁴ *Records of Seventh Ordinary Assembly, Plenary Meetings*, p. 79, and *Off. J.*, Special Suppl. No. 43, p. 8. On the difficulties created by the problem of the composition of the Council and on the attempts to solve them see Schücking and Wehberg, 3rd ed. (1931), pp. 462-479; Toynbee, *Survey*, 1928, pp. 100-114; Lange, *Vers un gouvernement international*.

A declaration of re-eligibility implied no guarantee of re-election. (iii) *Ad hoc representatives*.

Functions.—Like the Assembly, the Council could deal at its meetings with 'any matter within the sphere of action of the League or affecting the peace of the world' (Article 4) which was not by the Covenant expressly reserved for the sphere of action of the Assembly. The functions of the Council may be classified as being (a) within its exclusive competence; (b) requiring co-operation with the Assembly; and (c) within the concurrent or alternative competence of the Assembly and the Council.

Methods of Voting.—The Council could validly take a decision by means of the following kinds of votes, the choice of which depended upon the nature of the decision¹; (a) the unanimous vote of 'all the Members of the League represented at the meeting' (Article 5); that was *prima facie* the rule, of which Article 26 is one of many illustrations; (b) the vote of a simple 'majority of the Members of the League represented at the meeting,' which applied to 'all matters of procedure, including the appointment of committees to investigate particular matters' (Article 5); (c) the vote of all the members of the Council, *excluding* the representatives of the parties to a dispute,² such a vote sufficing under paragraph 6 of Article 15 to give validity to a Report under that paragraph, with the consequence that war against a party complying with the Report was a breach of the Covenant; (d) the vote of a simple majority of all the members of the Council³; this sufficed for a

La Société des Nations et la composition du Conseil (1928); Popovitch, *La composition du Conseil de la Société des Nations* (1929); Gretschaninow in *Z.o.V.*, 24 (1934), pp. 208-225 (with a valuable bibliography). See also above, § 116a, on State Equality and International Organisation. And see Myers in *A.J.*, 20 (1926), pp. 689-713.

¹ See Riches, *The Unanimity Rule and the League of Nations* (1933); Elen, *Le principe de l'unanimité dans la Société des Nations* (1935); Stone in *B.Y.*, 14 (1933), pp. 18-42; Fischer Williams in *A.J.*, 19 (1925), pp. 475-488; Hill, *ibid.*, 22 (1928), pp. 319-329; and, in connection with the

Council's request for an advisory opinion, McNair in *B.Y.*, 1926, pp. 1-13, and vol. II, p. 67; see also Schucking und Wehberg, pp. 336-338.

² See here Advisory Opinion No. 12, Series B, pp. 20-31, and Riches, *op. cit.*, pp. 131-137.

³ Some of the treaties connected with the settlement after the First World War made provision for the modification 'certain provisions with the consent of a majority of the Council; for instance, Article 12 of the Treaty of June 28, 1919, with Poland, and Article 14 of the Treaty of September 10, 1919, with Czecho-Slovakia.

Report upon a dispute under paragraph 4 of Article 15 which did not have the effect mentioned under (c) above as regards an ensuing war; (e) where it was desired to expel a member from the League, the unanimous vote of the members of the Council, with the exception of the representative of that State if it happened to be a member, was required (Article 16, paragraph 4).¹

The
Secre-
tariat.

§ 167g. The Secretariat of the League consisted of the Secretary-General, appointed by the Council with the approval of the majority of the Assembly, and of such other staff as were required (Article 6), men and women being equally eligible for all positions.²

The Secretariat was located at Geneva, the seat of the League, while representatives were maintained in a few other countries. The members of the Secretariat constituted an international civil service; while retaining their own nationality, they were expected to serve not their own States but the League and its members as a whole.³ An attempt was made in the case of the higher posts to preserve some degree of balance in point of nationality, but, at the same time, the ability and personal qualifications of the candidates were declared to be the principal test of selection.⁴ The 'officials

¹ As to the relation between the Assembly and the Council see *Report on the Relations between, and Respective Competence of, the Council and the Assembly (Records of the First Assembly, Plenary Meetings, pp. 318-320, adopted by the Assembly on December 7, 1920)*. See particularly the conclusion that 'the Council and the Assembly are each invested with particular powers and duties. Neither body has jurisdiction to render a decision in a matter which by the Treaties or the Covenant has been expressly committed to the other organs of the League. Either body may discuss and examine any matter which is within the competence of the League.' See also, Fischer Williams, *Some Aspects of the Covenant* (1934), pp. 76-80.

² See Morley, *The Society of Nations* (1932), pp. 261-337. For the Statute of the Administrative Tribunal which heard complaints alleging the non-

observance of the terms of appointment of officials of the Secretariat of the League or of the International Labour Office see *Off. J.*, May 1928, p. 751.

³ By a decision of the Assembly in 1932 the Secretary-General and officials of the Secretariat on taking up office were bound to make a declaration of loyalty to the League, including an undertaking not to seek or receive instructions from any Government or external authority. And see generally on the Secretariat of the League the valuable work by Ranshofen-Wertheimer, *The International Secretariat* (1945).

⁴ See the *Report of the Committee of Thirteen of 1930*. A. 16. 1930; and the Resolutions of the Assembly in 1932 and the Staff Regulations as amended in that year. See also Toynbee, *Survey*, 1928, pp. 135-140. And see, as to the status of League officials, the Report of October 8, 1932, of a Committee of Jurists on the

of the League' enjoyed diplomatic privileges and immunities when engaged on the business of the League (Article 7).¹

§ 167h. Article 24, paragraph 1, of the Covenant provided that there shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent, and that all international bureaux and all commissions for the regulation of matters of international interest constituted after the establishment of the League shall be placed under its direction. The Council took a somewhat conservative view of the scope of Article 24,² largely on account of the requirement of the consent of non-member States. The following bureaux were placed under the direction of the League: (1) International Hydrographic Bureau³; (2) Central International Office for the Control of the Liquor Traffic in Africa⁴; (3) International Commission for Air Navigation⁵; (4) International Bureau for Information and Inquiries regarding Relief to Foreigners (*Bureau international d'assistance*)⁶; (5) The Nansen International Office for Refugees⁷; (6) International Exhibitions Bureau.⁸ In addition, the following institutes were set up, for purposes falling within the province of the League, by agreements between the

question whether the League Assembly was entitled to reduce the salaries of the officials of the Secretariat, of the International Labour Office and of the Permanent Court of International Justice. The unanimous answer of the Committee was in the negative: Fourteenth Assembly, 1923, Fourth Committee: *Off. J.*, Special Suppl. No. 107 p. 206. After that, however, all new appointments were made subject to modification by the Assembly

nationalen Unionen (1920); Kunz, *Staatenverbindungen* (1929), pp. 382, 383; Ray, *Commentaire au Pacte* (1930), pp. 667-681; Boissier, *La Société des Nations et les Bureaux internationaux* (1932), pp. 55-113; Darraa in *Répertoire*, x, pp. 716, 717; Bailey in *American Political Science Quarterly*, 25 (1931), pp. 406-424.

² *Off. J.*, 1921, pp. 1166 *et seq.* And see below, p. 900.

³ *Off. J.*, 1922, pp. 91, 128-129

⁴ *Ibid.*, 1921, p. 1166.

⁵ *Ibid.*, pp. 761, 1166. This Organisation, composed partly of representatives of governments and partly of those of private institutions, must be distinguished from the International Relief Union which was established by the Convention of July 12, 1927.

⁶ *Records of the Eleventh Assembly* 1930, pp. 156-158.

⁷ *Off. J.*, 1931, p. 1110.

¹ See below, § 417a.

² See the Hanotaux Report adopted in 1921 by the Council: *Off. J.*, 1921, p. 759; the Resolution of the Council in 1923 concerning non conventional international bureaux: *ibid.*, 1923, pp. 858, 948; the Resolution of the Ninth Assembly in 1928: *Plenary Meetings*, p. 113, and *Off. J.*, 1928, p. 898. On Article 24 see generally Schöcking and Wehberg, pp. 756-762; Spreckelsen, *Die rechtlichen Beziehungen des Völkerbundes zu inter-*

League and particular Governments which established and maintained these institutes: (1) the International Institute of Intellectual Co-operation¹; (2) the International Institute for the Unification of Private Law²; (3) International Educational Cinematographic Institute³; (4) International Centre for the Study of Leprosy.⁴

iii. THE FUNCTION OF THE LEAGUE

The two
Purposes
of the
League.

§ 167i. The main purposes of the League were stated in solemn language in the Preamble to the Covenant:

The High Contracting Parties, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another, agree to this Covenant of the League of Nations.

It appears thus that the League was intended to serve two different purposes, namely, the maintenance of international peace and security, and the promotion of international co-operation.

Peaceful
Settle-
ment of
Inter-
national
Disputes.

§ 167k. The avoidance of war by the peaceful settlement of international disputes was one of the most important tasks of the League. Articles 11 to 17 of the Covenant, which contained the scheme for achieving this purpose, were examined in the previous editions in Part I. of the second

¹ *Ibid.*, 1925, pp. 284-289.

² *Ibid.*, 1926, pp. 812-815; 1928, p. 1773. For details see Myers in *A.J.*, 33 (1939), pp. 322-324.

³ *Off. J.*, 1927, p. 1450. For details see Myers, *op. cit.*, pp. 325-328.

⁴ *Off. J.*, 1928, p. 139; 1931, pp. 2085 *et seq.* As to the International Wine Office (see below, p. 998) see *Off. J.*, 1930, p. 516; as to the International Institute of Commerce

see *ibid.*, 1921, p. 761; 1923, p. 274; as to the International Institute of Agriculture see *ibid.*, 1924, p. 280; as to the *Union internationale de la Propriété Foncière Rétie* (International Bureau for Co-ordinating the Work of the National Federations of Urban Property) see *ibid.*, 1926, p. 545; as to the International Association for Life Saving and First Aid to Injuries see *ibid.*, 1930, p. 94.

volume of this work, entitled 'The Settlement of State Differences.'¹

§ 167l. Article 8 embodied the principle that national armaments shall be reduced to the lowest point consistent with national safety and with the enforcement by common action of international obligations. Reduction of Armaments.

§ 167m. By Article 10 of the Covenant—

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled. Guarantee against Aggression.

Apprehension as to the burden of the obligations entailed by Article 10 was one of the factors which prevented the United States of America from ratifying the Covenant, and Canada set on foot in the First Assembly in December 1920 a movement for its deletion.² The sole fruit of this attempt at deletion and later at amendment was an Interpretative Resolution which only failed to secure adoption by the Fourth Assembly in September 1923 because Persia voted against it and unanimity was required.³ No amount of interpretation can alter the fact that Article 10 contained a guarantee concerning external aggression against territorial integrity and existing political independence. It was a collective guarantee, so that, for instance, Great Britain, if

¹ Vol. II. §§ 25b-25g. The important limitation upon the jurisdiction of the League in the matter of disputes which is contained in paragraph 8 of Article 15—matters 'solely within the domestic jurisdiction' of either party—is dealt with below in vol. II. § 25f, to which add Tachi, *La souveraineté et l'indépendance de l'État et les questions intérieures en droit international* (1930); Le Fur in *Hague Recueil*, 54 (1935) (iv.), pp. 272-303.

² *Records of the First Assembly, Plenary Meetings*, p. 279; the matter was also discussed by the Second Assembly, and at the Third Assembly Canada proposed two amendments instead of deletion.

³ *Records of the Fourth Assembly,*

Plenary Meetings, p. 86. The main features of this Resolution were that due regard must be paid by the Council, in recommending the application of military measures, to the geographical situation and special conditions of each State, and that in the last resort each State must judge for itself 'in what degree [it] is bound to assure the execution of this obligation by employment of its military forces'; and see Scott in *A.J.*, 18 (1924), pp. 108-113. The British Government, in its memorandum despatched to the League Committee on Arbitration and Security in January 1928, accepted the interpretation of Article 10 contained in this Resolution.

she maintained the doctrine as to collective guarantees¹ enunciated by Lord Derby in 1867 and affirmed by Sir Edward Grey in 1914 in connection with the neutralisation of Luxemburg, was not entitled to consider that she was only under a duty to intervene if all the other members of the League would do the same, and that if the State resorting to external aggression was a member of the League no obligation to intervene would arise at all. No such expression as *la garantie collective* appeared in the Covenant. The Article was weakened by its second sentence, but nevertheless it remained not only a declaration of principle but also a solemn guarantee.²

Like any other international obligation, that Article had to be interpreted and applied in accordance with good faith, common sense, and the spirit and scope of other Articles of the Covenant. That meant that the guarantee although not collective had in some measure to be dependent upon common action on the part of the bulk of the members of the League. In January 1932 China appealed to the Council under that Article.³ In September 1935 Abyssinia

¹ See below, § 576.

² President Wilson himself seems to have regarded the expression 'territorial integrity' as meaning 'immunity not from armed invasion but from forcible annexation' (see Baker, 'The Making of the Covenant,' in Munch, *Les origines et l'œuvre de la Société des Nations*, II (1924) p. 58). Baker, *ibid.*, considers that 'its real meaning is that it abolishes the right of conquest. It is directed against the violent transfer of territory from one sovereignty to another without the consent of the members of the League.' See also Komarnicki, *La question de l'intégrité territoriale dans le Pacte de la Société des Nations* (1923); Struycken in *Bibliotheca Visseriana*, I. (1926) pp. 93-157; Schücking und Wehrberg, pp. 449-466; Scelle, 'Elaboration du pacte,' in Munch, *op. cit.*, I. (1923) pp. 62-137; Bask, *Der Inhalt des modernen Völkerrechts und der Ursprung des Artikels 10 der Völkerbundsatzung* (1926); Redtsloh, *op. cit.*, pp. 116-127; Bruce Williams, *State Security and the League*

of Nations (1927), ch. III., Bussmann, *Der völkerrechtliche Garantievertrag* (1927), pp. 17-24, 42-53; Steinlein, *Der Begriff des nicht herausgeforderten Angriffs* (1927), (Gomiorowski, *op. cit.*, II pp. 264-293; Yepes and da Silva, *op. cit.*, pp. 274-300); Ray, *op. cit.*, pp. 343 et seq.; Spaight, *Pseudo Security* (1928), pp. 35 ff.; Korenitch, *L'Article 10 du Pacte de la Société des Nations* (1931); Lipartiti, *L'articolo dieci del Patto della Società delle Nazioni* (1931); Brück, *Les sanctions de l'Article X du Pacte* (1933); Fischer Williams, *Some Aspects of the Covenant* (1931), pp. 103-125; Mirkovitch, *Des rapports entre l'Article 10 et l'Article 21 du Pacte* (1935); Report by Aglati and Charles de Visser, and Resolutions of the Institute of International Law, in *Annuaire*, 30 (1923), pp. 23-47 and 383-385; Rolin in *RI*, 3rd ser., 3 (1922), pp. 336-350; Wilmanns in *Z V.*, 17 (1933), pp. 26-112. And see below, vol. II, § 52m, on self-defence and aggression.

³ *Off. J.*, 1932, p. 373.

appealed, *inter alia*, under that Article.¹ In neither case did other members of the League take any effective action under that Article to fulfil the obligation of the guarantee. In the case of China the Council and the Assembly, respectively, affirmed the principle of non-recognition of changes brought about in disregard of Article 10.² In the case of Abyssinia practically all the members of the League actually resorted to some of the measures contemplated in Article 16 until, confronted with the success of the aggressor, they abandoned them for what they believed to be cogent reasons of policy.³

§ 167n. At the outbreak of the First World War in 1914, and during its continuance, it became apparent that secret treaties are a danger to peace. Accordingly, Article 18⁴ laid down the rule that in future every treaty or international engagement entered into by any member of the League must be forthwith registered with the Secretariat of the League, and as soon as possible be published, and that no such treaty or international engagement shall be binding until so registered.⁵ This Article is examined in § 518a.

§ 167o. Intimately connected with the guarantee against aggression discussed in § 167m was Article 19, which provided that --

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

¹ *Ibid.*, 1935, p. 1139

² *Ibid.*, Special Suppl. No. 101, p. 87; and see above, § 75c.

³ For what will probably remain the best account of that event see Toynbee's *Survey*, 1935 (ii), and *Documents*, 1935 (ii).

⁴ The Preamble to the Covenant spoke of 'the presumption of open, just, and honourable relations between nations.' 'Open diplomacy' in the sense of publicity of diplomatic negotiations is an entirely different matter. See Reinsch, *Secret Diplomacy* (1922); Poole, *The Conduct of Foreign Relations under Modern Democratic Conditions* (1924); Buell,

International Relations (1925), pp. 695-703; Memorandum by the Secretary-General of the League in *L.N.T.S.* i. at p. 9, and *Off. J.* (June 1920), at p. 154; and as to the publicity of meetings of the Council see Schücking and Wehberg, pp. 331, 332, and *Off. J.*, August 1922, p. 791. See also Dollot in *R.G.*, 36 (1929), pp. 479-501 on the meaning of diplomatic secrecy; and Guggenheim in *Archives de philosophie du droit*, Nos. 1-2 (1934).

⁵ For an example of a secret instrument see the Secret Protocol annexed to the Balkan Pact of February 9, 1934: *Documents*, 1934, p. 300.

The machinery offered by Article 19 was not free of doubt. In particular, it was not certain whether the Assembly in giving 'advice' must be unanimous, whether the doctrine of the *vœu*¹ already referred to could be invoked, or whether the doctrine of *nemo iudex in re sua* expounded by the Permanent Court in the *Mosul* Advisory Opinion² could be applied to this case. There was no legal obligation upon the member to follow the advice.³ But otherwise the scope of that Article was comprehensive.

The principle reflected in Article 19 was a modest beginning in an embryonic form of the legislative process in the society of nations.⁴ To some small extent that principle is susceptible of application by judicial means, namely, by the development under the control of the Permanent Court of the rule that *omnis conventio intelligitur rebus sic stantibus*.⁵ But that rule is not applicable in all cases in which the continued operation of a treaty becomes unjust and oppressive; neither is it applicable when the cause of friction and injustice lies in the existence and use of inter-

¹ See above, § 167e.

² *P.C.I.J.*, Series B., No. 12.

³ Bolivia requested the Second Assembly in 1921 to revise a treaty of 1904 between herself and Chile, but the request was reported by a Committee of Jurists to be out of order 'in its present form,' and it was withdrawn. This Committee pointed out that the Assembly could not modify a treaty but could merely advise its reconsideration, and that 'such advice can only be given in cases where treaties have become inapplicable—that is to say, where the state of affairs existing at the moment of their conclusion has subsequently undergone either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in cases of the existence of international conditions whose continuance might endanger the peace of the world.' Bolivia thereupon withdrew her request: *Records of the Second Assembly, Plenary Meetings*, pp. 466-470; and see Rappard, *International Relations as viewed from Geneva* (1925), pp. 111, 112. At the same time, and with

the same result, Peru requested the Assembly to revise a treaty with Chile of 1883: see *Records of the Second Assembly, Plenary Meetings*, pp. 52, 56, 580, 595. In 1925 China invoked Article 19 in connection with the extraterritoriality and similar treaties binding upon her (*Sixth Assembly, Plenary Meetings*, p. 44). The Assembly contented itself with drawing attention to the forthcoming conference on the matter (*ibid.*, p. 102). In 1929 China proposed the appointment of a committee to consider how Article 19 could be rendered more effective (*Tenth Assembly, Plenary Meetings*, p. 99). The Assembly did not follow that suggestion, but adopted a resolution restricting the conditions under which that Article could be invoked (*ibid.*, p. 177).

⁴ See above, § 37a.

⁵ See below, § 539. But it is probable that a State invoking the doctrine *rebus sic stantibus* might rely on a favourable finding under Article 19 as showing that it is justified in invoking a vital change of circumstances.

national rights not grounded in a treaty. In all these situations the function envisaged in Article 19 was political, and not legal.¹

§ 16700. The establishment of the League of Nations made a substantial change in the mutual relations of the members and added materially to their obligations under-

Incon-
sistency
with the
Covenant
of the
League.

¹ See Oppenheim, *The League of Nations* (1919), p. 69, who suggested that the function of declaring treaties discharged by a change of circumstances should be performed by an international court; Higgins in Hall, p. 407; Fauchille, §§ 858-858 (2); Hoijer, *Le pacte de la Société des Nations* (1926), pp. 333-346; Goellner, *La révision des traités sous le régime de la Société des Nations* (1925); Gonsiorowski, *op. cit.*, pp. 291-310; Lauterpacht, § 77; Briefly in *Gratius Society*, 11 (1926), pp. 11-20; Fischer Williams in *A.J.*, 22 (1928), pp. 89-104; and McNair in *Hague Recueil*, 22 (1928) (ii.), pp. 467-481.

The discussion of Article 19 was almost invariably coupled with a consideration of the doctrine *rebus sic stantibus*, and it is therefore convenient to give in this place a selection from the vast literature on the subject: Vellani, *La revisione dei trattati e i principi generali del diritto* (1930); Radokovitch, *La revision des traités et le Pacte de la Société des Nations* (1930); Werth-Kogendanz, *Die clausula rebus sic stantibus im Völkerrecht* (1931); Schnecker, *Die völkerrechtliche clausula rebus sic stantibus und Artikel 19 der Völkerbundsatzung* (1931); Reut-Nicolussi, *Zur Problematik der Heiligkeit der Verträge* (1931); Fischer Williams, *International Change and International Peace* (1932); the same in *International Affairs*, 10 (1931), pp. 326-347; Kunz, *Die Revision der Partner Friedensverträge* (1932); Wig-niölle, *La Société des Nations et la Revision des Traités* (1932); Tobin, *The Termination of Multipartite Treaties* (1933); Hill, *The Doctrine of 'rebus sic stantibus' in International Law* (1934); Cereti, *La revisione dei trattati* (1934); Bohmert, *Artikel 19 der Völkerbundsatzung* (1934); Lauterpacht, *The Function of Law*, pp. 270-285, and in *Peaceful Change—An International Problem*

(1937), pp. 135-165; *Harvard Research*, Part III, (1935), pp. 1077-1126, 1161-1173; Frangulis, *La théorie et pratique des traités internationaux* (1936), pp. 121-183; Scalfati, *La clausola 'rebus sic stantibus'* (1936); Scelle, *La théorie juridique de la revision des traités* (1936); the same in *Friedenswarte*, 32 (1932), pp. 193-196, and in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 469-482; Gramsch, *Grundlagen und Methoden internationaler Revision* (1937); Fischer Williams, *Aspects of Modern International Law* (1939), pp. 85-114; Potter, *Article 19 of the Covenant of the League of Nations* (1911); Bullington in *University of Pennsylvania Law Review*, 1927, pp. 153-177; Bouffall in *R.I.*, 3rd ser., 9 (1928), pp. 882-905; Genet in *R.G.*, 37 (1930), pp. 287-311; Denis in *A.S. Proceedings*, 1932, pp. 53-59; Auer in *Gratius Society*, 18 (1932), pp. 155-171; Wehberg in *Friedenswarte*, 32 (1932), pp. 196-202; Burckhardt in *R.I.*, 3rd ser., 14 (1933), pp. 5-30; McNair in *Hague Recueil*, vol. 43 (1933) (i.), pp. 280-289; Schindler, *ibid.*, vol. 46 (1933) (iv.), pp. 271-280; Garner in *Iowa Law Review*, 19 (1933-1934), pp. 312-329; Ray in *Hague Recueil*, vol. 48 (1934) (ii.), pp. 635-709; Whitton, *ibid.*, vol. 49 (1934) (iii.), pp. 250-268, and in *R.I. (Paris)*, 18 (1936), pp. 440-486; Filippucci-Gustiniani in *Lo Stato*, 1934, pp. 411-447, 498-541; Ténékidès in *R.G.*, 41 (1934), pp. 273-294; Le Fur in *Hague Recueil*, vol. 55 (1935) (iv.), pp. 214-246; Fairman in *A.J.*, 29 (1935), pp. 818-826; Gathorne-Hardy in *International Affairs*, 14 (1935), pp. 818-826; Mitrany, *ibid.*, pp. 826-836; Kraus in *New Commonwealth Quarterly*, 1 (1935), pp. 33-43; Zanca in *R.I. (Geneva)*, 13 (1935), pp. 13-25; Wright in *A.S. Proceedings*, 1936, pp. 55-73; Bourquin in *Hague Recueil*, vol. 64 (1938) (ii.), pp. 351-472.

taken for the sake of the purpose of the League as a whole. It was therefore considered necessary to provide expressly for the priority of these obligations over other treaty commitments, past or future. Any treaty, be it one of neutrality, or alliance, or commerce, or concerning the freedom of communications, might easily prove inconsistent with the Covenant. Accordingly Article 20¹ provided that

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations

This Article was of great importance although, upon analysis, it was largely declaratory of existing International Law

But lest Article 20² should seem to go too far, Article 21³ hastened to add that—

¹ See Fauchille, § 859, Hojer, *Le Pacte de la Société des Nations* (1926), pp. 347-350; Schucking und Wehberg, pp. 661-669, Ray, *op. cit.*, pp. 569, 570, Lauterpacht in *B.Y.*, 16 (1936), pp. 54-65. Upon the bearing of this Article upon subsequent treaties of neutrality see below, § 577*b*, and vol. II § 292*f*. Treaties some times expressly provided that they shall impose no obligations upon the parties which conflict with their rights and duties as members of the League, for instance, Article 9 of the Barcelona Convention and Statute on Freedom of Transit of April 20, 1921, and the Final Protocol of the Treaty of Arbitration and Conciliation between Germany and Switzerland of December 3, 1921, *L.N.T.S.*, 12, p. 293. For a detailed enumeration of these treaties see Rousseau in *R.G.*, 39 (1932), pp. 140-142, 158-162.

² For a striking illustration of this interpretation of Article 20 see the report of a legal sub-committee set up in 1935 by the Coordinating Committee of the Assembly in con-

nection with the application of sanctions against Italy. Doc. General 1936 6 (Co-ordinating Committee 40; also in *Off. J.*, Special Suppl. No. 145, pp. 21, 26. Thus, for instance, they held in effect that even if a treaty between two members of the League contained no express reservation regarding the provisions of the Covenant it did not operate as between them if its operation proved contrary to Article 16. In the course of the application of sanctions against Italy in 1935 Switzerland admitted that Italy would not be entitled to invoke the provisions of the Convention of 1869 relative to the Gothard Tunnel, but that the situation was affected by the circumstance that Germany was not a member of the League: *Off. J.*, Special Suppl. No. 145, p. 114. On the position of non-members generally see La Gal, *La Société des Nations et les États non membres* (1938).

³ Schucking und Wehberg, pp. 669-680; Hojer, *Le pacte de la Société des Nations* (1926), pp. 351-354; Ray, *op. cit.*, pp. 571-581.

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings¹ like the Monroe Doctrine,² for securing the maintenance of peace.

The effect of this Article appeared to be that if two or more States members of the League had previously established or later established a system of arbitration amongst themselves or a mutual guarantee or defensive alliance which did not conflict with their obligations under the Covenant, it was deserving of encouragement and was in no way inconsistent with the Covenant.

¹ Upon the meaning of this expression see Brown in *A.J.*, 13 (1919), pp. 738-741, and *ibid.*, 15 (1921), pp. 69-70; Wright, *ibid.*, 14 (1920), pp. 565-580; Hyde, i. § 57; Schucking und Wehberg, pp. 673, 674; and *Records of the Second Assembly, Plenary Meetings*, pp. 706, 707, 830-833 (as to the views of China and Czecho-Slovakia); Orue y Arregui in *Hague Recueil*, 53 (1935) (iii.), pp. 7-90; Sceni in *Rivista*, 28 (1936), pp. 172-208; see also Freytagh-Loringhoven, *Die Regionalverträge* (1937); and see below, § 571a.

² The desire to incorporate the Monroe Doctrine (for which see above, §§ 139-140) in the Covenant was the main reason for inserting Article 21; see Baker, *Woodrow Wilson and the World Settlement*, i. (1922) pp. 323-339; Hyde, i. § 97; Schucking und Wehberg, pp. 669-672; Fauchille, §§ 325-329; Lannoy, in *R.I.*, 3rd ser., 1, pp. 364-384; Elliott in *International Law Association's Thirtieth Report*, 1921, pp. 73-112; Madariaga in *Problems of Peace* (4th ser., 1929), pp. 60-85; Spencer in *A.J.*, 30 (1936), pp. 400-413. In accepting in 1931 the invitation to become a member of the League of Nations, Mexico expressly declared that she 'has never recognised the regional understanding mentioned in Article 21 of the Covenant.' This statement was not regarded either as a reservation or as a declaration inconsistent with Article 21. In September 1928 the Council of the League, in reply to

the request of Costa Rica for an official interpretation of Article 21, stated that the Article referred only to the relations of the Covenant with such engagements and that it could not have the effect of giving them a validity which they did not previously possess: (*Off. J.*, 1928, p. 1608. See Marshall Brown in *A.J.*, 26 (1932), pp. 117-121; Stefanich, *La Sociedad de las Naciones y la doctrina de Monroe* (1928). See also generally, on Latin-American States in relation to the League, Edwards in *International Affairs*, 8 (1929), pp. 134-153; Matos, 'L'Amérique et la Société des Nations,' in *Hague Recueil*, vol. 28 (1929) (iii.), pp. 5-99; Guerrero, *Les relations des États de l'Amérique latine avec la Société des Nations* (1936), and *problèmes actuels de l'organisation du monde* (1937). And see in particular Yepes and da Silva, *Commentaire théorique et pratique du Pacte de la Société des Nations et des Statuts de l'Union Panaméricaine*, i. (1934), ii. (1935), for a comparative account of the principles of the Covenant and of those of the Pan-American Union. As to the Pan-American system in relation to the United Nations and international organisation generally see Humphrey, *The Inter-American System* (1942); Margaret Ball, *The Problem of Inter-American Organization* (1944), Sharp in *Foreign Affairs* (U.S.A.), 23 (1945), pp. 450-464; Fenwick in *American Political Science Review*, 39 (1945), pp. 490-500; Kunz in *A.J.*, 39 (1945), pp. 527-533 and 758-761. And see above, p. 185, n. 1

Mandates.

§ 167p. Article 22 established the system of Mandates, which has already been discussed.¹

III

THE UNITED NATIONS

British Commentary on the Charter of the United Nations, Cmd. 6866 (1945) (cited here as *British Commentary*)—*The Charter of the United Nations. Hearings before the Committee on Foreign Relations, United States Senate*, 1945 (including a valuable commentary on the Charter contained in the Report of the Secretary of State to the President of the United States; cited here as *American Commentary*)—*Report to the Governor General in Council, by the Canadian Secretary of State for Foreign Affairs, on the United Nations Conference on International Organisation*. Department of External Affairs: Conference Series, 1945, No. 2 (cited here as *Canadian Commentary*)—*Commentary on the Report of the Preparatory Commission of the United Nations* (with Text of the Report as presented to the General Assembly, London, January 10, 1946; Cmd. 6734)—*Documents of the United Nations Conference on International Organisation* (15 vols., 1945, 1946, published by the United Nations Information Organisation in co-operation with the Library of Congress Goodrich and Hambro, *Charter of the United Nations* (2nd ed., 1949) Kopelmanas *L'Organisation des Nations Unies*, vol. 1. (1947)—Kaeckenbeek in *Illegue Revue* 70 (1947) (1.), pp. 114-330—Wehberg in *Friedenswarte* 15 (1945) pp. 331-392 Berenstein, *ibid.*, pp. 393-406 Finch in *A.J.*, 39 (1945) pp. 511-516 Potter, *ibid.*, pp. 516-551—Briggs, *ibid.*, pp. 664-679 Commentary in *International Conciliator*, September 1945, No. 413 Pollux in *B.Y.*, 23 (1946) pp. 54-82—Eagleton in *Yale Law Journal*, 55 (1946) pp. 974-996 Kelsen, *ibid.*, pp. 997-1015—Rappard, *ibid.*, pp. 1036-1048 Kirk *ibid.* pp. 1081-1096—Brierly in *B.Y.*, 23 (1946), pp. 83-94 Goodrich in *International Organisation*, 1. (1947), pp. 3-21 Gross in *A.J.*, 41 (1947) pp. 531-554 Engel in *Year Book of World Affairs*, 1953, pp. 71-101 *Yearbook of the United Nations* (a comprehensive annual publication) Bentwich and Martin, *A Commentary on the Charter of the United Nations* (1950) Kelsen, *The Law of the United Nations* (1950) (a leading treatise)—Ross, *Constitution of the United Nations* (1950) Schwarzenberger, *Power Politics* (2nd ed., 1951), pp. 427-457—Vanderbosch and Hogan, *The United Nations* (1952). On the Documents of the United Nations see Lamb in *A.J.*, 41 (1947) pp. 140-145.

i. THE OBJECTS AND THE LEGAL NATURE OF THE UNITED NATIONS

The Establishment of the United Nations.

§ 168. Throughout the Second World War the establishment of a general organisation of States for the purpose of safeguarding peace and promoting international co-operation

¹ See above, §§ 94c-94f.

and government was regarded as a major object of the war. There was a divergence of opinion whether the future international organisation ought to be a continuation of the League of Nations, suitably strengthened in the light of its history,¹ whether it ought to take the form of a more organic association on a federal basis,² or whether its structure ought to be determined by a combination of the lessons of experience and the requirements of the international situation at the close of the war.³ Events caused the adoption of the last solution. In Article 4 of the Moscow Declaration of November 1, 1943, Great Britain, the United States, Russia and China recognised 'the necessity of establishing at the earliest practicable date a general international organisation, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of

¹ See e.g. the article by Sir John Fischer Williams entitled 'A Reconstruction of the League of Nations,' in *Agenda*, vol. II No. 1 (1943), pp. 56-66. See also Lauterpacht in *Political Quarterly*, 12 (1941), pp. 121-133.

The League of Nations was dissolved by a resolution of its last Assembly in April 1946 (for an account of which see McKinnon Wood in *BY*, 23 (1946), pp. 317-323). For a valuable account of the work of that Assembly see *The League Hands Over*, published by the Secretariat of the League (Geneva, 1946-1). See also Meyers in *ILJ*, 42 (1945) pp. 320-334 and in particular Anfricht *Guide to League of Nations Publications* (1951), pp. 13-10, 130-133, 597-649. Previously the First General Assembly of the United Nations had adopted a Resolution declaring that the United Nations was willing to assume the exercise of certain functions and powers previously entrusted to the League of Nations in particular those connected with the custody of instruments of treaties deposited with the Secretariat of the League with the performance of certain functions of a technical and non-political character and with the work of the following League departments: The Economic and Financial and Transit Departments, the Health Section and the Opium Section. See

Records of the First General Assembly, First Session, pp. 706-709. For the Agreement of July 19, 1946 between the League of Nations and the United Nations determining the details of the transfer to the latter of the assets of the League of Nations see *General Assembly Journal* No. 75 Suppl. A 64 Add. 1 p. 899. For a List of Conventions with an indication of the relevant Articles conferring powers on the organs of the League of Nations see *League Document*, C 100 M. 100 1945 V.

² For a discussion of or support for these proposals see e.g. Streit, *Union Now* (1939); Jennings, *Federation for Western Europe* (1940); *Federal Union* (A Symposium, edited by Channing Pearce, 1940); Schwarzenberger, *Power Politics* (2nd ed., 1951); Brecht in *Harvard Law Review*, 55 (1941-1942), pp. 561-594, the same in *American Political Science Review*, 37 (1943), pp. 862-872; Potter, *ibid.*, pp. 850-862; Liverson in *Journal of Legislation and Political Philosophy*, 2 (1943), pp. 82-93; Dennon, *ibid.*, pp. 68-111; Roucek, *ibid.*, pp. 94-116. See also Bagleton, *The Forces that Shape Our Future* (1945), pp. 59-151.

³ See e.g. Guignenhem, *L'Organisation de la Société internationale* (1944).

international peace and security.¹ In pursuance of that Declaration conversations were held at Dumbarton Oaks, Washington, in August and September, 1944, between officials of Great Britain, the United States and the Soviet Union. Subsequently Chinese officials joined in the meetings, the result of which was a document embodying tentative proposals for a General International Organisation.² These proposals, together with the voting formula subsequently agreed to at the Yalta Conference,³ formed the basis of the discussions at the Conference which took place at San Francisco from April 25 to June 26, 1945, and which was attended by representatives of the following fifty States: Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Egypt, El Salvador, Ecuador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxemburg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Saudi Arabia, Syria, Turkey, Ukraine, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela, White Russia, Yugoslavia.⁴

¹ See *A.J.*, 38 (1944), Suppl., p. 5. See also the Report of the Crimea Conference of February 11, 1945, in which the representatives of Great Britain, the United States and the Soviet Union declared that 'the proposed international organisation will provide the greatest opportunity in all history to create in the years to come the essential conditions' of a secure and lasting peace: Cmd. 6598, p. 7. Of the preparatory work of private organisations and bodies there must be mentioned in particular the successive reports (and accompanying papers) of the Commission to study the Organisation of Peace (a private body under the chairmanship of Professor Shotwell of Columbia University), printed in *International Conciliation* pamphlets in the years 1940-1944, and *The International Law of the Future. Postulates, Principles, and Proposals*—an important private draft prepared by a number of persons in

the United States and Canada: *A.J.*, 38 (1944), Suppl., p. 41.

² Cmd 6560 (1944) and an official commentary thereon, Cmd 6571 (1944). For a comparison of the Dumbarton Oaks Proposals and the Covenant of the League see Hubert Wright in U.S. Senate Doc., 79th Congress, 1st Session, Doc. No. 33 (1945). See also Bourquin, *Vers une nouvelle Société des Nations* (1945).

³ See below, p. 432, n. 3.

⁴ Poland, in view of her internal position, was not invited to the Conference, but she subsequently signed the Charter as an original Member. Between 1946 and 1953 the following nine States were admitted: Afghanistan, Siam, Sweden, Iceland, Yemen, Pakistan, Burma, Israel and Indonesia. Accordingly, by the end of 1953 the membership of the United Nations was 60. And see below, § 168c.

The discussions at the Conference at San Francisco resulted in the unanimous adoption on June 26, 1945, without reservations, of the Charter of the United Nations¹ and the Statute of the International Court of Justice which is annexed to the Charter and has equal validity with it.² On the same day an Agreement was signed establishing the Preparatory Commission of the United Nations composed of the representatives of the States taking part in the San Francisco Conference.³ The main object of the Commission was to make provisional arrangements for the first session of the General Assembly, of the Security Council, of the Social and Economic Council, and of the Trusteeship Council, and for the convening of the International Court of Justice. The General Assembly met in London on January 10, 1946, and took as the basis of its work a comprehensive report of the Preparatory Commission relating to the organisation of the United Nations and to the taking over of the functions of the League of Nations.⁴

§ 168a. The purposes of the United Nations are set forth exhaustively in the Preamble⁵ and in the first Article of the Charter. The object of the United Nations is, in the language of the latter, 'to maintain international peace and security.' That object is to be achieved, negatively, by preventing and suppressing breaches of the peace and threats of such breaches and, positively, by promoting conditions conducive to the preservation and the maintenance of peace. That combination of the positive and the negative functions of the Organisation is a persistent feature of the Charter. Thus Article 1 lays down that it is the purpose of the United Nations : (a) to take effective collective

The
Purposes
of the
United
Nations.

¹ The title 'United Nations' was first suggested by President Roosevelt and adopted in the Declaration of January 1, 1942, in which the signatories, after pledging their resources for the achievement of common victory, subscribed to the purposes and principles embodied in the Atlantic Charter: *A.J.*, 36 (1942), Suppl., p. 191. At the time of the opening of the Conference at San Francisco forty seven States had subscribed to the Declaration.

² For the text of the Charter (including the Statute of the Court) and the British commentary thereon see Misc. No. 9 (1945), Cmd. 6666.

³ Cmd. 6669. And see in particular Kopelmanas, *L'Organisation des Nations Unies*, vol. 1. (1947).

⁴ For the text of the Report and a commentary thereon see Cmd. 6734.

⁵ See Salomon, *Le Préambule de la Charte* (1946), and Kelsen in *Journal of Politics*, 8 (1946), pp. 134-159.

measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression; (b) to bring about by peaceful means, and in conformity with the principles of justice and international law,¹ adjustment or settlement of international disputes or situations which might lead to a breach of the peace; (c) to develop friendly relations among States based on respect of equal rights and self-determination of peoples, and to take other appropriate measures for strengthening universal peace. Further, that major purpose is to be implemented by achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.² Finally, it is a purpose of the United Nations to be 'a centre for harmonising the actions of nations' in the attainment of their common ends.³

These purposes of the United Nations are expressed in a more general form in the Preamble, which has been described as forming an integral part of the Charter.⁴ Like the Charter itself, the Preamble not only emphasises the resolve to ensure, by 'the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.' It also expresses the positive determination 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.'⁵ On a wider plane

¹ See below, n 5

² See below, § 340.

³ See below, § 168.

⁴ *American Commentary*, p. 51, where the opinion is expressed that 'the Conference did not doubt that the statements expressed in the Preamble constitute valid evidence on the basis of which the Charter may thereafter be interpreted.' See also *Canadian Commentary*, p. 16.

⁵ The question of the place of International Law in the scheme of preserving international peace caused some heart searching and discussion both before and during the Conference at San Francisco. Unlike in Article 1

of the Charter, there was no reference in the statement of Purposes in the Dumbarton Oaks Proposals to international law and justice. At the San Francisco Conference a number of States desired to go beyond the affirmation of principles of justice and International Law as a condition of maintaining peace; they proposed that the maintenance of international peace and justice be declared to be one of the Purposes of the Organisation. That proposal did not prevail on the ground, apparently, that rigid insistence on legal justice may, in certain circumstances, occasion delay when expeditious action is imperative

the Preamble reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.' Significantly, the Preamble opens with the words 'We the peoples of the United Nations'—a phrase which was not adopted without some discussion at the Conference¹—although in the closing passage the 'respective Governments' are designated as having agreed to the Charter.

§ 168b. The principles on which the United Nations is based are, in substance, implicit in its purposes. However, the Charter expressly enunciates, in Article 2, certain principles to be followed, by the Organisation and its Members, as a matter of legal duty. These principles are as follows:

The Principles of the United Nations

(1) *The sovereign equality of all the Members of the Organisation*—a principle of some elasticity, which is commented upon below, § 168c.

(2) *The duties of peaceful settlement and of participation in the system of collective security and of enforcement of the peace.* These include the obligation to settle disputes by peaceful means 'in such a manner that international peace and security, and justice,'² are not endangered';³ the duty to refrain from the threat or use of force against the territorial integrity and the political independence of any State; and the obligation to give the United Nations assistance in any action

(see *Canadian Commentary*, p. 17). The controversy as to the merits of the proposition that 'order comes before law' is to a large extent of a dialectical character. It resolves itself substantially into the question as to whether order not based on law may not be a mere instrumentality of power inimical to justice which alone is capable of providing a true basis for the authority and, in the long run, for the effectiveness of the law. For an expression of some doubt as to the adequacy of the provisions of the Charter in the matter see Corbett in the *N. W. Harris Foundation Lectures* (1945), pp. 11-24, and Eagleton in *A.J.*, 39 (1945), pp. 751-754. See also Kelsen, *Law and Peace in International Relations* (1942), pp. 115-168 and Chakraborty in *A.J.*, 42 (1948), pp. 500-600. But see Briery, *The Outlook for International Law* (1944), pp. 74 *et seq.*

Note also Article 2 (5) of the Charter, in which the word 'justice' was added to the corresponding text of the Dumbarton Oaks Proposals.

¹ See also the reference in Article 50 of the Charter to 'the rights whatever of any States or any peoples'.

² See above, p. 404, n. 5.

³ It has been suggested—see e.g. *American Commentary*, p. 57—that this principle does not oblige members to settle all their international disputes, and that some disputes, provided they do not endanger international peace and security, may be left in a quiet state. The suggestion seems controversial. For the refusal to settle a dispute, although it may not be fraught with danger for international peace and security, may be contrary to justice (as to which see above, p. 404, n. 5).

taken in accordance with the Charter and to refrain from assisting any State against which the United Nations is taking measures of prevention or enforcement (Article 2 (3-5)).¹

All these obligations constitute perhaps the most fundamental of all legal duties binding upon members of the United Nations. For the United Nations as conceived by its founders is primarily an organisation for maintaining and enforcing peace. The binding character of these obligations is not affected by the circumstance that owing to the requirement of unanimous consent, in some cases, of all the permanent members of the Security Council, they may not always be effective. A permanent member of the Security Council may, by his vote, prevent a valid decision of the Council involving his participation in collective action, but the intrinsic legal merits of his conduct must continue to be judged by the paramount obligations expressed in the Principles.

It will also be noted that, in contrast to Article X of the Covenant of the League, the Charter does not provide for a guarantee of the territorial integrity and political independence of the members of the Organisation. It is probable that that object is secured, to some extent, by the negative obligation, outlined above, to refrain from the use of force or threats of force and by the acceptance of the obligation to participate in collective measures of enforcement decreed by the Security Council.²

(3) *Mutuality of Benefits and Obligations under the Charter.* Article 2 (2) lays down that 'All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.' In a legal

¹ See vol. II, §§ 43, 52a-52fd. And see Waldock in *Haque Recueil*, 81 (1952) (ii.), pp. 456-514.

² The proposal of New Zealand and a considerable number of other States that all the members of the Organisation should expressly undertake to resist by collective action any act of aggression against a member did not secure the necessary support. The proposal was apparently prompted by the view that, having regard to the

requirement of unanimity of the Great Powers in respect of collective action implying the use of force, such action in vindication of the territorial integrity and independence of member States is by no means certain under the existing provisions of the Charter. However, even if the principle of collective guarantee had been accepted it would still suffer from the same difficulty. The remedy, it is believed, lies in making safeguards workable, not in multiplying them.

instrument in which, because of the incidence of voting procedure, members may often be in the position of having to pronounce upon the extent of their own obligations, the emphasis upon the requirement of good faith in the fulfilment of obligations seems proper and necessary. For the same reason, although the mutuality of rights and obligations under a legal instrument follows from a general principle of law, it seemed wise, in view of the traditional tendency of States to stress their rights rather than their duties, to indicate the connection between the loyal fulfilment of the duties of the Charter and the enjoyment of the benefits which it is intended to secure.

(4) *Non-member States and international peace and security.* The Charter makes it mandatory upon the United Nations to ensure that non-member States¹ shall act in accordance with the principles of the organisation 'so far as may be necessary for the maintenance of international peace and security.' In embodying this important provision the Charter follows the corresponding provisions of Article 17 of the Covenant. Without imposing legal obligations upon non-member States it asserts, in effect, the right to control their conduct with regard to an essential aspect of their foreign relations. To that extent it amounts to an assertion of a right of intervention in relation to non-member States. As submitted above, such assertion is not inconsistent with the reasons underlying the general prohibition of intervention in International Law.² The view that the international community organised in the United Nations may - in cases affecting the general interest, including that of preservation of international peace - lawfully claim to affect non-member States is supported by the authority of an unanimous pronouncement of the International Court of Justice.³

¹ On the position of non member States see Kelsen, *The Law of the United Nations* (1950), pp. 106-110; Kunz in *A.J.*, 41 (1947) pp. 122-126, and 47 (1953), pp. 456-462; Guggenheim, vol. 1, p. 92; Katzarov in *Archiv des Völkerrechts*, 3 (1951), pp. 1-22; Liang in *A.J.*, 45 (1951), pp. 314-324. On the participation of

non-member States in the activities of the United Nations see Schachter in *B.Y.*, 27 (1948), pp. 115-122.

² § 140b.

³ See the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* *I.C.J. Reports*, 1949, p. 185. And see above, p. 22.

(5) *Exclusion of matters of domestic jurisdiction from the sphere of intervention by the United Nations* (Article 2 (7)). This negative Principle, of apparently alarming comprehensiveness, may, unless put in the perspective of the Charter as a whole, obscure the meaning of most of its significant provisions, and it is therefore necessary to analyse it in some detail (see below, § 168f).

Member-
ship of the
United
Nations. § 168c. Although the membership of the United Nations is not irrevocably confined to any number or group of States, it cannot be said that the Charter recognises to its full extent the idea of the universality of the political organisation of mankind. To that extent the Charter must be regarded as an expression, transient in character, of the conditions and of the sentiment prevailing at the time of its adoption. The Organisation is composed, in the first instance, of what may be described as original members, namely, all the States, numbering fifty,¹ which participated in the United Nations Conference on International Organisation at San Francisco or which, after having previously signed the Declaration of the United Nations of January 1, 1942,² sign and ratify the Charter (Article 3). Secondly, States may be admitted as members of the United Nations by a decision reached by a two-thirds majority of the Assembly on the recommendation of the Security Council (Article 4 (2))—for which recommendation there is required a majority of seven members of the Council including the concurring votes of the permanent members (Article 27 (3)). The Charter lays down no conditions of membership other than that the new members must be ‘peace-loving states’—a somewhat vague qualification—which accept the obligations of the Charter and which ‘in the judgment of the Organization, are able and willing to carry out these obligations’ (Article 4 (1)).³ While it is thus clear that no State

¹ For a list of these States see above, p. 402.

² See above p. 403, n. 1.

³ Some States proposed even more stringent requirements of membership. Thus Holland suggested that to the expression ‘peace-loving States’ there should be added the words

‘which may be expected on account of their institutions and by their international behaviour faithfully to observe and carry out international commitments’: see *Canadian Commentary*, p. 19. On the other hand, the Latin-American States favoured the principle of universality. See also

has a right to be admitted as a member, the members of the General Assembly and of the Security Council must exercise their judgment in good faith in reaching the decision whether a State is peace-loving and whether it is able and willing to carry out the obligations of the Charter. This was, in effect, the view both of the Court as a whole and of the dissenting minority of the Judges in the Advisory Opinion, given in 1948, on the question of the interpretation of Article 4 of the Charter.¹ The improper exercise of the power conferred by Article 4 in the matter of admission to membership may take place not only as the result of abuse of the so-called right of veto—i.e. the right of a permanent member of the Security Council to prevent the required unanimity of its permanent members without any attempt to explain the negative vote—but also of a one-sided and partisan interpretation of what constitutes a 'peace-loving' State. The practical result of these two improper ways of exercising the faculty of admitting new members is identical. The early history of the United Nations produced examples of both. While the competence of the General Assembly in this sphere is one of partnership exercised jointly with the Security Council, its general responsibility for the functioning of the United Nations as a whole entitles it to approach the Security Council with a view to remedying any defects

Kelsen in *Columbia Law Review* 46 (1946), pp. 391-411. On admission to membership of other international organisations see Jenks in *B.Y.*, 22 (1945), pp. 20-22.

¹ See below, p. 410. The Court rejected the view that the conditions of admission laid down in Article 4 represent only an indispensable minimum upon which any member is entitled to superimpose such political considerations as it may deem fit. The dissenting Judges were of the view that while the conditions enumerated in Article 4 were essential they were by no means exhaustive and that members were entitled to take into account such political considerations as they considered relevant. Actually the difference in the views of the Court as a whole and of the minority was less substantial than appears at first sight. While the Court con-

sidered the conditions laid down in Article 4 to be exhaustive, it did not exclude the right to take into account any factors including political factors, which 'it is possible reasonably and in good faith to connect with the conditions laid down in that Article' (*U. N. Reports*, 1948, p. 63). While the minority Judges fully conceded the right to take into account all political considerations relevant to the question of admission, they stressed the 'overriding legal obligation resting upon members of the United Nations to act in good faith . . . and with a view to carrying out the Purposes and Principles of the United Nations; they did 'not enjoy unlimited freedom' in the choice of the political considerations on which they base their vote (*ibid.*, p. 93). See, for an analysis of this Opinion, Fitzmaurice in *B.Y.*, 29 (1952), pp. 22-28.

in the procedure and in the actual exercise of the power of admitting new members. ✓ The General Assembly has been alive to this aspect of its responsibility.¹ However, any initiative of the General Assembly in the matter cannot alter the main provision of the Charter on the subject. Thus in its Advisory Opinion, given in 1950,² on the *Competence of the General Assembly for the Admission of a State to the United Nations* the Court declined to accept the argument that when the Security Council failed to decide in favour of an application for admission it, in effect, recommended the non-admission of the State concerned and that in such cases the General Assembly was confronted with a 'recommendation' which it could either accept or reject, and in rejecting it admit the applicant State. The effect of the suggestion that the General Assembly has the power to admit a State to

¹ The First General Assembly adopted a Resolution requesting the Security Council to appoint a committee to confer with a committee of the General Assembly with a view to preparing rules governing the admission of new members 'which will be acceptable both to the General Assembly and the Security Council': *Journal of the General Assembly*, No. 75, p. 824. For the action taken on that Resolution see *Annual Report of the Secretary-General*, 1947, p. 15. The Second General Assembly, confronted with the fact that the Security Council had failed to recommend for membership eleven States which applied for it—Albania, Austria, Bulgaria, Finland, Hungary, Ireland, Italy, Mongolia, Portugal, Roumania and Transjordan—adopted a number of Resolutions intended to remedy the situation. Thus it declared that Finland, Ireland, Italy, Portugal and Transjordan were peace loving States able and willing to carry out the obligations of the Charter, and should therefore be admitted to membership. The Security Council was asked, in the light of that declaration, to reconsider the applications of these States. The International Court of Justice was asked to give an Advisory Opinion on whether the consent to the admission of a new member may properly be made dependent on conditions

not expressly provided for in Article 4 of the Charter. It gave a negative reply to that question (see above p. 409). It may well be doubted whether that negative answer can substantially assist in alleviating the unsatisfactory position resulting from the existing formulation of Article 4. It may not be able to prevent a State so minded from an improper exercise of the right to admit new members so long as the adverse vote is cloaked in the elastic garb of the general conditions laid down in Article 4. It is probable that nothing short of the acknowledgment of the right of every recognised State to membership of the United Nations can obviate the possibility of abuse of the power to admit new members. See generally on the question of admission of new members Kelsen, *The Law of the United Nations* (1950), pp. 57-82; Huruber in *B.Y.*, 24 (1947), pp. 90-115; Klooz in *I.C.J.*, 13 (1949), pp. 246-261; Liang, *ibid.*, pp. 288-303; Green in *Current Legal Problems*, 2 (1949), pp. 258-282; Feinberg in *Hague Recueil*, 80 (1952) (4.), pp. 297-389. In 1951 the General Assembly adopted a Resolution (506A) affirming, *inter alia*, that the judgment of the United Nations on the admission of new Members ought to be based exclusively on the conditions contained in Article 4 of the Charter.

² *I.C.J. Reports*, 1950, p. 10.

membership in the absence of a recommendation of the Security Council would be, in the view of the Court, to deprive the Security Council of an important power entrusted to it by a clear provision of the Charter.

§ 168d. The absence of universality in the organisation of the United Nations expresses itself not only in the fact that the Charter neither makes provision for compulsory membership nor grants to all States the right to become members. The Charter provides expressly for termination of membership through expulsion by the General Assembly upon the recommendation of the Security Council as a sanction for persistent violation of the Principles of the Charter (Article 6).¹ Although the Charter itself does not expressly mention the right of withdrawal, in the absence of an express prohibition to that effect the members of the United Nations must be deemed to have preserved the right to sever what is, in law, a contractual relation of indefinite duration imposing upon States far-reaching restrictions of their sovereignty. Moreover, the relevant Committee of the San Francisco Conference put on record the view, eventually accepted by all the participating States, that nothing in the Charter deprives members of the right to withdraw from the Organisation. It is probable that any limitations upon that right are of a political and moral rather than of a legal nature.² Both the principle of the universality and of the

¹ In addition, Article 5 of the Charter lays down that any member of the United Nations against which the Security Council has taken measures of prevention or enforcement may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The latter may restore the exercise of these rights and privileges.

² The following extract from the report, bearing on the subject, of the *Rapporteur* to Commission I of the Conference may be quoted:

'The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organisation. The Committee deems that the highest duty of the nations which

will become members is to continue their co-operation within the Organisation for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other members, it is not the purpose of the Organisation to compel that member to continue its co-operation in the Organisation.

'It is obvious, particularly, that withdrawals or some other forms of dissolution of the Organisation would become inevitable if, deceiving the hopes of humanity, the Organisation was revealed to be unable to maintain peace or could do so only at the expense of law and justice.

Nor would a member be bound to

permanency of the political organisation of mankind and the experience of the League of Nations¹ suggested a different solution. However, most States represented at the Conference of San Francisco did not see their way to acquiesce in such an impairment of national sovereignty as is undoubtedly implied in the irrevocable acceptance of membership of an international organisation with most comprehensive and expanding aims. These considerations do not apply with equal cogency to States which are permanent members of the Security Council. For their concurrence is required both for the application of the existing important obligations of the Charter and for any extension of its obligations. The position is different in the case of States which are not permanent members of the Council and which, in the absence of a right of withdrawal, might have to submit to amendments of the Charter from which they dissent and which enlarge their obligations in matters of significance. Moreover the fact that the Great Powers insisted successfully on their unanimous consent as a condition of the valid acceptance of amendments to the Charter (see below, § 168s) prompted many States to urge the retention of the right of withdrawal from an Organisation the development and improvement of which can be prevented by the dissenting vote of a single permanent member of the Security Council.

The Principle of Sovereign Equality of the Members of the United Nations.

§ 168e. On the face of it the principle of the sovereign equality of all the members of the Organisation is an attempt to give formal vitality to a maxim which is in fact contradicted by many crucial provisions of the Charter. For there runs throughout the Charter a clear-cut differentiation between the rights— and, it might appear at first sight, be-

remain in the Organisation if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general Conference fails to secure the ratification necessary to bring such amendment into effect.

It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically

forbidding or permitting withdrawal.' *American Commentary*, p. 60; *Canadian Commentary*, p. 22. On withdrawal from membership of international organisations see Jenks in *B.Y.*, 22 (1945), pp. 22-25, and Kelsen in *R.G.*, 52 (1948), pp. 1-10, and the same, *The Law of the United Nations* (1950), pp. 122-135.

¹ Where the right of withdrawal was used mainly either for reasons of offended prestige or as a manoeuvre in the course of acts of aggression.

tween the duties--of the five Great Powers which are permanent members of the Security Council, and other members of the United Nations. The consent of the permanent members of the Security Council is required as a condition of the validity of the more important decisions not only of the Council but also of the General Assembly. The consent of the Great Powers who are permanent members of the Security Council is required for amendments of the Charter ; for admission of new members of the United Nations ; for decisions and recommendations in connection with the settlement of disputes and safeguarding international peace and security (except in the case of parties to the dispute) ; for decisions embodying measures for enforcement ; and in many other cases.¹ It might be argued that this means, in effect, that in some cases the duties of the Great Powers are in a different--and narrower--category than those of other members ; this would appear the case, for instance, with regard to measures of enforcement. For if the Charter cannot be enforced against permanent members of the Security Council except with their consent, does it not mean that their duties are, in effect, less exacting ? The answer is that in law the duties of all members of the United Nations are the same. In the words of Article 2 (2) 'all Members . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.' The general obligations of the Charter are, in principle, equally binding on all members. This is the first meaning of the principle of sovereign equality.

Secondly, the express enunciation of the principle of sovereign equality signifies that, apart from those aspects of the Charter in which the vote of the Great Powers is, in effect, given greater weight than that of other States, their equality as sovereign States remains in every other respect unimpaired. The privileged position of the Great Powers does not lend itself to extensive interpretation. To that extent the express enunciation of the principle of sovereign equality is not mere lip-service to a principle which has in fact been abandoned. It will also be noted that most of the

¹ See below, § 168f.

derogations from the principles of equality under the Charter—although usually cloaked in the unattractive garb of the somewhat ambiguous phrase that responsibility¹ must be linked with power—are consistent, to a substantial degree, with international justice and with the progressive requirements of international organisation. On the other hand, in one vital respect the absence of equality under the Charter seems to deny a basic condition of the rule of law, namely, inasmuch as measures of enforcement cannot be taken against a permanent member of the Security Council. To that extent the Charter departs from the principle of equality before the law. There is no such equality if the law can be enforced against some but not against other members of the community.²

Matters of
Domestic
Jurisdiction.

§ 168f. Paragraph 7 of Article 2 of the Charter provides as follows :

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This important provision, incorporated as one of the Principles of the Charter, has been considered by some as having the effect of nullifying much of the purpose of the Charter and of reducing it, to a large extent, to the category of a purely political instrument. There is no warrant for any such assumption if the following considerations are borne in mind :

(a) The expression 'essentially within the domestic juris-

¹ There need be no hesitation in advancing the claim that rights, including the right to determine the assumption and the extent of responsibility in implementing collective action, ought to be commensurate with power in many respects. Thus, for instance, it is proper that the power of a State—its size, its population, its wealth, its industrial capacity, and its contribution to the maintenance of international peace and security—should determine its influence,

as expressed in the formal weight of its vote, upon the decisions taken by the organs of the international organisation. But it does not follow that the unanimous vote of all permanent members of the Security Council constitutes a proper solution of a difficult problem.

² For a criticism of the phrase 'sovereign equality' see Kelsen in *Yale Law Journal*, 53 (1944), pp. 207-220.

diction of any state' is one capable of divergent interpretations. It seems that that expression was deliberately substituted for that used in Article 15 (8) of the Covenant which referred to matters which, *according to International Law*, are exclusively within the domestic jurisdiction of the State. The change was apparently due to the belief that the body of International Law on the subject is 'indefinite and inadequate' and that 'to the extent that the matter is dealt with by international practice and by text writers, the conceptions are inadequate and not of a character which ought to be frozen into the new Organisation.'¹ It is arguable that the language adopted by the Charter results in a limitation of the competence of the United Nations less rigid than that following from Article 15 (8) of the Covenant. For subjects such as tariffs or admission of aliens—typical examples of matters of domestic jurisdiction—although according to International Law they may be incontestably within the domestic jurisdiction of the State, need not, having regard to their international repercussions, be essentially matters of domestic jurisdiction. However that may be, the question whether a matter is or is not essentially within the domestic jurisdiction of a State is one which, in case of dispute, must be determined by an impartial finding either of the competent non-judicial organs of the United Nations or, if these bodies are unable to reach a decision, because of the exigencies of the voting procedure² or for other reasons, by the judicial organ of the United Nations, namely, the International Court of Justice.

(b) The exclusion of the right of 'intervention' on the part of the United Nations must be interpreted by reference to the accepted technical meaning of that term.³ It excludes intervention conceived as dictatorial, mandatory, interference

¹ *American Commentary*, p. 58. And see, vol. ii. § 25f, for the Advisory Opinion of the Permanent Court of International Justice in the *Tunis and Morocco Nationality Decrees* case to the effect that the question whether a matter is solely within the domestic jurisdiction of the State is a relative question the answer to which depends on the development of international

relations (Series B, No. 4, at p. 23).

² It is not clear whether unanimity (less the vote of the parties to the dispute) is necessary for the finding that a dispute is within the domestic jurisdiction of a State or whether such unanimity is required for the decision that a dispute is not within the domestic jurisdiction.

³ See above, § 140b.

intended to exercise direct pressure upon the State concerned. It does not rule out action by way of discussion, study, enquiry and recommendation¹ falling short of intervention.

(c) In so far as a 'recommendation,' although not implying a legal obligation to accept it, is calculated to exercise direct pressure, likely to be followed by measures of enforcement, upon a State in a matter which is essentially within its domestic jurisdiction, it is probable that it would come within the terms of Article 2 (7). Other recommendations, even if addressed to individual States, are not excluded by the terms of that provision. The same applies to recommendations which are general in character.

(d) The above consideration explains the provision of Article 2 (7) according to which there is no obligation to submit disputes arising out of matters of domestic jurisdiction to settlement under the Charter. For such settlement, even if not implying a decision of the Security Council, may result in a recommendation of the General Assembly or of the Security Council directly addressed to the parties to the dispute and in some ways indistinguishable from a decision.²

(e) As, apart from the powers of the Security Council in respect of maintaining international peace and security, the functions of the two other principal organs of the United Nations, namely, the General Assembly and the Social and Economic Council, are limited to discussion, study and recommendation, the exclusion of 'intervention' by the United Nations in essentially domestic matters is not, in fact, relevant to the activities of these bodies.³

¹ See below, (c).

² The reluctance to see matters of domestic jurisdiction dealt with by way of a recommendation of the Security Council or of the General Assembly in the course of settling disputes was apparently one of the main reasons for the insistence by Australia on the extended scope of the domestic jurisdiction clause in the Charter as compared with the Dumbarton Oaks Proposals. See *American Commentary*, p. 57; *Canadian Commentary*, pp. 18-19. So long as the determination of the question whether a matter is or is not one of

domestic jurisdiction is left for the decision of the International Court of Justice or any other legal tribunal, there would appear to be no objection to excluding such matters from the purview of obligatory judicial settlement. For the preliminary decision of the Court or other tribunal to the effect that a dispute is within the domestic jurisdiction of the defendant State would, in fact, amount to a decision on the merits.

³ But see *American Commentary*, p. 58, for the suggestion that the clause was deemed necessary for the reason, *inter alia*, that the Charter has

(f) The exception of matters of domestic jurisdiction does not apply to cases in which the Security Council, in pursuance of Chapter VII of the Charter, proceeds to take measures of enforcement after having determined 'the existence of any threat to the peace, breach of the peace, or act of aggression' (Article 39). Although there is thus no obligation to submit disputes involving matters of domestic jurisdiction to the ordinary procedure of settlement, the Security Council is entitled to take cognisance of situations threatening international peace and security and, in so far as such situations eventually require for their solution measures of enforcement decreed by the Security Council, the essentially domestic character of the situation does not constitute a bar to the jurisdiction of the Council. To that limited extent Article 2 (7) of the Charter meets the objection that it excludes from the competence of the United Nations those conflicts which historically have proved the most potent source of international friction.

(g) There is no substantial legal difference between the wording of the Charter referring to matters which are 'essentially within the domestic jurisdiction of any state' and the terms of the corresponding provision of Article 15 (8) of the Covenant of the League of Nations which excepted from the purview of the recommendations of the Council matters which the Council finds to be, according to International Law, within the exclusive domestic jurisdiction of a State. For, in practice, a matter ceases to be one essentially within the domestic jurisdiction of a State if

conferred wide powers upon the Economic and Social Council. In fact, there is nothing in the competence conferred upon that Council which may render intervention, in the legal sense of the word, possible. Neither is there anything in Article 2 (7) which rules out the concern, as distinguished from intervention, of the Economic and Social Council in what are regarded as 'domestic' matters.

The above considerations apply especially to the question of 'fundamental human rights and freedoms'

which it is the task of the United Nations to promote and encourage (see below, § 340f). The scope of that task is restricted not by the domestic jurisdiction clause of Article 2 (7), but by the limitations imposed upon the powers of the General Assembly and of the Economic and Social Council by the general scheme of the Charter. But there is no question of Article 2 (7) nullifying the possibilities of the solemn and numerous provisions in the matter of human rights and freedoms.

according to International Law it is no longer exclusively within the domestic jurisdiction of that State,¹ namely, when it is or becomes the subject-matter of an international obligation.² The mere allegation that it has, for the latter reason, ceased to be a matter of domestic jurisdiction is sufficient, until rejected by the appropriate authority, to make it the subject-matter of legitimate international concern. On the other hand, the fact that a question or dispute is bound to have international repercussions, however grave, is probably not in itself sufficient to remove a matter from the sphere of domestic jurisdiction. To hold otherwise would mean to make it possible for any State or any party to a dispute to circumvent a provision, which must be given *some* meaning, of the Charter by the simple device of raising the dispute in the international sphere or by adopting a threatening attitude menacing the peace of the world.³

(h) In general, it is doubtful whether, in its present formulation, Article 2, paragraph 7, serves any legally relevant purpose. With regard to the General Assembly and the Economic and Social Council the prohibition of intervention seems irrelevant for the reason that these bodies, lacking as they normally do the power to take enforceable decisions legally binding upon the members of the United Nations, cannot 'intervene.'⁴ The action of the Security Council can legally extend to intervention, but seeing that, as a rule, that body is competent only with regard to matters which affect or constitute a threat to international peace and security, such matters, having become the subject of direct international concern, are no longer essentially within the domestic jurisdiction of a State

¹ There has been a tendency, which is probably not warranted by the terms of the Charter, to magnify the alleged disintegrating effects of Article 2, para. 7. See, e.g., Kelsen in *Yale Law Journal*, 55 (1946), pp. 997-1007. See, on the other hand, the scholarly treatment of the subject by Kopelmanas, *L'Organisation des Nations Unies* (1947), pp. 207-252. And see Lauterpacht in *Hague Recueil*, 70 (1947) (i), Pollux in *Acta Scandinavica*, 17 (1946), pp. 13-35, Rousseau in *Annuaire*, 44 (1) (1952), pp.

137-180, Jones in *Illinois Law Review*, 46 (1951-1952), pp. 219-272, and the extensive literature referred to in vol. II, § 25gc.

² See, in addition to the Advisory Opinion in the case concerning the *Tunisia and Morocco Nationality Decrees* (Series B, No. 4, p. 24), the Advisory Opinion in the *Interpretation of Peace Treaties case (First Phase)*, *I.C.J. Reports*, 1950, p. 70.

³ See Fitzmaurice in *B.Y.*, 29 (1952), pp. 34-37.

⁴ See above, p. 415.

and as such excluded from intervention on the part of the Security Council.¹ Neither the Security Council nor the General Assembly were disposed, in 1946, to treat as a matter 'essentially within the domestic jurisdiction of any state' the question of the political régime in Spain.² In the same year, in the dispute between India and South Africa concerning the treatment of Indians in the latter country, the General Assembly adopted a Resolution which, in the opinion of South Africa but not of a two-thirds majority of the General Assembly, constituted intervention in the meaning of Article 2, para. 7, of the Charter.³ It is probable that the only legally relevant—and efficacious—purpose of that provision is to prevent intervention by way of legislative action of the United Nations in such matters as regulation of tariffs and admission of aliens, with regard to which some States

¹ 'Once a matter is recognised as one of legitimate international concern, no exception to the general rule is needed to bring it within the powers of the organisation. The general rule itself ceases to apply as soon as a matter ceases to be one of domestic jurisdiction.' This extract from the memorandum on the subject submitted by the Australian delegation to the Conference at San Francisco was referred to by Dr. Evatt, the Australian representative, in support of the jurisdiction of the Security Council in the matter of the political régime in Spain (see note below): *Journal of the Security Council*, First Year, No. 37, June 12, 1946, p. 728.

² See *Journal of the Security Council*, First Year, Nos. 31, 32, 38, 40-42. See also *Report of the Security Council's Sub-Committee on the Spanish Question*, 1946. And see *Journal of the First General Assembly*, Second Session, 1946, No. 75, p. 827, for the Resolution of the General Assembly expressing the view that 'the Franco Fascist Government of Spain . . . does not represent the Spanish people,' and recommending that it be debarred from membership in international agencies established or brought into relationship with the United Nations, and that all members of the United Nations should immediately recall from Madrid their ambassadors and

ministers plenipotentiary accredited there. See *Annual Report of the Secretary-General of 1947 on the Work of the Organisation*, p. 3, on the steps taken to implement that Resolution. As 19 States had no ambassadors or ministers plenipotentiary at the time of the passing of the Resolution, and as 30 had no diplomatic relations at all with the Franco Government at that time, the Resolution was somewhat nominal.

³ In that Resolution the General Assembly noted that because of the treatment of Indians in South Africa the relations between two member-States had been impaired and were likely to deteriorate unless a satisfactory settlement were reached, expressed the opinion that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements between the two Governments and the relevant provisions of the Charter, and requested the two Governments to report to the next Session of the General Assembly the measures adopted to this effect: *Journal of the First General Assembly*, Second Session, No. 75 p. 831. In 1947 the Second Assembly, without re-affirming the Resolution of the previous year, requested the two Governments to enter into negotiations with a view to reaching an agreement.

have traditionally exhibited particular apprehension of international interference.

The Legal
Nature
of the
United
Nations

§ 168g. The United Nations is the legal organisation of the international community. It has a legal personality distinct from that of its members. That fact is to some extent brought out by Article 104 of the Charter which provides that 'The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.' There was apparently some apprehension—for which there was no basis in fact—lest the express conferment of 'international personality' upon the United Nations be interpreted as creating a super-State. In the Convention on the Privileges and Immunities of the United Nations, approved by the First General Assembly in 1946, Article I provided expressly that 'The United Nations shall possess juridical personality' and that it shall have the capacity to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings.¹ That juridical personality is not limited to capacity for action in the sphere of private law. The Charter itself recognises the contractual capacity of the organs of the United Nations in what is in effect the wide sphere of treaties. Thus Article 43 of the Charter provides for agreements between the Security Council and the members or groups of members of the Organisation concerning the armed forces and other forms of assistance to be contributed by them for the maintenance of international peace and security; it is laid down that these agreements shall be subject to ratification by the signatory States in accordance with their constitutional processes. Article 62 provides for agreements to be made by the Economic and Social Council with various specialised international organisations brought into relationship with the United Nations. A number of such agreements have been concluded.² The First Assembly adopted, for the guidance of the Secretary-General, a draft Convention

¹ *Records of the First Assembly* (1st Session), p. 688.

² See below, p. 445. And see

generally on the treaty making power of the United Nations Party in *B.Y.*, 26 (1949), pp. 108-149.

between the United Nations and the United States of America in connection with the establishment of the seat of the United Nations in that country.¹ The United Nations as such may also exercise direct jurisdictional and legislative powers, for instance with regard to such trust areas as, according to Article 81 of the Charter, may be placed under the administrative authority of the United Nations, or with regard to its seat. It was by reference to these and other powers and functions of the United Nations that the International Court of Justice held in the Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations*, that the United Nations is an international person; that it is a subject of International Law; that it is capable of possessing international rights and duties; and that it has capacity to maintain its rights by bringing international claims.²

The seat of the United Nations is in New York.³ In

¹ *Records of the First Assembly* (1st Session), p. 693.

² *I.C.J. Reports*, 1949 p. 179. And see above, p. 22. See also Wright in *A.J.*, 13 (1949), pp. 509-516, and Eagleton in *Hague Record*, 76 (1950) (1), pp. 323-341.

³ On June 26, 1947, an Agreement was concluded between the United Nations and the United States in order to carry into effect the Resolution adopted by the General Assembly in December 1946 to establish the seat of the United Nations in that city. The Agreement authorizes the United Nations to establish in the headquarters district sending and receiving wireless stations (§ 4). Provision is made for supplemental agreements in case the United Nations should find it necessary to establish its own aerodrome and its own postal service (§§ 5 and 6). In general, and subject to the provisions of the Convention on the Privileges and Immunities of the United Nations approved by the General Assembly in February 1946 (Treaty Series, 1950, No. 10, Cmd. 7891), the Federal State and local laws of the United States shall apply and the jurisdiction of their courts extend to acts done and transactions taking place in the headquarters district (§ 7). However, it is provided

that the United Nations shall have the power to make regulations for purposes necessary for the full execution of its functions within the headquarters district. No Federal, State or local law inconsistent with such regulations shall be applicable within the headquarters district. Machinery—which applies to all other Articles of the Agreement—is provided for settling any difference between the United Nations and the United States as to the existence of any such inconsistency (§ 8). The headquarters district shall be inviolable and American authorities shall not be entitled to enter it, or to serve legal process within it, except with the consent of and under conditions laid down by the Secretary-General. But the United Nations is under a duty to prevent the headquarters district from becoming a place of refuge for persons avoiding arrest or required for extradition (§ 10). The United States authorities shall not impose any impediment to the transit to or from the headquarters district of representatives of member States, officials of the United Nations, and other persons enumerated in the Agreement, including representatives of press, film and other information agencies accredited to the United Nations after consulta-

December 1946, the Second General Assembly adopted a Resolution providing for a flag of the United Nations. The flag shows the official emblem of the United Nations at the centre of a background of light blue.¹

The United Nations, thus endowed with an international personality of its own in its capacity as the legal organisation of the international community, is a juristic person *sui generis*. As the International Court of Justice has observed, while the United Nations is an international person, it is not a State and its legal personality is not that of a State. The question of the legal nature of the potentially universal association of States constituting the political organisation of mankind transcends that of any accepted

tion with the United States. Laws and regulations in force in the United States regarding the entry and residence of aliens shall not be applied so as to interfere with the privileges as to transit granted by the Agreement. The approval of the Secretary of State of the United States shall be necessary for proceedings requiring persons thus privileged to leave the United States. Such approval shall not be given without consultation, as the case may be, with the member of the United Nations concerned or with the Secretary-General (§ 13). Every person appointed by a member as the principal resident representative to the United Nations or to a specialised agency, and similar categories of persons enumerated in § 15 of the Agreement, shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities as it accords to the diplomatic envoys accredited to it. Provision is also made for similar, though somewhat restricted, immunities of representatives of governments not recognised by the United States. The latter also assume obligations with regard to the protection of the headquarters district and its amenities as well as with regard to the maintenance of public services (§§ 16-18). No form of racial or religious discrimination is to be permitted within the headquarters district. For the text of the Agreement see *U.N.T.S.*, xi, p. 11. For the Interim Headquarters

Agreement see *ibid.* p. 347. Various similar agreements have been concluded by the Specialised Agencies. See e.g., the Agreement between the International Labour Organisation and Switzerland (*ibid.*, xv, p. 377) and the World Health Organisation and Switzerland (*ibid.*, xvi, p. 331). See on the legal status of the premises of the United Nations Brandon in *B.Y.*, 28 (1951) pp. 90-113.

¹ The First General Assembly also approved the emblem of the United Nations for its official seal, and recommended that legislation should be passed by members to prevent its use for commercial purposes by means of trade marks or commercial labels as well as the use of the official seal and of the name of the United Nations, and of abbreviations of that name through the use of initial letters. In 1947 the Security Council of the United Nations promulgated a Flag Code which provided: (a) that the flag of the United Nations shall not be subordinate to any other flag; (b) that it shall be flown from all buildings, offices and official residences designated as such by the United Nations; (c) that it shall be used by any unit acting on behalf of the United Nations such as the Military Staff Committee. See Jawcett in *J.L.Q.*, 3 (1950), p. 279. By a Resolution of the Security Council adopted in 1950 the forces operating in Korea were given the name and the flag of the United Nations. See Baxter in *B.Y.*, 29 (1952), pp. 332-337.

classification of composite States and, in particular, that of the difference between a Confederation of States and a Federation. In so far as it is helpful to use these traditional two types of a composite State as a standard of comparison, the United Nations still approximates more closely to a Confederation than to a Federal State. This is so in particular in view of the right of withdrawal from the Organisation, of the practical non-existence of any true legislative powers vested in the United Nations, and of the virtual absence of any direct relation between the United Nations and the nationals of the member-States. In all these respects the United Nations departs from a vital characteristic of a Federal State. At the same time, with regard to the subjects just mentioned, the United Nations bears witness to the fact that the differences between a closely knit Federal State and a Confederation are, as a matter of experience, a question of degree. Thus the right of secession from the United Nations must be deemed to be somewhat qualified both by the manner of the acknowledgment of the right of withdrawal and by the studied absence of an unqualified admission of a right to withdraw from the United Nations.¹ The wide powers of the Security Council in coping with situations threatening international peace and security approach, in some respects, those of legislation.² And the concern of the Charter for fundamental human rights and freedoms approximates, albeit in a rudimentary degree, to the federal guarantee of individual human rights as found in Federal States.

ii. THE ORGANS AND THE CONSTITUTION OF THE UNITED NATIONS

§ 168h. Whatever may be the future possibilities of developing the United Nations into a more integrated association of States of a federal character, the present structure of its principal organs is still, from this point of view, of a rudimentary character. There is in the Organisation

The General Character of the Organs of the United Nations

¹ See above, § 168d.

² See below, § 168j.

tion no effective centre of authority vested with the general responsibility for the functioning of the United Nations as a whole. Though the competence of the General Assembly is not limited to any particular aspect of the purposes of the United Nations, it is the competence of an organ which is primarily deliberative. While the Security Council is, subject to the exigencies of its voting procedure, endowed with executive powers of decision, such powers are limited mainly to the preservation of peace. However, in some matters the Security Council and the General Assembly share the responsibility for the performance of functions connected with the working of the United Nations as a whole, and to that extent they constitute, jointly, the central organ of the United Nations.¹ In addition to these two principal organs and the Secretariat, the Charter provides for the following three organs: (1) The Economic and Social Council (§ 168*m*); (2) The Trusteeship Council (§ 94*m*); (3) The International Court of Justice (§ 168*o*)

The
General
Assembly.

§ 168i. The functions of the General Assembly as laid down in Articles 9-17 of the Charter are essentially those of initiative, of discussion, of study, and of recommendation. The Assembly—which consists of the members of the United Nations²—may not only discuss matters within the scope of the Charter or relating to the powers and functions of any organs provided in the Charter. It may also make recommendations on these matters both to members of the United Nations and to the Security Council³. On the other hand, it is clear that the Assembly is not invested with legislative powers. However, although the recommendations of the Assembly are not legally binding, they provide an important instrument for bringing the weight of the public opinion of the world to bear upon the members of the United Nations. In particular, the right of discussion and recommendation comprises questions of co-operation in the main-

¹ See below, § 169*l*.

² Article 9 (2) lays down that each member shall have not more than five representatives in the General Assembly.

³ But it is laid down in Article 12

that while a dispute or situation is before the Security Council the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so desires.

tenance of international peace and security, including disputes brought before the Assembly,¹ as well as principles governing disarmament and regulation of armaments. The Assembly may also call the attention of the Security Council to situations likely to endanger international peace and security.²

It is expressly provided that the Assembly shall initiate studies and make recommendations for the purpose of: (a) promoting international co-operation in the political sphere and for encouraging the progressive development and the codification of International Law; and (b) furthering international co-operation in the economic, social, cultural and educational fields and in matters of health as well as in 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'³ The other functions conferred upon the General Assembly include those assigned to it under the trusteeship system, in particular the approval of the trusteeship agreements for areas not designated as strategic (Article 16);⁴ the consideration and approval of the budget of the United Nations (Article 17),⁵ participation in the

¹ The proposal, made at the San Francisco Conference, that the Assembly should have the power to submit general conventions to members of the United Nations for approval did not secure the necessary majority. However, it is believed that a power of that nature is nevertheless vested in the General Assembly by virtue of Chapters IV and IX of the Charter, and also as the result of Article 82 which empowers the Economic and Social Council to propose draft conventions for submission to the Assembly. In fact, the First General Assembly approved at its First Session a Convention on the Privileges and Immunities of the United Nations and proposed it for accession by each member of the United Nations. *Records of the First Assembly, First Session, 1946*, p. 687. In 1948 the General Assembly similarly approved the Genocide Convention. See below, § 340p.

² Article 11 (3).

³ Article 13.

⁴ See above, § 94j. On the question of the binding nature of the recommendations of the General Assembly see Sloan in *B.V.* 25 (1949), pp. 1-33. See also Haxby, *The Political Role of the General Assembly* (1951).

⁵ The same Article provides that the expenses of the Organisation shall be borne by the members as apportioned by the General Assembly. The First General Assembly adopted at its First Session detailed resolutions relating to budgetary and financial arrangements, including the appointment of an Advisory Committee on Administrative and Budgetary Questions and a Committee on Contributions charged with the apportionment of expenses: *Records of the First Assembly* 1946 pp. 678-685. See also *Report of the Preparatory Commission*, Cmd. 6734, pp. 131-139. Article 19 of the Charter lays down that any member of the United Nations which is in arrears in the payment of its financial contributions shall have no vote in the

election of the Judges of the International Court of Justice (Article 4 of the Statute); election of the six non-permanent members of the Security Council (Article 23), of the members of the Economic and Social Council (Article 61), and of some members of the Trusteeship Council (Article 86 (c)); the appointment of the Secretary-General upon the recommendation of the Security Council (Article 97); the adoption of regulations governing the Secretariat (Article 101);¹ the admission and expulsion of members (Articles 4 and 6); and participation in the process of amending the Charter (Articles 108 and 109). Moreover, the General Assembly is empowered to establish such subsidiary organs as may be necessary for the fulfilment of the purposes of the Organisation (Article 22). In this and similar respects the position of the General Assembly approaches that of the central and co-ordinating organ of the United Nations. Thus the Economic and Social Council and the Trusteeship Council are subordinate to the General Assembly and act under its authority. However, unlike the Security Council, the General Assembly is not endowed with effective powers of decision in the fulfilment of the general functions entrusted to it by the Charter.

General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. An exception is made for cases in which the Assembly is satisfied that the failure to pay contributions is due to circumstances beyond the control of the member.

The following list shows the assessment of the budgetary contributions of the members of the United Nations approved by the General Assembly in 1953, the figures indicating the percentages to be contributed in respect of the annual budget of the United Nations: Afghanistan 0.08; Argentina 1.40; Australia 1.75; Belgium 1.38; Bolivia 0.06; Brazil 1.40; Burma 0.13; Byelorussian Soviet Socialist Republic 0.50; Canada 3.30; Chile 0.33; China 5.62; Colombia 0.41; Costa Rica 0.04; Cuba 0.34; Czechoslovakia 1.05; Denmark 0.78; Dominican Republic

0.05; Ecuador 0.04; Egypt 0.17; El Salvador 0.06; Ethiopia 0.10; France 5.75; Greece 0.21; Guatemala 0.07; Haiti 0.01; Honduras 0.04; Iceland 0.04; India 3.40; Indonesia 0.60; Iran 0.28; Iraq 0.12; Israel 0.17; Lebanon 0.05; Liberia 0.04; Luxembourg 0.06; Mexico 0.75; Netherlands 1.25; New Zealand 0.48; Nicaragua 0.04; Norway 0.50; Pakistan 0.75; Panama 0.05; Paraguay 0.04; Peru 0.18; Philippines 0.45; Poland 1.73; Saudi Arabia 0.07; Sweden 1.65; Syria 0.08; Thailand 0.18; Turkey 0.65; Ukrainian Soviet Socialist Republic 1.84; Union of South Africa 0.78; Union of Soviet Socialist Republics 14.15; United Kingdom of Great Britain and Northern Ireland 9.80; United States of America 33.33; Uruguay 0.18; Venezuela 0.39; Yemen 0.04; Yugoslavia 0.44.

¹ See below, § 168p.

The Assembly meets, as a rule, in regular annual sessions. But special sessions may be convened by the Secretary-General at the request of the Security Council or of a majority of the members of the United Nations (Article 20).¹

§ 168j The constitution of the Security Council, as shown ^{The Security Council.} in its composition, its competence and its voting procedure, is more than any other aspect of the Charter expressive of the present character of the United Nations as an agency for preserving peace rather than a comprehensive instrument for the government of the world. The basic political assumption -which must remain a subject of controversy²-of the satisfactory working of the Security Council as constituted by the Charter is the continuing unity of action and purpose among the Great Powers who compose the permanent membership of the Council.

(1) *The Composition of the Security Council.* The Security

¹ The Charter does not lay down expressly that the Assembly shall meet at the seat of the Organisation. But this will probably be the rule save in exceptional circumstances. Thus the Second General Assembly decided that the Third Assembly in 1948 should take place in Europe. As to the seat of the United Nations see above, p. 421. See also Jenks, *The Headquarters of International Institutions, A Study of their Location and Status* (1945).

There is no provision in the Charter laying down that the meetings of the Assembly shall be public, but the relevant Committee of the Conference at San Francisco expressed the opinion that the rules of procedure of the Assembly should provide that, in general, the sessions of the Assembly shall be open to the public and the press of the world. *American Commentary*, p. 64. The work of the General Assembly is conducted primarily through the following six main Committees: (1) First Committee (Political and Security). This Committee considers, *inter alia*, the admission, suspension, and expulsion of members, political matters and those relating to security, and questions of co-operation in the maintenance of international peace and security, including those relating to disarmament; (2) Second Committee (Economic and

Financial), (3) Third Committee (Social, Humanitarian and Cultural); (4) Fourth Committee (Trusteeship); (5) Fifth Committee (Administrative and Budgetary), (6) Sixth Committee (Legal). The Sixth Committee is concerned with legal and constitutional questions, such as the registration of treaties, privileges and immunities of the United Nations, questions affecting the International Court of Justice, and the legal and constitutional aspects of questions referred to the other Committees. The Committee also considers measures to encourage the progressive development and codification of international law. There are also a general procedural committee and a committee on credentials of the members of the General Assembly. Finally, there has been established an Advisory Committee for Administrative and Budgetary Questions and a Committee on Contributions. The latter reports to the General Assembly on questions relating to the apportionment of the expenses of the United Nations among its members.

² There is room for the view that one of the main objects of the Organisation is to provide means for bringing the entire moral, legal and political authority of the United Nations to bear on situations in which unity

Council is composed of five permanent and six non-permanent members. The permanent members are China, France, Soviet Russia, Great Britain and the United States. The non-permanent members are elected by the General Assembly for a period of two years. They are not eligible for immediate re-election. Each member of the Security Council has one representative. The Charter lays down that in electing members of the Security Council regard shall be 'specially paid, in the first instance¹ to the contribution of the members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution' (Article 23). It is also provided that any member of the United Nations which is not a member of the Security Council may participate, without having a right to vote,² in the discussion of any question brought before the Security Council provided that, in the view of the latter, the interests of that member are affected (Article 31). It is laid down that any member of the United Nations which is not a member of the Security Council or any State which is not a member of the United Nations shall be invited to participate, without vote, in any discussion before the Council concerned with a dispute to which it is a party.

(2) *The Powers and Functions of the Security Council.* In contradistinction to the predominantly deliberative character of the functions of the Assembly, those of the Security Council are primarily of an executive nature. That executive function is confined almost exclusively to the maintenance of international peace and security. But within that limited compass the powers of the Security Council are not circum-

among the Great Powers has failed of realisation; that this is so in particular in cases in which one Great Power has finally ranged itself against the collective judgment of the United Nations; and that the necessity of directing the coercive authority of the United Nations as a whole against one State, even if it be a Great Power, would not necessarily signify a failure of the purpose of the United Nations.

¹ There is, in the English text of the Charter, no comma after the words 'in the first instance.' The intention of that deliberate omission—which,

however, does not appear in the texts of the other languages of the Charter

was to emphasise the primary importance of the contribution to the maintenance of international peace and security as distinguished from the factor of geographical distribution. This was done in order to meet, to some extent, the point of view of the so-called 'middle Powers.' See *Canadian Commentary*, p. 29.

² The proposal that, as in the corresponding case under the Covenant of the League, the State thus invited should have a vote, was not accepted.

scribed by any restraints other than those implied in the general obligation that 'in discharging its duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.' Subject to that general limitation, and 'in order to ensure prompt and effective action by the United Nations,' the members confer upon the Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties in that capacity the Council shall act on their behalf (Article 24).¹ They also 'agree to accept and carry out the decisions of the Security Council' reached in accordance with the Charter (Article 25). It is in that mandate conferred upon the Security Council and in the acceptance of the legal obligation to comply with its decisions that we find the very substantial measure of renunciation of national sovereignty on the part of the members of the United Nations other than the permanent members of the Security Council.² On the other hand, there is no legal obligation to treat recommendations, as distinguished from decisions, of the Security Council as binding,³ although such recommendations may provide requisite authority for individual or collective action in pursuance of the Charter. This was, for instance, the case with regard to the series of recommendations made by the Security Council in 1950 in connection with the attack upon South Korea.⁴

¹ The functions of the Security Council and of the United Nations generally as an agency for settling disputes and for maintaining international peace and security and the relevant provisions of the Charter are discussed in detail in Part I of Volume II (7th edition, 25b-25jc.)

² See Kelsen in *II L.R.*, 59 (1946), pp. 1087-1121.

³ In the *Corfu Channel (Compence)* case seven Judges of the International Court of Justice attached importance to stating that, contrary to the contention put forward by the United Kingdom, recommendations made by the Security Council under Article 36 (3) of the Charter did not make it obligatory upon the parties to submit a dispute to judicial settlement (*I.C.J.*

Reports, 1948, pp. 31, 32). There was no disposition to attach importance to the dialectics of the argument that, as a decision of the Council was required to make a recommendation, a recommendation was to that extent a decision binding under the terms of Article 25.

⁴ Thus in June and July 1950 the Security Council, after finding, in accordance with Article 39 of the Charter, that there had taken place a breach of the peace, recommended members of the United Nations to help the Republic of Korea to repel the armed attack. It also recommended that the forces and assistance provided by the Members be made available to the United Command under the United States. See below, p. 433, n. 1.

In the organisation and in the procedure of the Council account is taken of the importance and urgency of its task. The Charter lays down that the Security Council shall be so organised as to be able to function continuously and that for this purpose each member of the Council shall be permanently represented at the seat of the Organisation (Article 28). The Council is to hold periodic meetings not necessarily at the seat of the Organisation— at which its members may be represented, if they so desire, by a member of the Government or by some specially designated representative.¹

The powers of the Security Council are not limited to its executive functions in the sphere of preservation of international peace. For, together with the General Assembly, the Security Council is charged with functions relating to the working of the United Nations as a whole. Thus it has a part in the admission, expulsion and suspension of members², in the election of the Judges of the International Court of Justice³; and in the appointment of the Secretary-General.⁴

Voting
in the
Assembly
and in the
Council.

§ 168k. The Charter marks an important departure in the direction of the abandonment of the principle of unanimity. The significance of that innovation has tended to be obscured—not without good reason—by the circumstance that, for most practical purposes, it does not affect the position of the

¹ The subsidiary organs of the Security Council include: (1) The Military Staff Committee which advises and assists the Council on all questions relating to its military requirements for maintaining international peace and security, the employment, command and strategic direction of forces placed at the disposal of the Council, and the regulation of armaments; (2) The Atomic Energy Commission. This Commission, set up by the General Assembly, consists of all members of the Security Council and of Canada when the latter is not a member of the Security Council. The task of the Commission is to make proposals for extending the exchange of basic scientific information concerning atomic energy for peaceful means, control of atomic

energy to the extent of limiting its use to peaceful purposes, the elimination of atomic weapons from national armaments, and the provision of safeguards for the protection of States complying with measures of international control against the danger of violations and evasions of these measures. (For legal aspects of the international control of atomic energy see Bathurst in *B* 1, 24 (1947)) (3) The Commission for Conventional Armaments. The object of this Commission, which is composed of representatives of the eleven members of the Security Council, is to prepare proposals for the general regulation of armaments and armed forces.

² See above, §§ 168c, 168d.

³ Article 4 of the Statute.

⁴ See below, § 168p.

Great Powers whose unanimous consent in their capacity as permanent members of the Security Council is required, as a rule, for the substantive decisions of the Security Council and for many of the decisions of the General Assembly. But for that special position of the Great Powers, the abandonment of the principle of unanimity would constitute a significant innovation in the legal organisation of the international society.

(1) *The General Assembly.* As a rule, a simple majority of the members present and voting is required for the decisions of the General Assembly. The Charter does not appear to distinguish, in this respect, between decisions and recommendations. However, decisions of the Assembly on important questions require a two-thirds majority. These questions, according to Article 18 (2), include : recommendations concerning the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council and of the Trusteeship Council, the admission to membership, suspension of rights of membership, and expulsion of members, questions relating to the operation of the trusteeship system, and budgetary questions. Moreover, the Assembly may, by an ordinary majority, add to the categories of questions requiring a two-thirds majority.¹ Unless a question, however important, is comprised within the above enumeration or unless it has been expressly included within a category requiring a two-thirds majority, it can be made the subject of a recommendation by a simple majority.²

In assessing the bearing, upon the sovereignty of the members of the Assembly, of the departure from the tradi-

¹ Article 18 (3).

² For it is clear that the question whether a matter is 'important' does not admit of an automatic answer. A question may appear important to some members of the United Nations but not to others. It appears that in connection with the request for an Advisory Opinion on the *Status of South-West Africa* the President of the General Assembly ruled, in 1949,

that the matter should be treated as a procedural question and that it was not therefore necessary to obtain a majority of two-thirds of the members present and voting (*Official Records, 4th Session, Summary Records, p. 572*). The ruling seems to be open to doubt. And see on the voting in the General Assembly Hovey in *International Organization*, 4 (1950), pp. 412-427 ; Ball, *ibid.*, 5 (1951), pp. 3-31.

tional principle of unanimity, the fact must be borne in mind that, except in matters in regard to which specific jurisdiction has been conferred upon it,¹ the Assembly has no power to adopt decisions binding upon the members of the United Nations.

(2) *The Security Council.* Decisions of the Council require an affirmative vote of seven members, including the concurring votes of all the permanent members.² That general rule is qualified by the exception according to which in a decision taken under Chapter VI relating to the pacific settlement of disputes the parties to the dispute shall abstain from voting. That exception is of considerable, but not of decisive, importance, for with regard to measures of enforcement—including provisional measures calculated to prevent the aggravation of dangerous situations—undertaken under Chapter VII with respect to threats to the peace, breaches of the peace, and acts of aggression, the concurring vote of all the permanent members of the Security Council is required as a condition of the validity of its decisions.³ In matters of procedure the decisions of the Security Council require a majority of any seven of its members. On the other hand,

¹ Such as election of the members of various organs of the United Nations or participation in the admission, suspension, or expulsion of members.

² Article 27. In practice, the Security Council has regarded resolutions as having been validly adopted, notwithstanding the abstention or absence of one or more permanent members, provided that there have been at least seven affirmative votes and that no negative vote has been cast by a permanent member.

³ The above provisions in the matter of voting are the result of a special agreement reached by the United States, Great Britain and Soviet Russia at Malta during the Crimea Conference held in February 1945. The matter had been left open in the Dumbarton Oaks Proposals. As, with regard to the settlement of disputes, the unanimity of the permanent members of the Security Council—other than the parties to the

dispute—is required at every stage of the proceedings, apprehension was expressed at the San Francisco Conference that any permanent member of the Council might prevent a discussion and consideration of any situation brought before the Security Council. In particular, Soviet Russia advocated the view that the consideration of a dispute is a matter of substance and not of procedure. Eventually the Great Powers issued an interpretative statement the result of which is that no individual member of the Council can alone prevent consideration and discussion by the Council of a dispute or situation brought to its attention under Chapter VIII of the Charter. After such full discussion and consideration has taken place, any permanent member of the Council not a party to the dispute may prevent further action, e.g. by way of investigation or enquiry. For the statement of the Great Powers on the matter see *American Commentary*, p. 77; *Canadian Commentary*, p. 31.

the preliminary question whether a matter is one of procedure or substance would seem to require a majority of seven members including all the permanent members present and voting.¹

The provisions of Article 27 of the Charter in the matter of voting in the Security Council, in particular the requirement of unanimity of all its permanent members on matters other than those of procedure, are based on the assumption, which is unwarranted, that unity of view and action on the part of the Great Powers is an indispensable condition of the proper functioning of the United Nations, that no permanent member of the Security Council can properly be expected to

¹ This is the solution adopted in the statement issued at San Francisco by the four Sponsoring Powers (for the text of which see Goodrich and Hambro, *Charter of the United Nations* (2nd ed., 1949) pp 216-218). There is a difference of opinion as to the extent to which the practice of the Security Council has departed from the rule thus laid down. In 1949 in pursuance of a report of the Interim Committee (see p. 431), the General Assembly recommended in a Resolution that the Security Council should in the future treat as procedural a number of questions listed in the Resolution (Gen Ass Res. 267 (III)). The Resolution itself has no binding force. However it seems that—unless the view is taken that the concurring vote of the permanent members is required only for a decision that a question is one of substance—the solution, which does not constitute an authentic interpretation of the Charter, apparently adopted by the Sponsoring Powers may in effect obliterate the distinction between procedural and substantive questions inasmuch as it gives to any permanent member the power to stamp every question as one of substance. On the other hand, to deprive a permanent member of that right might result in conferring upon any seven members of the Security Council the power to treat any question as procedural. A solution of this problem may be found in the President's power to make a ruling that a resolution is adopted if, in the opinion of at least seven members of

the Council, it is clearly procedural see Official Records of the Security Council 507th Meeting 29th September 1950. A more rational solution of an otherwise insoluble difficulty would seem to confer upon the International Court of Justice at the request of seven members of the Security Council (who are of the opinion that a permanent member or members have abused their right in the matter) the competence to determine whether a particular question is procedural or substantive. For a discussion of the subject see Kelsen *op cit* pp 245-258, Goodrich and Hambro, *op cit*, pp. 213-223, Jimenez de Aréchaga *Voting and the Handling of Disputes in the Security Council* (1950), Day, *Le droit de veto dans l'Organisation des Nations Unies* (1952), Brugère *La règle de l'unanimité des membres permanents en Conseil de Sécurité* (1952), Liang in *A J.*, 42 (1948) pp 887-900 and 43 (1949), pp 134-141, Padelford in *International Organization* 2 (1948) pp 227-246, Rudzinski in *A J.* 45 (1951), pp 412-461. This aspect of the question acquired some prominence in connection with the Resolution of the Security Council adopted in 1950 on the subject of the hostilities in Korea at a time when the representative of Soviet Russia was abstaining from attendance at the meetings of the Security Council. See Schick in *Western Political Quarterly*, 3 (1950), pp 311-325, Liang in *A J.*, 44 (1950), pp 694-708; Kunz, *ibid.*, 45 (1951) pp 137-142.

submit to decisions of which it disapproves, and that the power to prevent decisions of an otherwise unanimous Security Council will not be abused. Any abuse of that power is likely to give rise to attempts to remedy the consequences of the voting procedure of Article 27 by means of a somewhat extensive construction of other Articles of the Charter. Thus it has been suggested that the failure of the Security Council, because of the use—or abuse—of the so-called right of veto, to deal effectively with situations involving a danger to international peace may legitimately be followed by the exercise of individual or collective self-defence on the part of the members of the United Nations in conformity with Article 51 of the Charter.¹ The proposal, adopted by the Second General Assembly in 1947, to set up an Interim Committee functioning during the period between the regular sessions of the General Assembly constitutes another effort to circumvent the effects of the 'veto.'² While these and any similar efforts not clearly inconsistent with the letter of the Charter must be considered as justified by the overriding right and obligation to ensure the fulfilment of the major purposes of the Charter, they emphasise the necessity of the eventual amendment of the Charter with a view to removing the requirement of the absolute unanimity of all the permanent members of the Security Council.³

¹ See above, p. 209.

² The Interim Committee was set up, in the first instance, for the period between the Second and the Third General Assemblies. It is to consider and to report to the General Assembly on any dispute or situation proposed for inclusion in the agenda of the General Assembly by any member or brought before it by the Security Council in virtue of Articles 11 (2), 14 or 35 relating to the maintenance of international peace and security and the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among nations. The Interim Committee is not to consider any matter of which the Security Council is seized unless the latter so desires. It is authorised to conduct investigations and to appoint commissions of enquiry by a two-thirds majority of its mem-

bers present and voting. See Laming in *AJ* 42 (1948) pp. 147-48, and Green in *Year Book of World Affairs*, 1949 pp. 160-187. See also Kelsen, *The Law of the United Nations* (1950), pp. 163-170.

³ In December 1946 the General Assembly adopted a Resolution requesting the permanent members of the Security Council to ensure that the use of their special voting privilege shall not impede the Security Council in reaching decisions promptly. It also recommended to the Security Council the adoption of practices and procedures calculated to reduce the differences in the application of Article 27 with the view to ensuring the effective exercise by the Security Council of its functions. See, on the question of the 'veto,' Wortley in *H.Y.*, 23 (1946), pp. 94-111. See also Briery, *ibid.*, pp. 83-84.

§ 1687. The governing consideration in assessing the nature of the relation between the General Assembly and the Security Council is that, in principle, they are entrusted with distinct spheres of activity. The Security Council is concerned primarily with preserving and maintaining international peace and security. The General Assembly is largely a deliberative organ concerned with the totality of matters coming within the scope of the United Nations. In a restricted sense the Security Council is the more important political organ of the United Nations inasmuch as its decisions, in the vital field of preservation of peace, are binding upon all the members of the Organisation and inasmuch as, if it deems it desirable, it has exclusive jurisdiction with regard to any dispute or situation which is actually before it in accordance with the Charter. But, in theory, the Security Council exercises these functions by virtue of delegation from the members of the United Nations. The Charter lays down, in Article 15, that the General Assembly shall receive and consider annual and special reports from the Security Council, such reports to include an account of the measures taken by it to maintain international peace and security. However, the Charter does not contemplate that in receiving and discussing such reports the General Assembly shall pass judgment upon the activities of the Security Council in a manner amounting to an assumption of concurrent jurisdiction in the matter of settling disputes¹ or to a subordination

¹ See, in particular, Article 12 of the Charter which lays down that while the Security Council is exercising its functions in respect of any dispute or situation assigned to it in the Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requires. In general, however, the Charter leaves wide scope for action by the Assembly in the matter of preserving international peace and security. See vol. ii. (8th ed.), §§ 256-259. It must be noted that Article 12 only prohibits the General Assembly to make recommendations in respect of disputes with regard to which the Security Council is exercising the

functions assigned to it. It does not prohibit discussion, study and report including, probably, an expression of opinion as to certain aspects of the dispute. This may be so in particular, without straining unduly the letter of Article 12, in cases in which the Security Council, though formally seized of a dispute, does not in fact exercise any functions in relation thereto. The position in this respect is quite clear when a dispute has been formally removed from the agenda of the Council, as in the case of the Polish proposal, in 1946, to direct members to sever diplomatic relations with Spain or in the case of the Korean dispute in 1951 (531st meeting of the Security Council). Subsequently,

of the Council to the overriding authority of the Assembly. Unlike in the case of the Economic and Social Council and the Trusteeship Council,¹ no such authority is vested in the General Assembly in relation to the Security Council. In the case concerning the *Competence of the General Assembly for the Admission of a State to the United Nations* the International Court of Justice stated formally that the Charter 'does not place the Security Council in a subordinate position' in relation to the General Assembly. It declined to subscribe to the view that the latter had the power to 'change, to the point of reversing, the meaning of a vote of the Security Council.'² On the other hand, the equality of status of these two principal organs does not prevent the General Assembly from assuming responsibilities, not forbidden to it by the Charter, with the view to rendering effective the objects of the United Nations.³

While the main fields of activity of the two principal organs of the United Nations are thus different and, to some extent, exclusive, there is a wide sphere of subjects bearing upon the essential aspect of the United Nations in which the Charter prescribes co-operation between these two bodies. This applies to such matters as the admission and expulsion of members,⁴ the appointment of the Secretary-General,⁵ the election of the Judges of the International Court of Justice,⁶ and, under Articles 108 and 109 of the Charter, the amendment of the Charter. Moreover, the

after the doubts as to the propriety of a recommendation had thus been removed, the General Assembly adopted on February 1, 1951, a Resolution (498V) which noted the failure of the Security Council, on account of lack of unanimity of its permanent members, to exercise its responsibility on the subject and found that the Government of the People's Republic in China had engaged in aggression in Korea. It also called upon all States and authorities to render assistance to the action of the United Nations in Korea. And see vol. ii., p. 176, n. 1, on the 'Uniting for Peace Resolution' adopted in 1960. For an analysis of the latter see Kelsen, *Recent Trends in the Law of the United Nations*

(1951), pp. 950-990. See also, on this aspect of the question, Vallat in *B.Y.*, 29 (1952), pp. 79-83.

¹ See above, § 941.

² *I.C.J. Reports*, 1950, p. 10. And see generally on the relation of the General Assembly and the Security Council Vallat in *B.Y.*, 20 (1952), pp. 63-104.

³ See e.g. as to the 'Interim Committee,' above, p. 434, and as to the prolongation of the tenure of office of the Secretary-General below, p. 442, n. 1.

⁴ See above, §§ 168c, 168d.

⁵ See below, p. 441.

⁶ See vol. ii., § 25 ad.

Charter leaves room for co-operation between the General Assembly and the Security Council with regard to the settlement of disputes and the maintenance of international peace and security.¹

§ 168m. The realisation that the peace of the world depends in the long run not only upon the acceptance of obligations and institutions for preventing and suppressing unlawful recourse to force, but also in the provision of means for removing the economic and similar causes of war, has found expression in the setting up of an Economic and Social Council as one of the six principal organs of the United Nations. Like the General Assembly, the Economic and Social Council is a body lacking in executive and legislative power. However, in so far as its essential objects can be achieved by the promotion of international co-operation and co-ordination as distinguished from international government proper, the Economic and Social Council has been entrusted with tasks lying within a very comprehensive field of activity.

The Economic and Social Council is the main instrument of the United Nations in the field of economic and social co-operation which, in so far as this can be done in a treaty --and the Charter is a treaty--is imposed upon the members of the Organisation as a legal duty. For, in Article 56 of the Charter 'all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement' of its economic and social objects. These are the promotion (a) of higher standards of living, of full employment, and of conditions of social and economic progress; (b) of the solution of international economic and social problems, as well as those in the sphere of health and of cultural and educational co-operation; (c) of universal respect for, and observance of, human rights and fundamental freedoms.²

¹ Thus the Security Council may call upon the General Assembly to co-operate with it in the steps taken to preserve or to restore peace (Articles 11 (3), 12 (1)).

² Article 55. See Finer, *The United*

Nations Economic and Social Council (1946); Alexandrowicz, *International Economic Organisations* (1952), pp. 219-238; Loveday in *International Organisation*, 7 (1953), pp. 325-341.

The functions of the Economic and Social Council are described in the following terms in Article 62 of the Charter :

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

In addition, the Economic and Social Council is charged with the task of co-ordinating the activities of the various international unions established by agreements between governments and, if deemed desirable, of bringing them into relationship with the United Nations. It may, in connection with the latter purpose, conclude agreements with these specialised agencies, subject to the approval of the Assembly.¹ It may take steps to receive regular reports from these agencies. Its functions also include assistance to the Security Council, the carrying out of recommendations and of special functions assigned by the Assembly and, with the approval of the latter, the performance of services at the request of members of the United Nations and of specialised agencies (Articles 63-66). It is provided that the Council shall set up commissions in economic and social fields and for the promotion of human rights.²

¹ Article 63. And see below, § 168r

² The following commissions have been set up by the Council. Transport and Communications, Fiscal, Statistical, Social, Human Rights (see below, § 340f), Status of Women and Narcotic Drugs. In addition, the Council has established regional economic commissions for Europe, for

Asia and the Far East, and for Latin America.

The Commissions are composed of representatives of members of the United Nations selected by the Council. The members of the Commissions are nominated by the Governments of the States selected after consultation with the Secretary.

The Economic and Social Council consists of eighteen members of the United Nations elected by the General Assembly. The Charter secures both continuity and change in the composition of the Council by providing that six members shall be elected each year for a term of three years. A retiring member is eligible for immediate re-election (Article 61). It is laid down that the Council shall invite any member of the United Nations to participate, without vote, in its deliberations on any question which is of particular interest to that member (Article 69), and that the Council may make arrangements for representatives of international specialised agencies to participate, without vote, in the activities of the Council and in its discussions (Article 70). Moreover, provision is made for consultation between the Council and international organisations of a non-governmental character concerned with matters within the competence of the Council (Article 71).¹ Finally, and sig-

General with the view to securing a balanced representation in various fields - and confirmed by the Council. See Resolution of the Council of June 21, 1946: *Official Records, First Year, Second Session, 1946*, p. 406. While the system of governmental representation is unobjectionable in principle, it may be open to serious criticism in some cases. Thus the Human Rights Commission urged, unsuccessfully, that it should be composed of independent persons. There is a distinct measure of incongruity in the purely governmental composition of a body entrusted with the function of protection of human rights against encroachments by governments.

¹ For a Report of a Committee, approved by the Council in 1946, on the principles to be applied in placing organisations on the list of non-governmental organisations eligible for consultation under Article 71 of the Charter, see *Official Records of the Economic and Social Council, First Year, Second Session (1946)*, p. 300. The Report distinguishes clearly between *participation* as provided in Articles 69 and 70 of the Charter (in the case of States not members of the Council or of specialised inter-governmental agencies) and *consulta-*

tion in accordance with Article 71. The object of consultation, as interpreted by the Report, is to secure for the Council or its organs expert information or advice from organisations having special competence on the subjects within their province and to enable organisations representing important elements of public opinion to express their views. The Report classifies into three groups, the organisations the consultative status of which is recognised: (a) Organisations which have a basic interest in most of the activities of the Council and are closely linked with the economic or social life of the areas which they represent. Organisations in that category may designate authorised representatives to sit as observers at the public meetings of the Council. They may circulate to the members of the Council written statements and communications. The World Federation of Trade Unions, the International Co-operative Alliance, the Inter-Parliamentary Union, the International Organisation of Employers, and the International Chamber of Commerce are included within this group; (b) Organisations which are concerned specifically only with some of the fields covered by the Council;

nificantly, the Charter authorises such arrangements with purely national organisations, after consultation with the State concerned (*ibid.*).

The
Trustee-
ship
Council.

§ 168n. The function and the composition of the Trusteeship Council are discussed elsewhere in this treatise (see above, § 94m).

The Inter-
national
Court of
Justice

§ 168o. The organisation and jurisdiction of the International Court of Justice, which has succeeded the Permanent Court of International Justice and has taken over its Statute without substantial changes, is discussed in volume II (eighth edition). But it must be noted that, unlike its predecessor, the International Court of Justice is an integral part of the United Nations as its 'principal judicial organ' (Article 92). In particular, the Charter provides that the organs of the United Nations Organisation and the special international agencies brought into relationship with it should be able, subject to a general authorisation of the Assembly, to avail themselves of the advisory jurisdiction of the Court.

The
Secretariat.

§ 168p. The provisions of the Charter relating to the Secretary-General and his staff give expression to the importance which the Charter attaches both to the office of the Secretary-General and to the maintenance of an efficient and reliable international civil service.¹ The Secretary-

(c) Organisations which are primarily concerned with the development of public opinion and with the dissemination of information. The facilities for consultation offered to organisations in these groups are more restricted. The terms of Article 71 of the Charter are wide enough to allow a progressive extension of the machinery of consultation. It is doubtful, therefore, whether the wide objects of the Council require or properly permit any rigid crystallisation of the procedure of consultation in the initial period of activity of the Council. There is a distinct element of artificiality in the assumption that the conception of 'consultation' rules out the possibility of the Council, or its organs, being addressed orally by the representatives of the organisations concerned. The progressive develop-

ment of international co-operation in this sphere is to a large extent dependent upon the realisation that States are the principal but not the exclusive instruments of the protection of the economic and social interests which require international regulation. A *Yearbook of International Organizations* is published by the Union of International Organizations in Brussels with the assistance, since 1951, of the Secretariat of the United Nations.

¹ As to the legal position of the Secretary-General see KUNA in *A.J.*, 40 (1946), pp. 786-792. For a comprehensive treatment of the subject see SCHWABEL, *The Secretary General of the United Nations His Powers and Practice* (1952). See also CROCKER in *International Organization*, 4 (1950), pp. 598-613. The Secretariat is

General is entrusted not only with the ordinary administrative functions in relation to the principal organs of the United Nations, other than the International Court of Justice, and with the preparation of annual reports to the General Assembly on the working of the United Nations (Article 98). He is also authorised to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security—a task of great responsibility (Article 99).¹ The Secretary-General, as the head of what is described in Article 7 of the Charter as one of the 'principal organs of the United Nations', is probably entitled to act in cases in which the Charter expressly or by implication confers functions upon the United Nations without specifying the organ called upon to fulfil them. Thus, for instance, it is the Secretary-General who is entitled to bring an international action on behalf of the United Nations in respect of injuries suffered by its officials.² The Secretary-General is appointed by the General Assembly upon the recommendation of the Security Council

divided into eight Departments devoted respectively to the following matters: Security Council Affairs (including a Division on Enforcement Measures and an Atomic Energy Commission Group); Economic Affairs (including Divisions of Statistics, of Economic Stability and Employment, of Economic Reconstruction, of Economic Development, and of Fiscal Matters); Social Affairs (including Divisions of Human Rights, of Demography, of Social Activities, of Narcotic Drugs, of Education, Science and Culture, and of Public Health); Trusteeship and Information from Non-Self-Governing Territories; Public Information; Legal Matters (including Divisions of General Legal Problems, for the Development and Codification of International Law, and of Immunities and of Registration of Treaties); Conferences and General Services (including the Bureau of Technical Services of the United Nations); and Administrative and Financial Services (including Bureaux concerned with questions relating to the Budget and Personnel). In 1950 a Technical Assistance Administration was estab-

lished with the status of a Department.

¹ As to the origin of Article 99 see Schwebel in *B.Y.*, 28 (1951), pp. 371-382.

² On the other hand, it would appear from the Advisory Opinion of the International Court of Justice in the *Interpretation of Peace Treaties* case (*Second Phase*) (*I.C.J. Reports*, 1950, p. 227) that, where a clause in a treaty confers specific functions upon the Secretary-General, as indeed upon any other international agency, such powers must be strictly construed and applied only to the case expressly provided for. However, the rule thus formulated must be read against the background of the general requirement of effectiveness in the interpretation of treaties. See below, p. 955. In the case referred to above the Court held that if a party to the treaty fails, contrary to its obligation, to appoint a representative to a Commission provided for by the Treaty, the Secretary-General of the United Nations is not authorised to appoint the third member of the Commission upon the request of the other party.

(Article 97).¹ The Charter contains detailed provisions for securing the efficiency and the independence of the Secretariat. Thus it is laid down expressly that the Secretary-General and his staff shall not seek or receive any instructions from any Government or from any other authority outside the Organisation. The members of the United Nations undertake 'to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities' (Article 100). The necessity of securing the independence of the officials of the United Nations underlay to a substantial degree the Advisory Opinion of the International Court of Justice in the *Reparation for Injuries* case, in which the Court affirmed the right of the United Nations to bring an international claim in respect of injuries suffered by its officials and involving the responsibility of a State.² The Court declined to accede to the view that the protection of an official of the United Nations rested exclusively with the State of which he was a national. 'If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter.'³ Moreover, the allegiance of the international official to the United Nations must depend, as the Court pointed out, in some measure on his assurance that his interests would be protected by the United Nations regardless of the attitude of his State to the particular mission on which he is engaged and regardless of the power of his State to protect his interests. In a different sphere, the United Nations has taken steps, through instruments such as the Convention on the Immunities of the United Nations and the Headquarters Agreement between the United

¹ When in 1950 the Security Council, on account of the absence of unanimity among its permanent members, failed to make a valid recommendation for the appointment of a Secretary-General on the expiry of the five-years' period of tenure of the person first elected, the General Assembly adopted a resolution to the effect that the Secretary-General should continue in office for a further

period of two years. Soviet Russia declared that such continuation in office of the Secretary-General, without the recommendation of the Security Council was invalid and that she would refuse to regard him as the Secretary-General. See Kelsen, *Recent Trends in the Law of the United Nations* (1951), pp. 950-952.

² See above, p. 421.

³ *I.C.J. Reports*, 1950, p. 182.

Nations and the United States of America,¹ to ensure the independent status of its officials in relation to the 'Host State,' in particular the United States. In this respect practice has tended, in a necessarily experimental manner, in the direction of the acceptance of legal principles aiming at striking a balance between the independent status of the official and the legitimate needs of the security of the host State. Thus, for instance, Article 25 of the Agreement of 1946 between Switzerland and the International Labour Organisation concerning the legal status of the latter fully safeguards the right of Switzerland to take the precautions necessary for her security; it provides that the International Labour Organisation shall collaborate with the Swiss authorities to avoid any prejudice to the security of Switzerland resulting from its activity.² While in the performance of their functions the officials of the United Nations and its specialised agencies must be guided primarily by their Obligations to the Organisation regardless of the particular interests of any member of the United Nations, including the Host State, their very position as international officials involves the necessity of such restraint and circumspection in their personal conduct as can reasonably be expected from them in the interest of the security and the observance of the laws of the country where they perform their official duties.³

The First General Assembly adopted detailed rules on the terms of appointment of the Secretary-General and on the organisation of the Secretariat.⁴

¹ See above, p. 421.

² *U.N.T.S.*, 15, p. 394.

³ For a report of a Committee of Jurists appointed in 1952 to consider this aspect of the question see *A.J.*, 47 (1953), Suppl. p. 87. See also Jaenicke in *Z.d.V.*, 14 (1951), pp. 46-117; Maxwell Cohen in *McGill Law Journal*, 1953, pp. 169-198; and, in particular, Schwabel in *B.Y.*, 30 (1953), pp. 71-115.

⁴ *Records of the First Assembly, First Session*, pp. 665-672. And see *ibid.*, pp. 674-677, for the provisional staff regulations. See also *ibid.*, p. 172, on the setting up of an Inter-

national Civil Service Commission. And see, generally, Ranshofen-Wortheimer, *The International Secretariat* (1945), and Jenks in *Public Administration Review*, 3 (1943), pp. 93-104. See also Purves, *The Internal Administration of an International Secretariat* (1945), and Giraud in *Hague Review*, 79 (1951) (n.), pp. 373-502. In view of the importance of securing adequately trained staff of high quality for the United Nations the Secretary-General, in pursuance of a Resolution adopted by the First General Assembly, invited, in 1947, representatives of the United Nations

Central-
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of Inter-
national
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tration.

§ 168r. The Charter envisages the United Nations as an agency for the centralisation and co-ordination of international administration. It lays down that the various specialised agencies of international administration in the fields of economics, culture, education, health, and related matters shall be brought into relationship with the United Nations by means of agreements concluded between them and the Economic and Social Council (Articles 57, 63).¹ Provision is made for the participation of the specialised agencies, without vote, in the deliberations of the Economic and Social Council and its commissions, and for its representatives to take part in the deliberations of the specialised bodies (Article 70). It is provided that the United Nations shall make recommendations for the co-ordination of the policies and activities of the specialised agencies and that they shall take the initiative in setting up new agencies by means of agreements between the States concerned.² In general, the specialised agencies are to be accorded full internal autonomy, subject to the general supervision, assistance and co-ordinating action of the

and of the specialised agencies to discuss the question of the establishment of an International Civil Service Commission. As a result it was proposed to establish an International Personnel Advisory Board charged with the function of improving recruitment of staff by means, *inter alia*, of advice, research and interchange of information on methods of recruitment. The Secretary-General has the final decision with regard to termination of appointments, but an Appeals Board has been set up to advise him with regard to appeals against termination of appointments (including termination for disciplinary reasons), disciplinary action, or with regard to complaints alleging non-observance of agreed terms of appointment. See also the Provisional Regulations for the United Nations Joint Staff Pension Scheme approved by the General Assembly in December 1946: *Journal* No. 75, Suppl. A-64, Add. 1, p. 909. In 1962 the General Assembly adopted new staff Regulations, for the text of

which see *Yearbook of the United Nations*, 1961, p. 117. In the Agreements concluded between the United Nations and the various Specialised Agencies (see below, p. 415) recognition is given to the desirability of the eventual establishment of a single unified international civil service and the development of common standards of employment and recruitment of personnel as well as of interchange of personnel. In particular, it was agreed to consult concerning the establishment, as an advisory body, of an International Civil Service Commission. See e.g. Article 11 of the Agreement of December 14, 1946, between the United Nations and the Food and Agriculture Organisation. See also Green in *Current Legal Problems*, 1954, pp. 192-211.

¹ But the Charter contemplates such co-ordination only with regard to agencies having 'wide international responsibilities' (Article 57), i.e. agencies set up by a considerable number of States.

² Articles 58 and 59.

United Nations. Thus the Charter gives the General Assembly the power to examine the administrative budgets of the specialised agencies with a view to making recommendations to them (Article 13 (3)). An early beginning was made for putting these provisions into effect through the conclusion of a number of Agreements between the United Nations (acting through the Economic and Social Council) and various specialised agencies such as the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organisation, the Food and Agriculture Organisation, and the International Civil Aviation Organisation.¹ These Agreements,² concluded in pursuance of Article 57 of the Charter, define the mutual relations and the manner of co-operation between the United Nations and the eleven specialised agencies concerned. Thus in the Agreement between the United Nations and the Food and Agriculture Organisation of the United Nations, the former recognises the latter as a specialised agency, provides that representatives of the United Nations shall be invited to attend the meetings of the Conference of the Organisation and its committees, including the Executive Committee, and that they may participate, without vote, in the deliberations of these bodies (Article 2). The same Article provides for a similar right of the Food and Agriculture Organisation in relation to the Economic and Social Council. Representatives of the Organisation, it is further laid down, shall be invited to the meetings of the General Assembly for the purpose of consultation and to the meetings of its main committees and the Trusteeship Council, with the right to participate in its deliberations, without a vote, in matters falling within the province of the Organisation. It is provided also that, subject to any preliminary consultation, the Organisation shall include on the agenda of its Conference

¹ As to the various specialised agencies see Appendix below. And see Pollacek in *A.J.*, 40 (1946), pp. 592-619; Blau in *R.U.*, 51 (1947), pp. 155-175; Liang in *A.J.*, 42 (1948), pp. 900-906; Alexandrowicz, *International Economic Organisations* (1952). And see generally on co-ordination in International organisation Jenks in

R.Y., 28 (1951), pp. 29-89 and in *Hague Recueil*, 77 (1950) (ii.), pp. 157-301. The activities of the specialised agencies are reviewed in detail in the successive volumes of the *Yearbook of the United Nations*.

² See Agreements between the United Nations and the Specialised Agencies (*U.N. Publications*, 1951).

or Executive Committee items proposed by the United Nations. Conversely, the Economic and Social Council and its Commissions and the Trusteeship Council are to include on their agenda items proposed by the Organisation. According to the Agreement the Organisation is bound to submit to its appropriate organs any recommendation made by the United Nations, to consult with it on the subject, and in due course to report to the United Nations on the action taken by the Organisation or its members (Article 4). The Agreement has detailed provisions concerning mutual exchange of information as well as the assistance to be given by the Organisation to the Security Council and the Trusteeship Council. The Organisation is given the important right, through its Conference, to ask the International Court of Justice for Advisory Opinions on legal questions arising within the scope of its activities (other than questions concerning the mutual relationship of the Organisation and the United Nations and other specialised agencies). The Agreement includes provisions, of a somewhat nominal character, intended to ensure that the headquarters of the Organisation and the United Nations shall be situated in the same place¹; principles for common action in the direction of the eventual development of a single unified international civil service²; arrangements for co-operation and elimination of duplication in the matter of statistical services; and, in particular, financial and budgetary arrangements with regard to the latter. The Agreement provides for consultation with the view to the eventual inclusion of the budget of the Organisation within the general budget of the United Nations. Pending the conclusion of such arrangements, provision is made for consultation with the Secretary-General of the United Nations in connection with the preparation of the budget of the Organisation; for examination by the General Assembly, with the participation of the representatives of the Organisation,

¹ This is conditional on: (a) the permanent headquarters of the United Nations being situated at a place where the Organisation can effectively or economically discharge its duties, and (b) on the conclusion of satisfactory arrangements between the

United Nations and the Organisation for the provision of a site and other facilities for the establishment of such headquarters. See Jenks, *Headquarters of International Organisations* (1945).

² See above, p. 444, n.

of the proposed budget of the Organisation and the making of such recommendations by the General Assembly as may be deemed necessary; and for the approximation, on the part of the Organisation, to standard practices and forms recommended, in this respect, by the United Nations (Article 14).

§ 168s. The question of the revision of and amendments to the Charter constituted one of the most difficult problems confronting the States participating in the Conference at San Francisco. It was widely felt (a) that provision must be made for amending the Charter in the light of experience and of the expanding needs of the organised international society, and (b) that there should be no possibility of such amendment being frustrated by the dissent of one Great Power. The latter view did not prevail. Article 108 of the Charter provides that amendments to the Charter shall come into force when adopted by a vote of two-thirds of the members of the General Assembly and ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council.

Revision
of and
Amend-
ments-
to the
Charter

At the same time the Charter lays down that a Conference for reviewing the Charter may be held at any time following an affirmative vote of two thirds of the General Assembly and any seven members of the Security Council, and that if such Conference has not been held before the tenth annual session of the General Assembly, a proposal to hold it should be put on the agenda of the Assembly and the Conference held if so decided by a majority of the General Assembly and by any seven members of the Security Council.¹ However, any amendment of the Charter adopted by the required majority of two-thirds must be ratified, if it is to be effective, by two-thirds of the members of the United Nations including all the permanent members of the Security Council. It is clear that the right of one Great Power to prevent a valid amendment is one of the unsatisfactory features of the Charter. In the event of a persistent abuse of that right in matters of fundamental importance other members of the United Nations would be faced, in the

¹ Article 109.

last resort,¹ with the alternative either of acquiescing in the frustration of changes which they deem to be essential to the United Nations or of exercising their right of withdrawal with a view to assisting in setting up a new international organisation.²

¹ But only in the last resort. For the generality and elasticity of some of the principal provisions of the Charter leave room for mitigating the consequences of any abusive exercise of rights. See above, p. 434, with regard to Article 27.

² See above, § 168d. The absence in the Charter of a satisfactory procedure of legal change expresses itself even more conspicuously in the failure of the Charter to provide direct machinery for changes in International Law generally. There is absent from the Charter any express reference, such as is found in Article 19 of the Covenant of the League of Nations (see above, § 167o), to any competence of the United Nations and its organs to consider and recommend changes in treaties and situations which require revision on the ground that they endanger international peace or for any other reason. The nearest approximation to a grant of such competence is represented by Article 14 of the Charter, in which the Assembly is given the power to 'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations'. It was generally recognised when the Charter was framed that the words 'any situation, regardless of origin' include treaties, but there was a disinclination to make an explicit reference to treaties in order not to identify the United

Nations too closely with the problem of the revision of the forthcoming peace settlements. In the period between the two World Wars the absence in the Covenant of the League of Nations of effective provisions for peaceful change was regarded by many as a conspicuous source of political and moral weakness of the League. It is believed that the defect was more fundamental than that inherent in any identification of the organised society of States with the cause of the victors and the perpetuation of the results of their victory. It is probable that effective machinery for changes in the existing law is of the essence of the normal existence and of the development of a society under the rule of law. For this reason there is room for the view that the provision of some effective machinery for amending International Law, including treaties, must constitute one of the main objects of the revision of the Charter as contemplated in Article 109. See above, § 167o, and below § 539, for the literature on the peaceful revision of International Law. See also Schwarzenberger, *Power Politics* (2nd ed., 1951), pp. 485-491; Clark and Sohn, *Peace through Disarmament and Charter Revision* (1953); International Law Association Report, 1954, U.S. Senate, *Review of the United Nations Charter: a Collection of Documents and Hearing before a Sub-Committee on Foreign Relations* (both published by Government Printing Office (1954)).

PART II

**THE OBJECTS OF THE LAW OF
NATIONS**

CHAPTER 1

STATE TERRITORY

I

ON STATE TERRITORY IN GENERAL

Vattel, ii, §§ 79-83—Hall, § 30—Westlake, i, pp. 86-90—Lawrence, §§ 71-73—Phillimore, i, §§ 150-154—Wheaton, §§ 161-163—Moore, i, 125—Bluntschli, § 277—Holtzendorff in *Holtzendorff*, ii, pp. 225-232—Hefster, §§ 65-68—Fauchille, §§ 482 (1)-482 (5), 484 (1)-485—Pradier-Fodéré, ii, § 612—Merignhac, ii, pp. 356, 366—Nya, i, pp. 436-445—Rivier, i, pp. 135-142—Sellers, pp. 647-652—Calvo, i, §§ 260-262—Gemma, pp. 180-183—Cruchaga, §§ 413-418—Fiore, i, §§ 522-530—Martens, i, § 88—De Loutch, i, pp. 316-320—Bustamante, pp. 277-291—Balladore Pallice, pp. 391-396—Hamel, *Das Wesen des Staatsgebietes* (1933) (in particular pp. 284 *et seq.*)—Schade, *Wesen und Umfang des Staatsgebietes* (1934)—Sereni, *La rappresentanza nel diritto internazionale* (1936), pp. 256 *et seq.*—Verdross, pp. 177-179, 183-186, and in *Z.I.*, 37 (1927), pp. 293-305—Henrich, *Theorie des Staatsgebietes* (1922), pp. 1-54—Donati, *Stato e territorio* (1924)—Giese in *Z.I.*, 11 (1918-1920), pp. 461-495—Heinrich, *ibid.*, 13 (1926), pp. 28-63, 184-232, 325-352—Schoenborn in *Hague Recueil*, vol. 30 (1929) (v.), pp. 91-134—Hostie, *ibid.*, 40 (1930) (n.), pp. 440-449—Tachi in *R.G.*, 38 (1931), pp. 406-419—Kelsen in *Hague Recueil*, vol. 42 (1932) (iv.), pp. 204-220—Strupp, *ibid.*, vol. 47 (1934) (i.), pp. 540-548—Prager in *Z.I.R.*, 14 (1934), pp. 611-633—Monaco in *Rivista*, 26 (1934), pp. 289-320, 401-502—Lauterpacht in *Hague Recueil*, vol. 62 (1937) (iv.), pp. 318-326.

§ 169. State territory is that defined portion of the surface of the globe which is subjected to the sovereignty of the State. A State without a territory is not possible, although the necessary territory may be very small, as in the case of the Vatican City, the Principality of Monaco, the Republic of San Marino, or the Principality of Liechtenstein. A wandering tribe, although it has a Government and is otherwise organised, is not a State until it has settled down on a territory of its own.¹

State territory is also named territorial property of a State. Yet it must be borne in mind that territorial

¹ See above, § 64.

property is a term of Public Law, and must not be confounded with private property. The territory of a State is not the property of the monarch, or of the Government, or even of the people, of a State; it is the country which is subjected to the territorial supremacy or the *imperium* of a State. This distinction has, however, in former centuries not been sharply drawn. In spite of the *dictum* of Seneca, *Omnia rex imperio possidet, singuli dominio*, the *imperium* of the monarch and the State over the State territory has very often been identified with private property of the monarch or the State. But with the disappearance of absolutism this identification has likewise disappeared. It is for this reason that nowadays, according to the Constitutional Law of most countries, neither the monarch nor the Government is able to dispose of parts of the State territory without the consent of Parliament.¹

Import-
ance of
State
Territory.

§ 170. The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. State territory is an object of the Law of Nations, because the latter recognises the supreme authority of every State within its territory. Whatever person or thing is on, or enters into, that territory, is *ipso facto* subjected to the supreme authority of the State according to the old rules, *Quidquid est in territorio, est etiam de territorio* and *Qui in territorio meo est, etiam meus subditus est*. No foreign authority has any power within the boundaries of the home territory, although foreign sovereigns and diplomatic envoys enjoy the so-called privilege of extraterritoriality, and although the Law of Nations does, and international treaties may, restrict² the home authority in many points in the exercise of its sovereignty.

Divisi-
bility of
Territorial
Sove-
reignty.

§ 171. The supreme authority which a State exercises over its territory would seem to suggest that on one and the same territory there can exist one full sovereign State only, and that two or more full sovereign States on one and the

¹ In Great Britain there has been a strong tendency in favour of obtaining Parliamentary approval by means of a statute, for instance, the Anglo-German Agreement Act, 1890 (as to Heligoland), the Anglo-French Con-

vention Act, 1904, and the Anglo-Italian Treaty (East African Territories) Act, 1925; and see McNair in *B.Y.*, 1928, pp. 59-68.

² See above, §§ 126-128.

same territory are an impossibility. On the other hand, it is difficult to ignore the fact that, as shown above,¹ sovereignty may in practice be divisible. This explains the exceptions—some real and some apparent—to the rule of the exclusiveness of a single sovereignty over the same territory:

(1) The first and perhaps only true exception to that rule is the case of the so-called *condominium*. In this case a piece of territory consisting of land or water is under the *joint enancy* of two or more States, these several States exercising sovereignty conjointly over it, and over the individuals living thereon.² Thus Schleswig-Holstein and Lauenburg from 1864 till 1866 were under the *condominium* of Austria and Prussia,³ since 1898 the Sudan has been under the *condominium* of Great Britain and Egypt,⁴ since 1914 the New Hebrides have been under a *condominium* of Great Britain and France,⁵ and since 1939 the Islands of Canton

¹ See above, §§ 66-69.

² As to Tanger see above, § 95.

³ Moresnet (Kelmis), on the frontier of Belgium and Germany, was formerly under the *condominium* of these two States because they could not come to an agreement regarding the interpretation of a boundary treaty of 1815 between the Netherlands and Prussia; but by Article 32 of the Treaty of Peace of 1919 with Germany, Germany recognised the full sovereignty of Belgium over this territory. See Schröder, *Das grenzübergreifende Gebiet von Moresnet* (1902).

⁴ See Sarkislian, *Le Soudan égyptien* (1913). See also the Agreement between Great Britain and Egypt of January 19, 1899, signed at Cairo: Martens, *N.R.G.*, 3rd ser., iv. p. 791; *British and Foreign State Papers*, vol. xci. p. 19. And see Card, *Situation internationale du Soudan égyptien* (1932); O'Rourke, *The Juristic Status of Egypt and the Sudan* (1935). See also the Treaty of Alliance between Great Britain and Egypt of 1936—Treaty Series, No. 6 (1937), Cmd. 5360—in which the question of sovereignty over the Sudan was expressly reserved. According to the Annex to Article 11 of the Treaty the participation of the Sudan

in international conventions was effected by joint action of Great Britain and Egypt. In the Agreement of February 12, 1953, concerning self-government and self-determination for the Sudan the United Kingdom and Egypt agreed that the status of the Sudan shall be determined by a freely elected constituent Assembly which may decide either to link the Sudan with Egypt or to choose complete independence. The two Governments agreed to respect the decision thus taken; Treaty Series, No. 47 (1953), Cmd. 8001. See above, § 91.

⁵ By a treaty of August 6, 1914 (Martens, *N.R.G.*, 3rd ser., xii. pp. 198-240). While the authority exercised over the native population is a joint sovereignty, each of the two States exercises separate jurisdiction over its own subjects. See Brunet, *Le Régime international des Nouvelles-Hébrides* (1908); Grignon-Dumoulin, *Le Condominium . . . des Nouvelles-Hébrides* (1928); Politis in *R.G.*, 11 (1907), pp. 789-759; and Fauchille, § 187, as to the régime before 1914. The existing arrangements are contained in the following documents in the Treaty Series: No. 3 of 1908, No. 7 of 1922, No. 2 of 1923, Nos. 8 and 28 of 1927. See also the Exchange

and Endenburg, which are of importance for the maintenance of aviation routes over the Pacific, have been under the 'joint control' of Great Britain and the United States.¹ In some cases that arrangement is adopted as a provisional measure with regard to territories whose fate is to be decided later on.² Until a final settlement, the interested States do not each exercise an individual sovereignty over these territories, but they agree upon a joint administration under their conjoint sovereignty. Thus, for instance, in the Peace Treaties of 1919 the Central Powers ceded certain territories to the Allied and Associated Powers which until the final disposition of these territories held them under their joint sovereignty.³ But in other cases, like those of the Sudan and the New Hebrides, there is in law a division of sovereignty. When on June 5, 1945, Great Britain, the United States, Russia and France, in a 'Declaration regarding the defeat of Germany,' assumed supreme authority over that country, they provided an example of joint exercise of sovereignty.⁴

of Notes of January 31, 1935: Treaty Series, No. 7 (1935), Cmd. 4852. And see above, §§ 94, 95, as to Tangier, which constitutes a curious combination of a protectorate and a *condominium*. For an example of joint use as distinguished from a *condominium* proper, see the Convention for the Trans-Isthmian Highway of March 2, 1936 (ratified in 1939) between the United States and Panama. Article 7 of the Convention provides that, subject to the laws relating to vehicular traffic in force in their respective jurisdictions, the two countries shall equally enjoy the use of the Trans-Isthmian Highway: *A.J.*, 34 (1940), Suppl., p. 161. And see the Agreement of August 1945 between China and Soviet Russia providing that the 'Chinese Chungchun Railway' shall become the common property of the two States and shall be operated by them jointly. After thirty years the complete ownership of the railway is to pass to China. For the text of the Agreement see *Bulletin of the State Department*, 14 (1946), p. 207.

¹ See the Agreement between the United States and Great Britain of April 6, 1939: *L.N.T.S.*, vol. 196, p. 344. The Agreement provides for

a joint administration of the islands, for a period of fifty years, by a United States and a British official. See Reeves in *A.J.*, 33 (1939), pp. 521-526. The provisions of the British Protectorates, Protected States and Protected Persons Order in Council, 1949 (No. 140) apply to the New Hebrides and Canton Island 'as if they were protected states' (s. 6).

² Existing and former examples of *condominium* are discussed by Kunz, *Staatenverbindungen* (1929), pp. 278-282, and Baker Fox in *A.J.*, 39 (1945), pp. 486-503. See also Tullio, *Il Condominium nel Diritto pubblico internazionale* (1910), and Pilotti in *R.I. (Genera)*, 19 (1941), pp. 284-306. And see Hunter Miller, *San Juan Archipelago. Study of the Joint Occupation of San Juan Island* (1943).

³ See e.g. Article 99 of the Treaty of Versailles with regard to Memel; Articles 53 and 74 of the Treaty of Trianon with regard to Fiume.

⁴ See above, § 101. (1945) Cmd. 6048. See Kelsen in *A.J.*, 38 (1944), pp. 689-694, for a suggestion of a *condominium* proper over Germany pending the establishment of a democratic German State. And see below, § 237a.

The partial responsibility of the Security Council of the United Nations for the administration of the Free Territory of Trieste, set up in 1946,¹ is in the same category.

(2) In other cases one State actually exercises sovereignty which is, in law, vested elsewhere. This is, for instance, the case of the administration of a piece of territory by a foreign Power, with the consent of the owner-State. Thus, from 1878 to 1914 the Turkish island of Cyprus was under British administration,² and the Turkish provinces of Bosnia and Herzegovina were from 1878 to 1908 under the administration of Austria-Hungary.³ In these cases a cession of pieces of territory had for all practical purposes taken place although in law they still belonged to the former owner State. Such nominal sovereignty is not totally devoid of practical consequences. Thus in the case concerning the *Lighthouses in Crete and Samos* the Permanent Court of International Justice held, on October 8, 1937, that notwithstanding the very wide autonomy conceded by Turkey to the islands of Crete and Samos these territories must be regarded as having been under Turkish sovereignty in 1913, with the result that Turkey could properly grant or renew concessions with regard to these islands.⁴

(3) The third case is that of a piece of territory leased or pledged by the owner-State to a foreign Power. Thus,

¹ See Gervais in *R.G.* 51 (1947), pp. 134-154.

² Cyprus was annexed by Great Britain on November 5, 1914 (see *R.G.*, 21 (1914), pp. 510-512), and the annexation was recognised by Turkey in Article 20 of the Treaty of Lausanne of 1923. See Headlam-Morley, *Studies in Diplomatic History* (1929), pp. 193-211; Toynbee, *Survey*, 1931, pp. 354-394; Dondias in *R.I. (Paris)*, 12 (1933), pp. 130-159 and the same, *La question cypriste* (1934). For an analysis of the nature of the British administration of Cyprus see the decision of the Anglo-Turkish Mixed Arbitral Tribunal of December 16, 1929, in *Parounak v. Turkish Government*. The Tribunal held that on August 29, 1914, Cyprus was a British protectorate in the sense that it fell within the designation of a

country 'under the protection' of Great Britain in the meaning of Article 64 of the Treaty of Lausanne: *Annual Digest*, 1929-1930, Case No. 11.

³ The Turkish island of Ada-Kalé, in the river Danube, was under the administration of Austria-Hungary from 1878 to 1913. See Błociszewski in *R.G.*, 21 (1914), pp. 379-390.

⁴ *P.C.I.J.*, Series A/B, No. 71. In a Dissenting Opinion Judge Hudson said with regard to this point: 'A juristic conception must not be stretched to the breaking point, and a ghost of hollow sovereignty cannot be permitted to obscure the realities of this situation' (at p. 127). But see Lauterpacht in *Hague Recueil*, 62 (1937) (iv.), pp. 325-326, for an analysis of the position on the lines suggested in the Judgment of the Court

China in 1898 leased¹ the district of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang-chow Wan to France,² and Port Arthur to Russia.³ Thus, further, in 1803 Sweden pledged the town of Wismar⁴ to the Grand Duchy of Mecklenburg-Schwerin, and the Republic of Genoa in 1768 pledged the island of Corsica to France. Some of these cases comprise, for most practical purposes, cessions of pieces of territory, but in strict law these remain the property of the leasing State.⁵ Such property is not a mere fiction, as

¹ See below, § 216. By Article 156 of the Treaty of Peace of 1919 with Germany, Germany renounced all her rights under this lease in favour of Japan. For the history and termination, in 1922, of the Kiaochow lease see Goddard, *Tsingtao under Three Flags* (1929).

² At the Washington Conference of 1921-1922 Japan, Great Britain, and France agreed on certain conditions to restore Kiaochow, Wei-Hai-Wei, and Kuang-chow Wan to China—see Cmd 1627 of 1922 and Fauchille, § 557 (15). See also below, n 5.

³ Russia in 1905, by the Peace Treaty of Portsmouth, transferred her lease to Japan. By an Agreement of August 14 1945, between China and Soviet Russia the two parties agreed, for a period of thirty years to a joint use of the port. See *Bulletin of State Department* 14 (1946) p 206. In the Treaty of Moscow of February 11, 1950 provision was made for handing over the naval base of Port Arthur to China not later than the end of 1952. *A J.*, 44 (1950) Suppl., p. 87. In Article 4 of the Peace Treaty of 1947 Finland granted to Soviet Russia on the basis of a fifty years' lease at an annual rent of five million Finnish marks the use and administration of territory and waters for the establishment of a Soviet naval base in the area of Porkkala Vdd.

⁴ This transaction took place for the sum of 1,250,000 thaler, on condition that Sweden, after the lapse of 100 years, should be entitled to take back the town of Wismar on repayment of the money, with 5 per cent. interest per annum. Sweden

in 1903—see Martens *V R G.*, 2nd ser., 31, pp 572 and 571 formally waived her right to retake the town; see Schmidt, *Der schwedisch-mecklenburgische Pfandvertrag über Stadt und Herrschaft Wismar* (1901).

⁵ Distinguish, however, (1) the somewhat peculiar leases granted in perpetuity by China to Great Britain between 1851 and 1861 in seven British Concessions in order to enable merchants in these concessions to own land and houses for the purpose of trade and residence. In the case of one concession, these leases were at once transferred to the lot holders, in the other cases the British Government became the ground landlord and in 1927 it proposed to surrender its reversionary rights to the lot holders (see Treasury Minute of December 7, 1927, Cmd 2994). See the Exchange of Notes of October 1929 between Great Britain and China providing for the return of the British Concession at Chinkiang, the dissolution of the British Municipal Administration there, and the substitution of Chinese deeds of perpetual lease for the lease in perpetuity under the Sino-British Agreement of 1861. *Treaty Series*, No 3 (1930), Cmd 3469, and (2) the genuine international leases of which the following instances may be mentioned: Great Britain to Italy of land at Kisumu in Kenya for the purpose of erecting a bonded warehouse and other buildings (see *Hertslet's Commercial Treaties*, 21, pp. 687-690), Germany to Czechoslovakia by Article 363 of the Treaty of Versailles of 1919; the Government of India to France regarding the French Loge at Balasore

some writers ¹ maintain, for it is possible for the lease to come to an end by expiration of time or by rescission. Thus the lease granted in 1894 by Great Britain to the former Congo Free State, of the so-called Lado Enclave, was rescinded ² in 1906,³ and the British lease of Wei-Hai-Wei was rescinded in 1930.⁴ On the other hand, the leases of small pieces of territory granted in 1941 by Great Britain to the United States for the use and operation of naval and

on April 26, 1920 (*Hertslet's Commercial Treaties*, 30, p. 227); Italy to Czecho-Slovakia of an area in the port of Trieste on March 23, 1921 (*L.N.T.S.*, 32, p. 251). See also Schönborn, in *Z.V.*, 7 (1913), pp. 438-445 and Váli, *Servitudes of International Law* (1933), pp. 128-136. And see Villamovitch, *Zône libre Serbe à Salonique* (1926). The characteristic of the leases mentioned in this note is that they do not transfer any exercise of sovereignty. As to foreign concessions in China generally, and in particular that of Shanghai, see Toynbee, *Survey*, 1927, pp. 369-381, 394-399, and 1929, pp. 322-344; Escarra, *La Chine et le droit international* (1931), pp. 80-147; the same in *Répertoire*, iii, pp. 420-427, and in *Hague Recueil*, vol. 27 (1929) (ii.), pp. 1-134; *Report of the Hon. Mr. Justice Richard Feetham to the Shanghai Municipal Council*, 2 vols. (1931); Des Courtils, *La concession française de Chang-hai* (1934); Dennis in *A.S. Proceedings*, 1930, pp. 194-200; Pratt in *B.Y.*, 19 (1938), pp. 1-18. As to the use of the international settlement as a base of Japanese operations against China in 1932 see Toynbee, *Survey*, 1932, pp. 495-502. For the Agreement with China of February 17, 1930, relating to Chinese Courts in the International Settlement at Shanghai and providing for the establishment in the International Settlement at Shanghai of a Chinese District Court and a Branch High Court to try Chinese offenders in accordance with Chinese law see *Treaty Series*, No. 20 (1930), Cmd. 3563. It was held in *In re Ning Yi-Ching and Others* that, as the British concession at Tientsin, in which Great Britain exercised certain jurisdictional rights, was part of Chinese

territory, the writ of habeas corpus was not available to prevent certain Chinese prisoners from being handed over to the Japanese authorities: (1939) 56 *T.L.R.* 3. As to the Shanghai Settlement see Fraser in *J.C.L.*, 3rd ser., vol. 21 (1939), pp. 38-53. In Article 4 of the Treaty with China of January 11, 1941, for the relinquishment of extra-territorial rights in China, Great Britain agreed to the cessation of the special rights accorded to her in the Settlements at Shanghai and Amoy, as well as with regard to the concessions of Tientsin and Canton, and to the return of these areas to Chinese administration: Cmd. 6456 (1943).

¹ See, for instance, Perrinjaquet in *R.G.*, 16 (1909), pp. 340-367. For a full discussion see Lauterpacht, *Analogy*, pp. 181-190. See also Yang, *Les territoires à bail en Chine* (1929); Young, *The International Legal Status of the Kwangtung Leased Territory* (1931).

² By Article 1 of the Treaty of London of May 9, 1906; see Martens, *N.R.G.*, 2nd ser., 35, p. 454.

³ Similarly, the leases of the German concessions at Hankow and Tientsin, and the Austro-Hungarian concession at Tientsin, were abrogated by Article 132 of the Treaty of Peace with Germany and Article 116 of the Treaty of Peace with Austria, and the areas were restored to the full sovereignty of China.

⁴ See Convention of April 18, 1830, providing for the return of Wei-Hai-Wei and the abrogation of the Convention of 1898: *Treaty Series*, No. 50 (1930), Cmd. 3741. Wei-Hai-Wei was formally restored to China on October 1, 1930. See Toynbee, *Survey*, 1930, pp. 351-354.

air bases in Newfoundland, Bermuda, Jamaica, St. Lucia, Antigua, Trinidad and British Guiana for a term of ninety-nine years¹ did not involve, apart from a rigidly limited concession of certain jurisdictional rights,² any surrender either of sovereignty or of the exercise thereof.³

(4) The fourth case is that of a piece of territory of which the use, occupation, and control are in perpetuity granted by the owner-State to another State, to the exclusion of the exercise of any sovereign rights over the territory concerned on the part of the grantor. In this way⁴ the Republic of Panama transferred, in 1903, to the United States of America a ten-mile-wide strip of territory for the purpose of constructing, administering, and defending the

¹ See Exchange of Notes of September 2, 1940 between the British Ambassador and the United States Secretary of State in connection with the transfer of fifty destroyers to Great Britain: *A.J.*, 34 (1940), Suppl., p. 184. For the Agreement of March 27, 1941, embodying the terms of the leases see *ibid.*, 35 (1941) Suppl., pp. 134-159.

² These include the jurisdiction of United States courts with regard to treason, sabotage, espionage and similar offences committed within the leased area (Art. 4), and the provision that no arrest shall be made and no process served within the leased area without the permission of the United States authorities (Art. 6). However, in case of refusal of permission they must, except with regard to the offences referred to in Article 4 above, surrender the person whose arrest is sought to the authorities of the territory. In 1950 the conditions under which jurisdiction can be exercised by the United States were modified and regulated in considerable detail. Thus the United States has exclusive jurisdiction, if a state of war exists, where the accused is a member of a United States force. It has also exclusive jurisdiction, even if a state of war does not exist, if the accused is a member of the United States forces in respect of security offences wherever committed and offences against the interests of the United States committed inside the leased area. It has concurrent juris-

diction over all other offences wherever committed. Moreover, it has also exclusive jurisdiction in respect of security offences over persons who are not citizens of the United States wherever a civil court of the United States is sitting in the leased territory. See Exchange of Notes of August 1, 1950: *A.J.*, 45 (1951), Suppl., p. 97; Treaty Series, No. 65 (1950), Cmd. 8076. See also the Agreement of January 15, 1952, concerning the extension of the Bahamas Long Range Practice Ground by Additional Sites: Treaty Series, No. 10 (1952), Cmd. 8485, and the previous Agreement of July 21, 1950: Treaty Series, No. 74 (1950), Cmd. 8109.

³ Thus, for instance, the Government of the territory in question is responsible for enacting legislation necessary to ensure the safety and security of the United States naval and air bases. See also *Wilson v. A.J.*, 34 (1940), p. 703. In *Spelar v. United States* the Supreme Court finally held that the United States did not possess sovereignty over the air base in Newfoundland and that it was therefore a 'foreign country' in the meaning of a United States statute: (1949) U.S. 217; *Annual Digest*, 1948, Case No. 21. See also *Gonnell v. Vermilya Brown Co* (1947) 184 F. (2d) 924; *Annual Digest*, 1947, Case No. 18.

⁴ See below, § 184, and *Boyd in R.G.*, 17 (1910), pp. 614-624.

so-called Panama Canal. In this case also the grantor retains in law the property in the territory, although only the grantee exercises sovereignty there.¹

(5) The fifth case is that of the territory of a Federal State. As a Federal State is considered² itself a State side by side with its single member-States, the fact is apparent that the different territories of the single member-States are at the same time collectively the territory of the Federal State. This is the consequence of the fact that sovereignty is divided between a Federal State and its member-States.

(6) The case of mandated areas has already been considered.³ Here we find a State exercising most of the attributes of sovereignty over territory which is not its own.⁴ The position is essentially the same with regard

¹ See Woolsey in *A.J.*, 20 (1926), pp. 117-124, 37 (1913), pp. 482-489. And see to the same effect the judgment of the Supreme Court of Panama in *Republic of Panama v. Schwartziger*: *Annual Digest*, 1927-1928, Case No. 114. In *Luckenbach Steamship Co. v. United States* the Supreme Court held, in January 1930, that the ports of the Panama Canal Zone were foreign ports within the meaning of a United States statute: 280 U.S. 173; *Annual Digest*, 1929-1930, Case No. 50. And see *ibid.*, Case No. 51, for a decision of the Panamanian Supreme Court of February 17, 1930, to the effect that the Canal Zone was not foreign territory in relation to Panama (*In re Bartlett*); *In re Burriel*, by the same Court, *Annual Digest*, 1931-1932 Case No. 53. See also below, § 181.

As to leases granted to the United States in Cuba for the lease of lands for coaling and naval stations see the Treaty of February 1903: *A.J.*, 4 (1910), Suppl., p. 177. The Treaty of 1934, while abrogating other provisions of the Treaty of 1903, left intact the stipulations as to leases: *A.J.*, 28 (1934), Suppl., p. 97.

² See above, § 89.

³ See above, §§ 94c-94f.

⁴ The German territory of the Saar constituted for a time another example of the exercise of sovereignty in foreign territory. By Article 45 of the Treaty of Versailles Germany 'renounced in favour of the League of Nations, in the capacity of trustee,

the government of the territory.' The League exercised this trust through a Governing Commission of five persons appointed by the Council of the League. The inhabitants retained their German nationality. In 1934, as the result of a plebiscite held in conformity with the provisions of the Treaty, the government of the territory was restored to Germany. See Fauchille, § 431; Schücking und Wehberg, pp. 120, 121; Franck in *Archiv des öffentlichen Rechts*, 43 (1922), pp. 1-49; Redslob in *R.I. (Genera)*, 3 (1925), pp. 283-302; Coursier, *Le statut international de la Sarre* (1925); Russell, *The International Government of the Saar* (1926); Lutger in *Z.V.*, 14 (1927), pp. 215-236. After the Second World War the Saar was constituted a separate territory with a government, legislature and nationality of its own. As such it became in its own name a party to various treaties such as the European Convention on Human Rights (see below, § 340b). It entered into a financial, economic and customs union with France. A Treaty concluded with France in 1948 regulated the judicial organisation of the Saar. It provided, *inter alia*, for a Franco-Sarrois division of the Court of Appeal composed of judges from France and the Saar. French courts have considered the Saar to be a foreign country. See *Société Koehl v. Hildebrand, Dalloz Hebd.*, 1951, *Jurisprudence*, p. 62. As to the plebiscite in 1934 see below, § 219.

to trust territories.¹ Moreover, the Charter of the United Nations provides for the possibility of joint trusteeship by several States—a case of joint exercise of divided sovereignty.²

II

THE DIFFERENT PARTS OF STATE TERRITORY

Land,
National
Waters,
Territorial
Waters.

§ 172. The territory of a State consists in the first place of the land within its boundaries. To this must be added, in the case of a State with a sea coast, certain waters which are within or adjacent to its land boundaries. These waters are of two kinds—national and territorial: (1) *National Waters*. These consist of the waters in its lakes, in its canals, in its rivers together with their mouths,³ in its ports and harbours, and in some of its gulfs and bays. These different kinds of national, or, as they are sometimes called, internal or inland, waters will be examined in due course, but they must be distinguished at once from territorial waters.⁴ National waters are, in fact, legally though not

¹ See above, § 94*n*.

² See above, § 94*j*.

³ See below, § 176, and *Rex v Kiso Furazawa* (1930), 42, *British Columbia Reports*, 548. As to the line of demarcation between national waters and territorial waters see Codification Conference, *Bases of Discussion*, II, pp. 61-63.

⁴ This distinction is made *eo nomine* in the case of bays by Hurst in *B.Y.*, 1922-1923, at p. 46, and (also in the case of bays) in the final draft convention contained in the League Codification Committee's report, cited below, § 185. The distinction is widely recognised, indirectly and by implication, in practice, and deserves general recognition as a matter of theory. As to ports and bays, contrast Hyde, I, §§ 221 and 226, as to ports see Fauchille, § 517 (1), more generally see the valuable article by Charteris in *B.Y.*, 1920-1921, at pp. 47, 62-65, Rivier, I, p. 153, as to 'golfses et baies, rades, havres et ports, embouchures des fleuves', Lapradelle in *R.G.*, 5 (1898), at p. 265, Article 2 of the Resolutions of the Institute of International Law concerning the Legal Status of Ships and their Crews in Foreign Ports in *Annuaire*,

17 (1898), p. 273 (cited by Charteris, *op cit*), Sir Robert Phillimore in *Reg v Keyn* (1876), 2 Lx D at p. 82 (cited by Charteris, *op cit*) and particularly at foot 1 p. 81 and top of p. 82. Twiss § 180, suggests the use of the terms 'maritime territory' for national waters and 'jurisdictional waters' for the maritime belt. That the distinction is recognised by the English common law is, it is believed, clear from a comparison of *Reg v Cunningham* (1859), 3 Bells Crown Cases 86, where the whole of the Bristol Channel was stated to be within the bodies of the counties of Glamorgan and Somerset, and *Reg v Keyn* (1876), 2 Ex D 65 (see above, § 23), where if the place of the collision (about two and a half miles from Dover beach) could have been said to be within the body of the county of Kent, no difficulty would have arisen in finding a court (not necessarily the Central Criminal Court) with jurisdiction to try the offender. *The Fagernes*, [1927] P. 311, while reversing *Reg v Cunningham* as to the status of the Bristol Channel, does not affect the principle for which the latter decision is cited above: see below, § 191.

physically, equivalent to national land. (ii) *Territorial Waters*. These consist of the waters contained in a certain zone or belt, called the maritime or marginal belt, which surrounds a State and thus includes a part of the waters in some of its bays, gulfs, and straits.

The distinction between national and territorial waters is important from the point of view of International Law (1) because in territorial waters foreign States can claim for their ships a certain right of passage (which is discussed below), whereas in national waters no such right exists¹; (2) because in the case of gulfs and bays which are admitted to be national, the base line for the measurement of territorial waters is the line where the waters of the gulf or bay cease to be national²; and (3) it is also possible that the Municipal Law of certain States draws a distinction in the matter of jurisdiction.³

§ 172a. In contradistinction to these real parts of State territory there are some things that are either in every respect or for some purposes treated as though they were territorial parts of a State. They are fictional and in a sense only parts of the territory. Thus men-of-war and other public vessels on the high seas as well as in foreign territorial waters are essentially in every point treated as though they were floating parts of their home State.⁴ The premises in which foreign diplomatic envoys have their official residence are in many respects treated as though they were parts of the home States of the envoys concerned.⁵ Again, merchantmen on the high seas are in certain respects treated as though they were floating parts of the territory of the State under whose flag they legitimately sail.⁶

§ 173. The subsoil beneath the territorial land and water

¹ See Hurst in *B.Y.*, 1922-1923, at p. 54; Sir Robert Phillimore in *Reg. v. Keyn* (1876), 2 Ex. D. at foot of p. 81 and top of p. 82. See also Hyde, i. § 187 (access to ports), and Hall, § 42 (n. 3). And see Gidel, i. pp. 44-62, for a general discussion.

² See Hurst, *op. cit.*, and Article 2 of the North Sea Fisheries Convention of 1882 as an instance of the application of this principle, and literature, cited below, § 191, p. 505, n. 1.

³ See p. 17 (n. 1) above as to *Reg. v. Keyn*.

⁴ See below, § 450.

⁵ See below, § 390.

⁶ See *Lotus*, § 264, and, for the *Lotus* case before the Permanent Court in 1927, above, § 147a.

⁷ See Schoenborn in *Hague Recueil*, vol. 30 (1929) (6), pp. 145-151. As regards the subsoil of the open sea, see below, §§ 287c and 287d.

is of importance on account of telegraph and telephone wires and the like, and also on account of the working of mines and the building of tunnels. The territorial subsoil is not a special part of territory, although this is frequently asserted. But it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface and the territorial waters appurtenant to the territory of the State.¹

Territorial
Atmo-
sphere.

§ 174. The space of the territorial atmosphere is no more a special part of territory than the territorial subsoil, but it is of the greatest importance on account of wires for telegraphs, telephones, electric traction, and the like, on account of wireless telegraphy, and, above all, on account of aerial navigation.

(1) Nothing need be said concerning wires for telegraphs and the like, except that obviously the territorial State can prevent neighbouring States from making use of its territorial atmosphere for such wires.

(2) As regards wireless telegraphy,² the International Radiographic Conventions signed at London on July 3, 1912, and at Washington on November 25, 1927,³ and the various International Telecommunication Conventions,⁴ contain no stipulation respecting the general question whether the territorial State is compelled to allow the passage over its territory of waves emanating from a foreign wireless telegraphy station. No such compulsion exists according to customary International Law. Accordingly, subject, possibly, to the principle prohibiting the abuse of rights,⁵ the territorial State can prevent the passage of such waves⁶ over its territory.

¹ See below, § 190b. And see below §§ 287c, 287d as to the subsoil of the Continental Shelf.

² For literature see below, Appendix.

³ See below, §§ 287a, 287b.

⁴ See below, § 197f.

⁵ See above, § 155aa. And see below, § 178a.

⁶ See *Annuaire*, 21 (1906), pp. 327-329. However, the Institute of

International Law in August and September 1927 discussed Radiotelegraphic Communication at its meeting at Lausanne (see Scott in *A.J.*, 21 (1927), pp. 716-736), and adopted a resolution to the effect that a State 'does not . . . have the right to prevent the simple passage of wave-lengths over its territory.' See also Saulemont, *Radiophonie et le droit* (1927); Mance, *International*

(3) But with regard to aerial navigation the space of the territorial atmosphere is of particular importance, and will be considered in §§ 197a-197e.

§ 175. It should be mentioned that not every part of territory is alienable by the owner-State. For it is evident that the territorial waters are as much inseparable appurtenances of the land as are the territorial subsoil and atmosphere. Only pieces of land together with the appurtenant territorial waters are alienable parts of territory.¹ There is, however, one exception to this, since boundary waters² may wholly belong to one of the riparian States, and may therefore be transferred through cession from one riparian State to the other without the bank itself. But it is obvious that this is only an apparent, not a real, exception to the rule that territorial waters are inseparable appurtenances of the land. For boundary waters that are ceded to the other riparian State remain an appurtenance of land, although they are now an appurtenance of the one bank only.

III

RIVERS

Grotius, n. c. 2, §§ 11-15 Pufendorf, m. c. 3, § 8 Vattel, ii, §§ 117, 128 129, 134—Hall, § 39—Westlake, i, pp. 144-163—Lawrence, § 92—Phillimore, i, §§ 155-171—Moore, i, §§ 128-132 Wheaton, §§ 192 205 - Hyde, i, §§ 159-184 Bluntschli, §§ 314, 315 - Hackworth, v, §§ 84 89 - De Loutet, i, pp. 414 456 Fauchille §§ 520 531 (1) Sibert pp. 789 831 - Despagne, §§ 419-421 - Mérignhac, ii, pp. 605-632 - Pradier-Fodéré, ii, §§ 688-755 - Nys, i, pp. 467-471, and ii, pp. 129-163 Rivier, i, p. 142 and § 14 - Calvo, i, §§ 302 340—Cuchaga, §§ 454-465—Suarez, §§ 125-130 - Fiore, ii, §§ 755-797, and *Code*, §§ 288-290, and 981-987 - Martens, i, § 102, ii, § 57 Keith's Wheaton, pp. 385-403 Baty, pp. 81-85—Smith, ii, pp. 273-368—Higgins and Colombos, §§ 179-212—Delavaud, *Navigations . . . sur les fleuves internationaux* (1885) Bergès, *Du régime de navigation*

Telecommunications (1943); Cereti in *Rivista*, 3rd ser., 5 (1926), pp. 1-20; Cavaglieri in *R.I. (Paris)*, 2 (1928), pp. 860-872; and Report of Committee in *International Law Association's Thirty-fourth Report* (1927), pp. 469-480. See also the writers referred to

below, § 197 f

¹ See below, § 185. But by treaty obligation a part of territory may be made inalienable, or only alienable *sub modo*; see below, § 213 (n.).

² See below, § 199.

des fleuves internationaux (1902)—Lopez, *Régimen internacional de los Ríos navegables* (1905)—Schulthess, *Das internationale Wasserrecht* (1915)—Kaeckenbeek, *International Rivers* (1918), and, same title, British Foreign Office Peace Handbook (1920)—Ogilvie, *International Waterways* (1920)—Van Eysinga, *Évolution du droit fluvial international*, 1815-1919 (1920), and in *Bibliotheca Fisseriana*, ii. (1924), pp. 123-157—Lederle, *Das Recht der internationalen Gewässer* (1920), pp. 71-125, 132-233—Dupuis in *Hague Recueil*, 1924, i. pp. 219-262—Charles de Visscher, *Le droit international des communications* (1924)—Kasama, *La navigation fluviale en droit international* (1928)—Quint, *International Rivierenrecht* (1930), and in *R.I.*, 3rd ser., 12 (1931), pp. 325-340—Triepel, *Internationale Wasserläufe* (1931)—Vošta, *Mezinárodní řeky* (1938)—Manoe, *International River and Canal Transport* (1914)—Huber in *Z.V.*, 1 (1907), pp. 29, 159—Hyde in *A.J.*, 4 (1910), pp. 145-155—Vallotton in *R.I.*, 2nd ser., 15 (1913), pp. 271-306—Bonsek in *Z.V.*, 7 (1913), pp. 39-55—Wittmaak in *Jahrbuch für Völkerrecht*, 1. (1913) pp. 481-496—Hostie in *R.I.*, 3rd ser., 2 (1921), pp. 532-567, and *ibid.*, 4 (1923), pp. 246-271—Lederle in *Z.V.*, 13 (1926), pp. 64-76—Hennig in *Z.I.*, 36 (1926), pp. 100-116—League Publication, *Barcelona Conference, Verbatim Records and Texts relating to the Régime of Navigable Waterways of International Concern* (1921)—Corthéas in *Répertoire*, iv. pp. 55-67—Lederle in *Strupp, Wört.*, iii. pp. 869-873—Vallotton-d'Erlach in *Annuaire*, 35 (1.) (1929), pp. 228-401, 37 (1932), pp. 67-103, and 38 (1934), pp. 167-175—Winiarski in *Hague Recueil*, vol. 45 (1933) (iii.), pp. 79-215—Leener, *ibid.*, vol. 55 (1936) (i.), pp. 34-46—Wehle in *A.J.*, 40 (1946), pp. 100-120.

Rivers as
State Property of
Riparian
States.

§ 176. Theory and practice agree upon the rule that rivers are part of the territory of the riparian State. Consequently, (a) if a river lies wholly, that is, from its source to its mouth, within the boundaries of one and the same State, such State owns it exclusively.¹ As such rivers are under the sway of one State only and exclusively, they are called *national rivers*. Thus, all English, Scottish, and Irish rivers are national, and so are, to give some Continental examples, the Seine, Loire, and Garonne, which are French; and the Tiber, which is Italian. But many rivers do not run through the land of one and the same State only. (b) Secondly, there are so-called *boundary rivers*, that is, rivers which separate two different States from each other. (c) Thirdly, there are rivers which run through several States and are therefore described as *non-national rivers*.² Such rivers are owned by more than one State. Boundary rivers belong to the territory of

¹ Including the mouth of the river, the waters in the river and its mouth being national or internal waters (see above, § 142).

² The alternative term 'pluri-national' (or 'multi-national') has certain merits.

the States they separate, the boundary line,¹ as a rule, running either through the middle of the river or through the middle of the so-called mid-channel of the river. Rivers which run through several States belong to the territories of the States concerned; each State owns that part of the river which runs through its territory.

(d) There is, however, another group of rivers to be mentioned, which comprises all such rivers as are navigable from the open sea and at the same time either separate or pass through several States between their sources and their mouths. These rivers, too, belong to the territories of the different States concerned, but they are nevertheless named *international rivers*, because freedom of navigation in time of peace on all such rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by conventional International Law.²

§ 177. There is no rule of the Law of Nations in existence which grants foreign States the right of admission for their public or private vessels to navigation on national rivers. In the absence of commercial or other treaties granting such a right, every State can exclude foreign vessels from its national rivers, or admit them under certain conditions only, such as on payment of dues and the like.³ The teaching of Grotius (ii. c. 2, §§ 10, 12, and 13) that innocent passage through rivers must be granted has not been recognised by the practice of the States, and Bluntschli's assertion (§ 314) that such rivers as are navigable from the open sea must in

Navigation on National Boundary- and not-National Rivers.

¹ See below, § 199; Huber in *Z.I.*, 1 (1907), pp. 29, 159; and Schulthess, *op. cit.*, pp. 8-15. The Treaties of Peace of 1919 with Germany (Article 30), Austria (Article 30), Hungary (Article 30), and Bulgaria (Article 30) provided that in case of boundaries therein defined by a waterway, the terms 'course' and 'channel' signified (a) in the case of non-navigable rivers, the median line of the waterway or of its principal arm; (b) in the case of navigable rivers, the median line of the principal channel.

² The distinction made in the text between 'national,' 'boundary,' 'not-national,' and 'international'

rivers is not made by other writers. They class as 'international' all such rivers as are not national. Hennig, *op. cit.*, at p. 101, states that the first treaty in which rivers were described as 'international' was the Treaty of Peace with Germany of 1919, Part XII.

³ As to the jurisdiction over passing ships see Gidel in *Revue critique de droit international*, 29 (1934), pp. 16 et seq. For an interpretation of a conventional provision as to levying dues see *Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox* (1934), S. Ct. 361; *Z.d.V.*, 4 (1934), pp. 690, 691.

time of peace be open to vessels of all nations, is at best an anticipation of a future rule of International Law ; such a rule does not as yet exist.

As regards boundary rivers and not-national rivers running through several States, the riparian States can regulate navigation on such parts of these rivers as they own, and they can certainly exclude vessels of non-riparian States altogether, unless prevented therefrom by virtue of special treaties.

Navigation on International Rivers.

§ 178. *Historical*.—Whereas there is certainly no recognised principle of free navigation on national, boundary, and not-national rivers, a movement for the recognition of free navigation on international rivers set in at the beginning of the nineteenth century.¹ Until the French Revolution towards the end of the eighteenth century, the riparian States of such rivers as are now called international rivers could, in the absence of special treaties, exclude foreign vessels altogether from those parts which ran through their territory, or admit them under discretionary conditions. Thus, the River Scheldt² was wholly shut up in favour of the Netherlands according to Article 14 of the Peace Treaty of Münster of 1648 between the Netherlands and Spain. Subsequently, developments in the contrary direction began with a decree of the French Convention, dated November 16, 1792, which opened the Rivers Scheldt and Meuse to the vessels of all riparian States. But it was

¹ For a historical sketch see the Advisory Opinion of the Permanent Court on the *European Danube Commission*, Series B, No. 14, at pp. 38-41.

² There remain outstanding certain difficult questions between Belgium and Holland concerning the Scheldt: see Maeterlinck and Biaschop in *Grotius Society*, 4 (1919), pp. 253-295; Omond, *ibid.*, 6 (1921), pp. 80-88; Bourquin in *R.G.*, 27 (1920), pp. 5-28; *Grotius Annuaire*, 1926, pp. 84-122; *Solicitors' Journal*, vol. 71 (1927), pp. 509-511, 536, 537; Fauchille, § 627. A Belgo-Dutch treaty dealing with the disputed points and creating a new régime, after being ratified by Belgium, was rejected by the First Chamber of the Dutch States-General on March 24, 1927.

See Smith, *The Economic Uses of International Rivers* (1931), pp. 24-39; Blondeau, *L'Escaut, fleuve international, et le conflit holland-belge* (1932); Siotto Pintor in *Hague Recueil*, vol. 21 (1928) (1.), pp. 286-367; Rolin Jaquemyns in *R.I.*, 3rd ser., 9 (1928), pp. 377-399; Van Eysinga, *ibid.*, pp. 732-752; Bastid in *R.G.*, 35 (1928), pp. 689-712; Lederle in *Z.I.*, 44 (1931), pp. 71-93. See also the Judgment of the Permanent Court of International Justice of June 28, 1937, in the dispute between Belgium and Holland concerning the *Diversion of Water from the Meuse*: Series A/B, No. 70; and see Dehouasse in *R.I. (Paris)*, 19 (1937), pp. 177-263. As to the Passage of Wielingen see below, § 194.

not until the Congress of Vienna¹ in 1815 that the principle of free navigation on the international rivers of Europe by merchantmen of not only the riparian but of all States was proclaimed.² The Congress itself gave *theoretical* recognition to that principle in making arrangements³ for free navigation on the Rivers Scheldt, Meuse, Rhine, and on the navigable tributaries of the latter—namely, the Rivers Neckar, Main, and Moselle—although more than fifty years elapsed before it became realised in *practice*, in 1868,⁴ and even then in a somewhat restricted way.⁵

¹ Articles 108-117 of the Final Act of the Vienna Congress; see Martens, *N.R.*, 2, p. 427. As to British and American policy with regard to rivers of international concern see Bacon in *B.Y.*, 9 (1930), pp. 158-170, and *ibid.*, 13 (1932), pp. 76-91. As to Finland see *Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht* (1926). As to Latin America see Sosa-Rodriguez, *Le droit fluvial international et les fleuves de l'Amérique latine* (1935). As to the Brazilian rivers see Hill, *Diplomatic Relations between the United States and Brazil* (1932), pp. 214-238.

² But note that Article 109 of the principal Act of the Vienna Congress contains the words 'sous le rapport du commerce,' and that according to the views held in certain quarters the 'freedom of navigation' is subject to considerable qualifications. For a clear exposition of the historical basis and the rationale of the principle of the freedom of navigation on so-called international rivers see the Judgment of the Permanent Court of International Justice of September 10, 1929, in the case of the *Territorial Jurisdiction of the International Commission of the River Oder*. Series A. No. 23, pp. 27, 28.

³ 'Règlements pour la libre navigation des rivières'; see Martens, *N.R.*, 2, p. 434.

⁴ See the Convention of Mannheim of October 17, 1868.

⁵ *The Congo and the Niger*. The General Act (see Martens, *N.R.G.*, 2nd ser., 10, p. 417) of the Congo Conference at Berlin in 1884-1885 provided for free navigation on the

Rivers Congo and Niger and their tributaries, and the creation of an 'International Congo Commission' as a special international organ for the regulation of the navigation of that river; but this Commission was never appointed. The Peace Conference of 1919 dealt with these two rivers. The General Act above mentioned was abrogated by a Convention signed at St. Germain on September 10, 1919 (Treaty Series, No. 18 (1919), Cmd 477); but the old Article 1, which defined the area within which the trade of all nations should enjoy complete freedom, was re-enacted and new rules were laid down, so that the original or acceding parties to the new convention should enjoy the full benefit in practice of that freedom of navigation on the Congo, Niger, and their tributaries which was declared by the General Act. For an interpretation of these provisions see the decision of the Permanent Court of International Justice of December 12, 1934, in the *Oscar Chin* case between Great Britain and Belgium: Series A.B. No. 63, and below, pp. 688, n. 2, and 895, n. 2. There are also a number of treaties stipulating for freedom of navigation for the merchantmen of all States on certain South American rivers (see Taylor, § 238, Moore, i. § 131, pp. 639-651, and Hackworth, i. § 88). An arbitration tribunal in Paris, in the case of the boundary dispute between Great Britain and Venezuela, decided in 1899 in favour of freedom of navigation for the merchantmen of all States upon the Rivers Amakourou and Parima (Martens, *N.R.G.*, 2nd ser., 29, p. 587).

The Danube.—The next step was taken by the Peace Treaty of Paris of 1856, which by its Article 15¹ stipulated for free navigation on 'the Danube and its Mouths,' and expressly declared the principle of the Vienna Congress regarding free navigation on international rivers for merchantmen of all nations to be part of 'European Public Law.' A special international organ for the regulation of navigation on the Danube below Isatscha was created, the so-called European Danube Commission.

The Treaties of Peace of 1919 and 1920 with Germany, Austria, Bulgaria, and Hungary (i) confirmed the European Commission in the powers it possessed before the First World War² (the exercise of which had gradually been extended as far upwards as Braila); (ii) extended the internationalised stretch of the river upwards as far as Ulm in Germany (including the Rhine-Danube waterway then under construction); and (iii) foreshadowed the creation of a new International Commission for the purpose of administering the newly internationalised portion of the Danube. In due course a Definitive Statute of the Danube was established by a Convention³ of July 23, 1921. By this Statute the

¹ See Martens, *N.R.G.*, 15, p. 776. The documents concerning navigation on the Danube are collected by Sturdza, *Recueil de documents relatifs à la liberté de navigation du Danube* (Berlin, 1904); see also Demorgny, *La question du Danube* (1911); Dugern in *Z.I.*, 26 (1916), pp. 510-562; Fauchille, §§ 528-528 (12), Hajnal, *The Danube* (1920); Rühlend in *Z.I.*, 30 (1922-1923), pp. 243-248; Chamberlain, *The Régime of the International Rivers - Danube and Rhine* (1923), pp. 13-134; Radovanovitch, *Le Danube et l'application du principe de la liberté de la navigation fluviale* (1926), Sherman in *A.J.*, 17 (1923), pp. 438-459; Hostie in *R.I.*, 3rd ser., 4 (1923), pp. 246-271; Lederle in *Z.V.*, 13 (1926), pp. 70-73; Blochowski in *Hague Recueil*, 1926 (i.), pp. 257-336.

² See p. 55 of the Advisory Opinion referred to above, p. 178, n. 1.

³ Treaty Series, No. 16 of 1922, Cmd. 1754; *L.N.T.S.*, 26, p. 174; *A.J.*, 17 (1923), Suppl., pp. 13-27.

See Hajnal, *Le Droit du Danube international* (1929), and in *R.I.*, 3rd ser., 9 (1928), pp. 588-645; *Commission Européenne du Danube et son œuvre de 1856 à 1931* (1931); Radovanovitch in *R.I.*, 3rd ser., 13 (1932), pp. 564-631; Marcantonato in *R.I. (Paris)*, 17 (1936), pp. 460-533. For the agreement of June 28, 1932, between Yugoslavia, Roumania and the International Commission of the Danube for the setting up of special services at the Iron Gates see Hudson, *Legislation*, vi, p. 47.

For the *modus vivendi* and Declaration of June 25, 1933, concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braila see *P.C.I.J.*, Series E, No. 9, p. 115, and No. 10, p. 91. And see Hudson, *Legislation*, v, p. 806, for the Declaration of December 5, 1930, which, however, is now only of historical importance. See also the Arrangement and Final Protocol of August 18, 1938, Misc. No. 1 (1939), Cmd. 5946. And see Sofronie in *R.G.*, 48 (1941-1945), pp. 53-77.

powers of the European Commission were confirmed, and navigation on the Danube was declared to be 'unrestricted and open to all flags on a footing of complete equality' ¹ over the whole navigable course of the river, that is to say, between Ulm and the Black Sea.' ² The jurisdiction of the International Commission extended from Ulm to Braila, that is, 'the fluvial Danube,' and of the European Commission from Braila to the Black Sea, that is, 'the maritime Danube.' ³ The Treaties of Peace of 1947 with Bulgaria, ⁴ Roumania and Hungary lay down that navigation on the Danube shall be free and open for the nationals, commercial vessels and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. ⁵ No agreement could be reached on the question of the details of the régime of internationalisation. However, in a separate Declaration issued in December 1946, Great Britain, the United States, Soviet Russia and France agreed to convene a Conference to lay down a new régime for the Danube to give practical effect to the principles laid down in these Treaties. The Conference, which met in 1948 at Belgrade, was attended by the Soviet Union, the Ukrainian Soviet Republic, Bulgaria, Roumania, Yugoslavia, Czechoslovakia, Hungary the seven Danubian States as well as the United States, the United Kingdom and France. ⁶ It adopted a Convention which has entered into force as between the first-named seven States, but which is regarded as invalid by the three latter States for the reason that, notwithstanding an apparent assurance of equality for all States, ⁷ it sanctions,

¹ Subject to a limited reservation of *cabotage* (see below, § 187) to riparian States by Article 22.

² See Bacon in *A.J.*, 31 (1937), pp. 414-430; Auburtin in *Z.d.V.*, 9 (1939), pp. 338-354.

³ In 1927 the Permanent Court gave an Advisory Opinion upon the powers of the European Commission and of Roumania respectively in regard to the section of the maritime Danube between Braila and Galatz, and other matters: Series B, No. 14. For the literature thereon see below, vol. II, p. 74. The International Commission published a monthly periodical entitled *Le Danube International*.

⁴ Article 36 of the Treaty.

⁵ The principle of equality does not apply to traffic between ports of the same State (so-called '*petit cabotage*'). See also Wehle in *A.J.*, 40 (1946), pp. 100-120.

⁶ Italy, Belgium and Greece were not invited although Article 42 of the Paris Convention provided that all signatories shall be invited to any conference discussing the Convention.

⁷ Article 1 of the Convention reproduces literally the provisions, summarised in the text above, of the Peace Treaties of 1947 with Bulgaria, Hungary and Roumania relating to freedom of navigation on the Danube

in effect, the predominant control of the Soviet Union and excludes from participation in the Danube Commission Austria and Germany, which are riparian States, as well as all non-riparian States. Great Britain, France and the United States regard the Convention of 1921 as still in force.¹

Other
European
Rivers
after the
First
World
War.

§ 178a. The Peace Treaties at the end of the First World War declared a number of European rivers international, and foreshadowed a 'General Convention' which would provide a general régime applicable to them. Germany, Austria, Bulgaria, and Hungary agreed to accede to this convention.² The following parts of rivers were declared international: parts of the Elbe (*Labe*), of the Ulava (*Moldau*), of the Oder, of the Niemen, of the Morava (*March*), of the Theiss (*Thaya*), of the Vistula,³ and of the Pruth,⁴ and the Danube up to Ulm, including the then projected Rhine-Danube waterway.⁵ On these waterways the nationals, property, and flags of all States were to be treated on a footing of perfect equality with the nationals, property, and flags of the riparian States.⁶

Of these rivers and parts of rivers, the Elbe was made the subject of a special régime by a Statute of Navigation⁷ signed on February 22, 1922, which in the main adopted the

¹ See Sinclair in *B.Y.*, 25 (1948), pp. 398-404; Kuns in *A.J.*, 43 (1949), pp. 104-113; Smith in *Year Book of World Affairs*, 1950, pp. 190-212; Imbert in *R.U.*, 55 (1951), pp. 73-94.

² Treaty of Peace with Germany Article 338; with Austria, Article 299; with Bulgaria, Article 227; with Hungary, Article 276; see Wehberg, *Die Fortbildung des Flussschiffahrtsrechts im Versailler Friedensvertrag* (1919); Jacomini in *Rivista*, 3rd ser., i. (1921), pp. 542-546.

³ Article 18 of the Treaty of June 28, 1919, between the Allied and Associated Powers and Poland, by applying to the Vistula (together with the Bug and the Narev) the régime contained in Articles 332 to 337 of the Treaty of Peace with Germany pending the conclusion of a general convention, by implication declares it international; see Fauchille, § 527 (2); Libera, *Le*

régime juridique de la Vistule et du Niemen (1929).

⁴ Fauchille, § 528 (13)

⁵ 'And all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without transshipment from one vessel to another, together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river.' See Treaty of Peace (1919) with Germany, Article 331; with Austria, Article 291; Treaty with Poland, Article 18; Treaty with Roumania, Article 16.

⁶ See, for example, Treaty of Peace with Germany, Article 332.

⁷ Treaty Series, No. 3 (1923), Cmd. 1833; *A.J.*, 17 (1923), Suppl., pp. 227-242; and see Fauchille, § 527 (1).

principles of the Barcelona Convention of 1921 (about to be discussed) as to freedom of navigation and equality of treatment. The Oder¹ was placed under an International Commission. The Rhine and Moselle were not made subject to the general provisional régime. The Convention of Mannheim of 1868 was to continue for the time being to govern the navigation of the Rhine and Moselle, but subject to important modifications introduced by the Treaty of Peace with Germany.² In May 1936³ a Convention regulating the navigation of the Rhine was signed by all the States concerned, with the exception of Holland. But before it entered into force Germany declared on November 14, 1936, that she no longer considered herself bound by the provisions of Part XII. of the Treaty of Versailles concerning the Commissions of the Danube, the Rhine, the Elbe, and the Oder.⁴ She announced the cessation of German co-operation in the International River Commissions, but declared that, subject to reciprocal treatment of German ships, navigation on German waterways shall be open to ships of all States on a footing of equality with vessels of German nationals.

§ 178b. In 1921 a conference was summoned under the auspices of the League of Nations to draw up the general convention foreshadowed in the Peace Treaties, and there

The
Barcelona
Conven-
tion of
1921

¹ Fauchille, § 527 (2). See Labera, *op. cit.*, and, as to the Oder, *P.C.I.J.*, Series A, No. 23.

² See Articles 351-362; Fauchille, §§ 526 (2) 528 (1); Charles de Visscher in *R.I.L.* 3rd ser., 1 (1920), pp. 80-85; Hennig, *Rheinschiffahrt und Versailler Frieden* (1921), and in *Z.V.*, 29 (1921), pp. 20-26; Borel in *B.V.*, 1921-1922, pp. 75-89; Chamberlain, *The Regime of the International Rivers Danube and Rhine* (1923), pp. 137-283; Niboyet in *R.G.*, 30 (1923), pp. 5-33; Lederle in *Z.V.*, 13 (1926), pp. 73-76; and for the adhesion of Holland to the modification made by the Treaty of Peace with Germany see two protocols of January 21, 1921, and March 20, 1923: *L.N.T.S.*, 20, p. 112. See also Vomhoff, *Zur Revision der Mannheimer Rheinschiffahrtsakte* (1927); Strauss, *Les Juridictions en droit fluvial rhénan* (1930); Sause, *Die völkerrechtliche Stellung des Rheins*

(1931); Kruse, *Die internationalen Stromschiffahrtskommissionen* (1931); Telders, *Der Kampf um die Rheinschiffahrtsakte* (1934); Van Eysinga, *La Commission centrale pour la Navigation du Rhin* (1935); Hostie in *Hague Recueil*, vol. 28 (1929) (iii.), pp. 109-225; Corbigny in *R.G.*, 37 (1930), pp. 62-95 (with a bibliography); Lederle in *Z.V.*, 20 (1936), pp. 65-80; Biays in *R.G.*, 56 (1952) pp. 273-278.

³ Hudson, *Legislation*, vii. p. 290

⁴ For the text of the Note see *Z.V.*, 21 (1937), pp. 111-113. For the British attitude see Mr. Eden's statement in the House of Commons on November 10, 1936: 317 H.C. Deb., cols. 1334-5. See also *Documents*, 1936, pp. 282-286.

For a German view see Totzek, *Das Wesen und die innere Berechtigung der Strominternationalisierung* (1933); Otto, the same title (1933).

met at Barcelona the representatives of forty States, European, American, and Asian (the United States of America, the Argentine Republic, Russia, and Turkey¹ being notable absentees), together with delegates from Germany and Hungary in a consultative capacity. This conference produced a 'Convention and Statute on the Régime of Navigable Waterways of International Concern'² which has received many ratifications (including that of Great Britain) and accessions, and is now in force. With certain reservations as to *cabotage*³ and as to the navigation of warships and other vessels engaged upon public services,⁴ each of the contracting parties 'accords free exercise of navigation to the vessels flying the flag of one of the other contracting States on those parts of navigable waterways' (as defined by the Statute) 'which may be situated under its sovereignty or authority' (Article 2). In the exercise of this navigation 'the nationals, property, and flags of all contracting States shall be treated in all respects on a footing of perfect equality' (Article 4). No dues of any kind may be levied other than equitable dues in the nature of payment for services rendered in maintaining and improving the navigability of the waterway (Article 7). Each riparian State is bound to refrain from measures likely to reduce the facilities for navigation, and undertakes to remove any obstacles and dangers to navigation which may occur (Article 10). In the absence of special conventions making other arrangements, navigable waterways are administered by each of the riparian States under whose sovereignty or authority

¹ Who, however, by Article 101 of the Treaty of Lausanne of 1923 agreed to accede to the Barcelona Convention on Navigable Waterways.

² *L.N.T.S.*, 7, pp. 36-63; Treaty Series, No. 28 of 1923; *A.J.*, 18 (1924), Suppl., pp. 161-165; League of Nations Publication, *Barcelona Conference, Verbatim Records and Texts relating to the Convention on the Régime of Navigable Waterways of International Concern* (1921); Alvarez, *La Conférence de Barcelone sur le transit et le nouveau droit international*, in *Travaux de l'Académie des Sciences morales et politiques*,

81 (1921); Toulmin in *B.Y.*, 1922-1923, pp. 167-178; Fauchille, § 525 (14); Hostie in *R.I.*, 3rd ser., 2 (1921), pp. 532-567; Dupuis in *Hague Recueil*, 1924 (i.), pp. 248-262; Lederle in *Z.V.*, 13 (1926), pp. 64-76; Hajnal in *Strupp, Wört.*, iii, pp. 31-34; and see generally on inland navigation, Niboyet in *Annuaire*, 34 (1928), pp. 145-172; as to other conventions emanating from the Barcelona Conference of 1921 see below, § 258.

³ See Article 5 of the Statute, and below, § 187.

⁴ See Article 17 of the Statute.

they may be situated (Article 12). The Statute does not entail the withdrawal or prevent the future grant of any greater facilities for freedom of navigation under conditions consistent with the principle of equality (Article 20). The Statute does not attempt to regulate the rights and duties of belligerents and neutrals in time of war, but nevertheless 'continues in force in time of war so far as such rights and duties permit' (Article 15). Disputes, failing settlement by the mediation of the Advisory and Technical Committee of the League Organisation for Communications and Transit or by some other means, were to be referred to the Permanent Court of International Justice (Article 22).

The relation of the above-mentioned Barcelona Convention to the Peace Treaties is that it is 'the General Convention (to be) drawn up by the Allied and Associated Powers and approved by the League of Nations,' which is referred to in the Peace Treaties; but it does not modify any existing greater facilities for free navigation which those treaties may create upon conditions consistent with the principle of equality.

As some of the States wished to go even further than the opening of 'navigable waterways of international concern' and to open purely national waterways, an Additional Protocol of the same date was signed and ratified by certain States,¹ whereby they grant to one another, 'on condition of reciprocity' and in time of peace, either (a) 'on all navigable waterways' (that is, presumably, rivers, canals, and lakes) or ² (b) 'on all *naturally* navigable waterways' (that is, presumably, rivers and lakes) 'under their sovereignty or authority and accessible to ordinary commercial navigation to and from the sea, perfect equality of treatment for the flags of any signatory State 'as regards the transport of imports and exports without transhipment.'

General.— After the First World War there took place important applications of the principle of free navigation upon rivers, the essence of which is the admission of the

¹ Including Great Britain as to 'all navigable waterways.'

² States must declare on signing whether they accept alternative (a) or the more limited alternative (b).

flags of all States upon terms of equality and subject to the payment of such dues only as are equitably required for maintaining and improving the conditions of navigation. The principle cannot be described as a recognised rule of customary International Law, but machinery now exists in the Barcelona Convention of 1921 whereby it is capable of becoming a world-wide principle of conventional International Law. The League of Nations created an Organisation for Communications and Transit, an international body to safeguard and foster the principle.¹ It was under the auspices of the League and due largely to its Consultative Committee on Communications and Transit that a series of conventions relating to the unification of river laws was concluded in 1930.²

Utilisation of the Flow of Rivers.

§ 178c. Apart from navigation on rivers, the question of the utilisation of the flow of rivers is of importance.³ With regard to national rivers, the question cannot indeed be raised, since the local State is absolutely unhindered in the utilisation of the flow. But the flow of not-national,⁴ boundary, and international rivers is not within the arbitrary power of one of the riparian States, for it is a *res* of Inter-

¹ See Schücking und Wehberg, pp. 733-743.

² The Conference in question was held at Geneva in November and December 1930. It adopted, on December 9, the following Conventions: (1) Convention on the Registration of Inland Navigation Vessels, Rights in *rem* over Such Vessels, and other Cognate Questions. Doc. Conf. U.D.F. 58 (1); Hudson, *Legislation*, v. p. 822; Paunescu, *L'unification internationale des privilèges et hypothèques en droit maritime et en droit fluvial* (1933); (2) Convention on Administrative Measures for Attesting the Rights of Inland Navigation Vessels to a Flag. Doc. Conf. U.D.F. 59 (1); Hudson, *Legislation*, v. p. 848; (3) Convention for the Unification of Certain Rules Concerning Collisions in Inland Navigation. Doc. Conf. U.D.F. 57 (1); Hudson, *Legislation*, v. p. 8151; Chagnière-Hauptmann in *Navigations du Rhin*, viii. (1930), pp. 42-72;

Niboyet in *R.I.*, 3rd ser., 12 (1931), pp. 303-324, 547-577; Kuhn in *A.J.*, 26 (1932), pp. 121-124. And see Convention on the Measurement of Vessels Employed in Inland Navigation of November 27, 1925, which provides that measurement certificates issued by the competent authorities of one of the contracting parties in accordance with the provisions of the Convention shall be accepted, to the exclusion of others, by the authorities of the other contracting parties: *L.N.T.S.*, 67, p. 63. Hudson, *Legislation*, iii. p. 1808. In June 1947 an International Congress of River Transportation, convened by the International Committee on Inland Navigation, was held in Paris.

³ The work of Schücking, *Das internationale Wasserrecht* (1915), is most valuable on this question. See also Lederle's book, cited above, pp. 187-209, and the authors and cases referred to below, p. 475, n. 2.

⁴ Or pluri-national.

national Law¹ that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use² of the flow of the river on its part.³

¹ See above, § 127.

² For an exhaustive and careful treatment of the whole subject see Smith, *The Economic Use of International Rivers* (1931), whose conclusions are fully in accordance with the view propounded in the text. See also Hackworth, 1 § 86; Hyde, 1, pp. 316 *et seq.*, and Neumeyer, *Ein Beitrag zum internationalen Wasserrecht in Festschrift für G. Uhn* (1915). And see the Exchange of Notes of May 7, 1929, between Great Britain and Egypt concerning the use of the waters of the Nile for irrigation purposes, Treaty Series, No. 17 (1929), and, for the preceding discussion, Egypt No. 1 (1928), Cmd. 3050. As to the Gash river in Eritrea and the Sudan see the answer in the House of Commons, London *Times* newspaper, May 8, 1924. As to the Rio Grande see an opinion of the Law Officers of the United States, which appears to be of more general application and to conflict with the views as to user expressed above in § 178c, in *U.S. Opinions of Attorney General*, 21 (1893-1897), p. 271. See also *A.J.*, 6 (1912), pp. 478-486; Hawkins in *Temple Law Quarterly*, 5 (1930-1931), pp. 193-207. And see a decision of the German *Staatsgerichtshof* of June 18, 1927, in a litigation between Baden and Württemberg regarding the use of the Danube, which supports the view as to user expressed in the text: *Entscheidungen des Reichsgerichts in Zivilsachen*, vol. cxvi, Appendix, p. 18; *Annual Digest*, 1927-1928, Case No. 86. As to the *Chicago Sanitary District* case and the diversion of waters from the Great Lakes see Garner in *A.J.*, 22 (1928), pp. 837-840; Dealey, *ibid.*, 23 (1929), pp. 307-328; Williams in *Michigan Law Review*, 28 (1929-

1930), pp. 1-25; Smith in *B.Y.*, 9 (1930), pp. 144-157, and in *Canadian Bar Review*, 8 (1930), pp. 330-343; Eagleton in *R.I.*, 3rd ser., 13 (1932), pp. 398-409; Lynde in *Illinois Law Review*, 25 (1930-1931), pp. 243-260; Simsarian in *A.J.*, 32 (1938), pp. 488-518. On the agreement of 1948 between Pakistan and India concerning the waters of the Punjab see Andrássy in *Hague Recueil*, 1951. See also *Arizona v. California* (1931), 283 U.S. 423, as to which see Niles in *New York University Law Quarterly Review*, 10 (1932-1933), pp. 188-212; *Wisconsin v. Illinois*, 281 U.S. 200. See also *Connecticut v. Massachusetts* (1931), 282 U.S. 660; *A.J.*, 26 (1932), p. 163; *B.Y.*, 13 (1932), p. 189. Connecticut attempted to obtain an injunction against Massachusetts to prevent her from diverting the waters of two small non-navigable streams, running in their entire course within Massachusetts but tributary to the river Connecticut which flows through both States. The object was to provide a water supply for Boston and its neighbouring cities. It was held that the alleged prospective damage would be negligible in comparison with the benefit to Massachusetts. As to the diversion of water from the Meuse see above, § 178.

³ The Institute of International Law, at its meeting at Madrid in 1911, adopted a 'Réglementation internationale des cours d'eau internationaux au point de vue de leurs forces motrices et de leur utilisation industrielle et agricole,' for the consideration of the several States and any such action as they might think fit. See *Annuaire*, 24 (1911), p. 365. See also Bar in *R.G.*, 17 (1910), pp. 281-288.

A 'Convention¹ Relative to the Development of Hydraulic Power affecting more than one State' was signed at Geneva on December 9, 1923, by sixteen States and one Dominion, and is now in force. While not affecting the right of each State, 'within the limits of International Law' discussed above, to carry out upon its own territory operations for the development of hydraulic power, and without imposing upon any State the duty to take part in joint operations partly on its own territory and partly on the territory of another State or to submit to operations on the territory of another State which might cause serious prejudice to its neighbours, it provides that the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed and will regulate the situation created by them.²

IV

LAKES AND LAND-LOCKED SEAS

Vattel, i. § 294—Hall, § 38—Phillimore, i. §§ 205-206a—Twiss, i. § 181—Moore, i. §§ 135-143—Hyde, i. § 186—Bluntschli, § 316—Hackworth, i. § 91—Fauchille, §§ 495-405, 519—Despagnet, No. 407—Mérignhac, ii. 587-595—Pradier-Fodéré, ii. §§ 640-640—Nys, i. pp. 488-491—Calvo, i. §§ 301, 373, 374, 383—Fiore, ii. §§ 811-813, and Code, §§ 284 and 1005—Martens, i. § 100—Rivier, i. pp. 143-145, 230—Higgins and Colombos, §§ 150-158—Muschoff, *La Mer Noire et les détroits de Constantinople* (1901)—Schulthess, *Das internationale Wasserrecht* (1915)—Loderle, *Das Recht der internationalen Gewässer* (1920), pp. 125-129—Hunt in *A.J.*, 4 (1910), pp. 285-313.

Lakes and Land-locked Seas as State Property of Riparian States. § 179. Theory and practice agree upon the rule that such lakes and land-locked seas as are entirely enclosed by the land of one and the same State are part of the territory of

¹ *L.N.T.S.*, 36, p. 76; Treaty Series, No. 26 of 1925; *A.J.*, 20 (1926), Suppl., pp. 145-152. See also the resolution of the Seventh Pan-American Conference of December 1933, printed in *A.J.*, 28 (1934), Suppl., pp. 59-60.

² See *Société Énergie Électrique du Littoral Méditerranéen v. Compagnie Imprese Elettriche Liguri*, decided in 1939 by the Italian Court of Cassation (*Annual Digest*, 1938-1940, Case No. 47) for the interpretation of a

French Italian Treaty of 1914 on the utilisation of the River Roja which flows partly in Italy and partly in France. And see Annexes III and V to the Peace Treaty of 1946 with Italy concerning the supply of water and hydro-electric plants on the Italian frontiers with France and Yugoslavia. And see the document on hydro-electric use of international rivers issued in 1951 by the Economic Commission for Europe (Doc. E/ECF/EP/98).

that State. Thus Lake Windermere is part of British territory, and the Lake of Como is Italian territory. As regards, however, such lakes and land-locked seas as are surrounded by the territories of several States, no unanimity exists. The majority of writers consider these lakes and land locked seas to be parts of the surrounding territories, but several¹ dissent, asserting that these lakes and seas do not belong to the riparian States, but are free like the open sea. The practice of the States seems to favour the opinion of the majority of writers, for special treaties frequently arrange what portions of such lakes and seas belong to each of the riparian States.² Examples are the Lake of Constance,³ which is surrounded by the territories of Germany (Baden, Wurttemberg, Bavaria), Austria, and Switzerland (Thurgau and St. Gall); the Lake of Geneva, which belongs to Switzerland and France⁴, the Lakes of Huron, Erie, and Ontario, which belong to the British Dominion of Canada and the United States of America.⁵

§ 180. On analogy with so-called international rivers, such lakes and land-locked seas as are surrounded by the territories of several States, and are at the same time navigable from the open sea, are called 'international lakes and land-locked seas.' However, although some writers⁶ dissent, hitherto the Law of Nations has not recognised the principle

So-called
Inter-
national
Lakes and
Land-
locked
Seas.

¹ See, for instance, Calvo, i. § 301, Caratheodory in *Holtendorff*, ii. p. 378.

- As regards the utilisation of the flow of such lakes and seas, the position is the same as with regard to the utilisation of the flow of rivers. See above, § 178a, as to Lake Michigan. In time of war such lakes and seas are likened to the open sea for the purpose of the law of maritime prize: see *In re Craft captured on the Victoria Nyansa*, [1919] P. 83, and American cases there discussed, and see below, vol. ii. § 181 (n.).

² See Stoffel, *Die Fischererwerbsverhältnisse des Bodensees unter besonderer Berücksichtigung der an ihm bestehenden Hoheitsrechte* (1900): Loderle in *Strupp, Würt.*, i. pp. 149-151; Reber, *Der Bodensee im Völkerrecht in Annalen des deutschen Rechts*, 59 (1926), pp. 70-197; Doka, *Der Bodensee im internationalen Recht*

1927, Schuster *Die Entwicklung der Hoheitsverhältnisse am Bodensee* (1951).

³ See Fauchille, § 519 (3).

- As regards jurisdiction, fisheries, and navigation on the Canadian-American lakes see Moore, i. §§ 136-143. Callahan, *The Neutrality of the American Lakes and Anglo-American Relations* (1898), and *U.S. v. Rodgers* (1893), 150 U.S. 249 (Scott, Cases, p. 222). These lakes are not neutralised, because the agreement made by an exchange of Notes between Great Britain and the United States on April 28 and 29, 1817, does not stipulate neutralisation, but only limits the number of war-vessels to be kept on the lakes by the two Governments. See Moore, i. § 143.

⁶ See, for instance, Rivier, i. p. 230; Caratheodory in *Holtendorff*, ii. p. 378; Calvo, i. § 301.

of free navigation on such lakes and seas. In the case of the lakes within the Congo district, free navigation is stipulated for by treaty.¹ It is probable that in the near future this principle will be recognised, as practically all so-called international lakes and land-locked seas are actually open to merchantmen of all nations. Good examples of such international lakes and land-locked seas are the above-named Lakes of Huron, Erie, and Ontario.

The Black
Sea.

§ 181. The Black Sea is a land-locked sea which was undoubtedly wholly a part of Turkish territory as long as the enclosing land was all Turkish and as long as the Bosphorus and the Dardanelles, the approach to the Black Sea, which were exclusively part of Turkish territory, were not open to the merchantmen of all nations. But matters changed when Russia, Roumania, and Bulgaria became littoral States. It would be wrong to maintain that the Black Sea then became part of the territories of the four States, for the Bosphorus and the Dardanelles, although belonging to Turkish territory, are nevertheless parts of the Mediterranean Sea, and are open to merchantmen of all nations. The Black Sea is consequently now part of the open sea² and is not the property of any State. Article 11 of the Peace Treaty of Paris³ of 1856 neutralised the Black Sea, and declared it open to merchantmen of all nations, but interdicted it to men-of-war of the littoral as well as of other States, admitting only a few Turkish and Russian public vessels for the service of their coasts. But although the neutralisation was stipulated 'formally and in perpetuity,' it lasted only till 1870. In that year, during the Franco-Prussian War, Russia shook off the restrictions of the Treaty of Paris, and the Powers assembled at the Conference of London signed, on March 13, 1871, the Treaty of London,⁴ by which the neutralisation of the Black Sea and the exclusion of men-

¹ Article 15 of the General Act of the Congo Conference—see Martens, *N.R.G.*, 2nd ser., 10, p. 417—by which free navigation was originally stipulated, was abrogated by the Convention signed at St Germain on September 10, 1919 (Treaty Series, No. 18 (1919), Cmd. 477), so far as

the signatories of that Convention are concerned, but the free navigation of these lakes is provided for in the new Convention.

² See below, § 252.

³ See Martens, *N.R.G.*, 15, p. 775.

⁴ See Martens, *N.R.G.*, 18, p. 303.

of-war therefrom were abolished. But the right of the Porte to forbid foreign men-of-war passage through the Dardanelles and the Bosphorus¹ was upheld by that Treaty, as was also free navigation for merchantmen of all nations on the Black Sea. No change was made in the latter respect either by the Straits Convention annexed to the Treaty of Lausanne of 1923, which maintained freedom of transit and navigation between the Mediterranean Sea and the Black Sea,² or by the Montreux Convention of 1936 which replaced it.³ Thus the Black Sea continues to be an open sea.⁴

V

CANALS

Westlake, i pp 338-349. Lawrence, § 90, and *Essays*, pp 37-146. Phillimore, i §§ 99a and 907. Moore, in §§ 336-371. Hackworth, ii, §§ 216-219—Hyde i §§ 20, 198. Fauchille §§ 511-515. Sibtart, pp 763-782. Pradier-Fodere, ii §§ 658-660. Nys i pp 516-539. Rivier, i § 16—Calvo, i, §§ 376-380. Floure *Canal* §§ 988-992. Mertens ii § 59. De Loutch i pp 457-462—Sir Travers Twiss in *RI*, 7 (1875), p 682, 14 (1882), p 572, 17 (1885), p 615. Keith's Wheaton, pp 404-413. Holland, *Studies*, pp 270-293. Asser in *RI* 20 (1888), p 519. Rossignol *Le Canal de Suez* (1898). Camand *Étude sur le régime juridique du Canal de Suez* (1899)—Charles Roux *L'Isthme et le Canal de Suez* (1901). Othlom *Der Suezkanal* (1905). Müller Heymer *Der Panamakanal in der Politik der Vereinigten Staaten* (1909). Ariss *The Panama Canal* (1911). Cistelli *Il Canale di Panama* (1913). Bunau Varilla *Panama* (1913). Dedreux, *Der Suezkanal in internationalen Rechte* (1913). Laun *Die Internationalisierung der Meerengen und Kanäle* (1918). Whittuck *International Canals* (1920) (British Foreign Office Peace Handbook). Charles de Visscher, *Le Droit international des communications* (1924). Benno *La situation internationale du Canal de Suez* (1929). Hallberg *The Suez Canal* (1931). Wilson *The Suez Canal* (1933)—Saint Victor, *Le Canal de Suez* (1934)—Molano, *Il canale di Suez e il suo regime internazionale* (1936)—Rheinstrom, *Die völkerrechtliche Stellung der internationalen Kanäle* (1937). Schonfield, *The Suez Canal* (1939). Dupuis in *Hague Recueil*, 1924, i, pp 194-218—Hains, Davis, Knapp, Olney, Wambaugh, and Kennedy in *A J*, 3 (1909), pp 354 and 885, 4 (1910), p 314, 5 (1911), pp 298, 615, 620—Lehmann in *Z.I.*, 23 (1913), pp 46-102—Baty in *Jahrbuch des Völkerrecht*, i (1913), pp 453-480. Diena in *Z I*, 25 (1915), pp 14-22—Buell in *Genoa Special Studies*, vi (1935) No. 3. Wilson in *Grotius Society*, xxi (1935), pp 127-144. Hoskins in *A J*, 37 (1943), pp 373-385.

¹ See below, § 197.

² As to the position of the Straits see below, § 197.

³ See below, § 197.

⁴ Fauchille, §§ 497-503, discusses the status of a number of particular seas.

Canals
State Prop-
erty of
Riparian
States.

§ 182. That canals are parts of the territories of the respective territorial States is obvious from the fact that they are artificially constructed waterways. And there ought to be no doubt¹ that all the rules regarding rivers² must analogously be applied to canals. The matter would need no special mention at all were it not for the inter-oceanic canals which were constructed during the second half of the nineteenth century or are contemplated in the future. As regards one of these, the Corinth Canal, which connects the Gulf of Corinth with the Gulf of Ægina, there is not much to be said.³ It is entirely within the territory of Greece, and although the canal is kept open for navigation to vessels of all nations, Greece exclusively controls the navigation thereof.

The Suez
Canal.

§ 183. The most important of the interoceanic canals is that of Suez, which connects the Red Sea with the Mediterranean. In 1875 Sir Travers Twiss⁴ proposed the neutralisation of the canal, and in 1879 the Institute of International Law voted⁵ in favour of the protection of free navigation on the canal by an international treaty. In 1883 Great Britain proposed an international conference to the Powers for the purpose of neutralising it but it took several years before agreement was achieved. This was done by the Convention of Constantinople⁶ of October 29, 1888, between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia, and Turkey. This Treaty comprises seventeen articles, the more important stipulations of which are the following :

(1) The canal is open in time of peace as well as of war to merchantmen and men-of-war of all nations. No attempt to restrict this

¹ See, however, Holland, *Studies*, p. 278.

² That is, national rivers; see above, § 176. The waters in canals, at any rate a canal not internationalised, are national waters.

³ See below, vol. ii. § 325c, and Fauchille, §§ 514, 1460.

⁴ See *R.I.*, 7, pp. 682-694.

⁵ See *Annuaire*, 3 and 4, i., p. 349.

⁶ See Martens, *N.R.G.*, 2nd ser., 15, p. 557. Great Britain became a

party to the Convention of Constantinople subject to a certain reservation, which was, however, removed by Article 6 of the Declaration respecting Egypt and Morocco signed in London on April 8, 1904, by Great Britain and France (see *Parl. Papers*, France, No. 1 (1904), p. 9). See Holland, *Studies*, p. 293, and Westlake, i. p. 345. The status of the Suez Canal was discussed by the Permanent Court in the *Wimbledon* case, Series A, No. 1.

free use of the canal is allowed in time either of peace or of war. The canal can never be blockaded (Article 1).

(2) In time of war, even if Turkey is a belligerent, no act of hostility is allowed either inside the canal itself or within three sea miles from its ports.¹ Men-of-war of the belligerents have to pass through the canal without delay. They may not stay longer than twenty-four hours, a case of absolute necessity excepted, within the harbours of Port Said and Suez, and twenty-four hours must elapse between the departure from those harbours of a belligerent man-of-war and a vessel of the enemy. Troops, munitions, and other war material may neither be shipped nor unshipped within the canal and its harbours. All rules regarding belligerents' men-of-war are likewise valid for their prizes (Articles 4, 5, 6).

(3) No men-of-war are allowed to be stationed inside the canal, but each Power may station two men-of-war in the harbours of Port Said and Suez. Belligerents, however, are not allowed to station men-of-war in these harbours (Article 7). No permanent fortifications are allowed in the canal (Article 2).

(4) The signatory Powers are obliged to notify the treaty to others and to invite them to accede thereto (Article 16).

On December 18, 1914, Great Britain proclaimed a protectorate over Egypt. By the Treaties of Peace, Germany² and Austria³ consented to the transfer to the British Government of the powers conferred by the Suez Canal

¹ As to the position of the Canal during the First World War see *The Pindus, Heligoland, and Bontock* [1916] 2 A.C. 193; 2 B. and C.P.C. 116; *The Südmark* [1917] A.C. 620; 2 B. and C.P.C. 473; *H.M. Procurator v. Deutsches Kohlen Dept.* [1919] A.C. 291; 3 B. and C.P.C. 265; below, vol. II, p. 245, n. 3; and Garner, *Prize Law during the World War* (1927), §§ 174, 217. As to the position of the Suez Canal in the event of application of sanctions under Article 16 of the Covenant see Buell in *Geneva Special Studies*, vi (1935), No. 3, and in *R.I.*, 43 (1936), pp. 50-76; Guibal, *Peut-on fermer le Canal de Suez?* (1937); Landecker in *R.I. (Geneva)*, 13 (1935), pp. 204-220; Hoskins in *Foreign Affairs (U.S.A.)*, 14 (1935), pp. 93-101. Throughout the Italo-Abyssinian dispute it was never maintained by the British Government that, as between mem-

bers of the League of Nations the provisions of the Convention of 1868 possessed, in relation to Articles 16 and 20 (see above, § 16700) of the Covenant, a status different from or superior to any other treaty binding upon members of the League. This attitude, it is believed, was in accordance with the existing legal position. The difficulties in the way of closing the Suez Canal to Italian shipping were of a political, not legal, nature. See (1935) Cmd. 5072. It was stated on May 6, 1936, by the British Foreign Secretary that 'the Canal could not have been closed except by League action': 311 H.C. Deb. 5 s., cols. 1732-1741. And see generally Siegfried in *Hague Recueil*, 74 (1949) (i.), pp. 5-68 and Guillian in *Etudes Georges Scelle* (1950), vol. ii., pp. 735-752.

² Article 152.

³ Article 107.

Convention upon the Sultan, and by Article 17 of the Treaty of Lausanne, of 1923 Turkey renounced all her rights and titles over Egypt as from November 5, 1914. Great Britain, in declaring the independence of Egypt on February 28, 1922, reserved for future negotiation between the British and Egyptian Governments the question, amongst others, of the defence of the canal.¹ In Article 8 of the Treaty of Alliance of August 26, 1936, between Great Britain and Egypt, the parties recognised that, while the canal was an integral part of Egypt, it was an essential means of communication between the different parts of the British Empire. Provision was therefore made for ensuring the defence of the canal by British forces stationed in Egyptian territory in collaboration with Egyptian forces.²

The Kiel
Canal.

§ 183a. The Kiel Canal, which connects the Baltic with the North Sea, was constructed by Germany, mainly for strategic purposes. It runs wholly through German territory, and before the First World War, although Germany in fact kept it open to vessels of other nations, she controlled navigation, and could at any time have closed it to them, apart from any special treaty relations. But by Articles 380-386 of the Treaty of Peace with Germany it is provided that 'the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality,'

¹ See above, § 93a.

² Treaty Series, No. 6 (1937), Cmd. 5380. An Annex to Article 8 lays down the size of British forces to be stationed in Egypt. At the end of twenty years the question whether the presence of British forces in Egypt is still necessary, shall be decided, in case of disagreement, by the Council of the League or another body to be agreed upon by the parties. See *Le Goff in R.G.*, 46 (1939), pp. 142-158. For the British-Italian Agreement (Annex 8) of April 16, 1938, reaffirming the intention of the parties to abide by the provisions of the Convention of 1888, see Cmd. 5726 (1938); *Documents*, 1938 (1), p. 148. In August 1940, following upon previous precautionary measures, the British naval authorities in command of the

defences of the Canal took over the control of the interests of the Suez Canal Company. During the war the Canal was repeatedly attacked by Italian and German air forces. See *Hoskins in A.J.*, 37 (1943), pp. 373-385. Following upon hostilities in Palestine in 1948, Egypt, in pursuance of what she considered a lawful blockade of Israel subsequent to the armistice concluded between her and other Arab countries with Israel, established a régime of visit and search of ships passing through the canal. In 1951 the Security Council in a Resolution described the blockade thus instituted as unjustified interference with the rights of navigation and called, unsuccessfully, upon Egypt to terminate the restrictions thus imposed. See *I.C.J.Q.*, 1 (1952), pp. 85-91.

and that only such charges shall be levied as are intended to cover in an equitable manner the cost of maintaining or improving the conditions of navigation.

In 1923 the status of the Kiel Canal came before the Permanent Court in the case of the *Wimbledon*.¹ The Court by a majority,² in giving judgment against Germany, held that the Kiel Canal was to be open to States at peace with Germany, even if these were engaged in a war in which Germany was neutral. Further, the Court, after examining the treaty provisions affecting the Suez and Panama Canals (which, however, differ from the Kiel Canal provisions in that the last, unlike the two former, has not been placed outside the region of war), stated that the precedents of the Suez and Panama Canals³

'are merely illustrations of the general opinion according to which, when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.'

On November 14, 1936, Germany denounced unilaterally Articles 380-386 of the Treaty of Versailles. There was no express protest on the part of the majority of the interested signatories of the Treaty.⁴

§ 184. On November 18, 1901, the United States and ^{The Panama Canal.} Great Britain concluded the so-called Hay-Pauncefote Treaty⁵ providing for a canal between the Atlantic and Pacific Oceans, by whatever route might be considered

¹ Series A, No. 1. This was a British ship chartered to a French company and carrying a cargo of munitions from Salonika to Danzig for the Polish Government, then at war, or assumed for the purposes of the judgment to be at war, with Russia. The German Government refused to grant a request for the passage of this vessel through the Kiel Canal under Article 380 of the Treaty of Peace, on the ground that such passage would constitute a breach of certain German Neutrality

Orders and involve Germany in a breach of neutrality. The vessel eventually proceeded by Skagen to Danzig, and lost thirteen days owing to the denial of passage through the canal. For literature see below, vol. ii. § 259g.

² MM. An. Jotti and Huber and Professor Schucking delivered important dissenting judgments.

³ At p. 28.

⁴ See above, § 178a.

⁵ See Moore, iii. § 366-368.

expedient, and superseding the Clayton-Bulwer Treaty.¹ Under the Treaty of 1901 the United States has the exclusive right of providing for the regulation and management of the canal, and a number of rules, substantially as embodied in the Suez Canal Convention, are adopted 'as the basis of the neutralisation' of the canal.²

It is to be free and open to the vessels of commerce and of war of all nations observing these rules 'on terms of entire equality',³ it is never to be blockaded, nor shall any right of war be exercised or any act of hostility be committed within it. The United States is, however, at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.⁴ The transit of belligerent vessels and prizes through the canal is to be effected with the least possible delay, and they may not revictual, or take any stores, except so far as may be strictly

¹ Already in 1850 Great Britain and the United States, in the Clayton-Bulwer Treaty of Washington (see Martens, *N.R.U.*, 15, p. 187, and Moore, in §§ 351-365, applicable also by Article 8 to a proposed canal through the Isthmus of Panama), had stipulated the free navigation and neutralisation of a canal between the Pacific and the Atlantic Ocean proposed to be constructed by way of the river San Juan de Nicaragua and either or both of the lakes of Nicaragua and Managua. In 1881 the building of a canal through the Isthmus of Panama was taken in hand but in 1888 the work was stopped in consequence of the financial collapse of the company undertaking its construction. After this the United States came back to the old project of a canal by way of the river San Juan de Nicaragua. For the eventuality of the completion of this canal, Great Britain and the United States signed, on February 3, 1900, the Convention of Washington, which stipulated for free navigation on, and neutralisation of, the proposed canal on the analogy of the Convention of Constantinople, 1888, regarding the Suez Canal; but this convention was not ratified, because the Senate made amendments which Great Britain could not accept.

² The status of the Panama Canal was discussed by the Permanent Court

in the *Humbleton* case, Series A, No. 1.

³ For the dispute with the United States which arose upon this expression and was amicably settled in 1914 see *Parl. Papers Misc.*, No. 12 (1912), Cmd. 6451. Oppenheim, *The Panama Canal Conflict* (2nd ed. 1913), Richards, *The Panama Canal Controversy* (1913), Root, *The Obligations of the United States as to Panama Canal Tolls* (1913), and articles in the *Law Magazine and Review*, 38 (1912-1913), *A.J.*, 6 (1912), and 7 (1913), *R.I.*, 2nd ser., 14 (1912), *Z.I.*, 6 (1913) *Z.I.*, 23 (1913), *Jahrbuch für Völkerrecht*, 1 (1913), and *A.S. Proceedings* 7 (1913).

⁴ On the question whether the United States has a right to fortify the Panama Canal see Hains and Davis in *A.J.*, 3 (1900), pp. 354-364 and pp. 885-904, and Olney, Wambaugh, and Kennedy in *A.J.*, 5 (1911), pp. 294, 615, 620. In February 1929 the United States issued regulations concerning air navigation in the Panama Canal Zone and declared the latter, including the three-mile limit, to be a 'military air space reservation'. The regulations prohibit, *inter alia*, the making of any photograph of military or naval installations of the Panama Canal Zone without the permission of the Governor. *A.J.*, 23 (1929), Suppl., pp. 121-129. See also above, § 171.

necessary. No belligerent is to embark or disembark troops or munitions of war in the canal, or in the waters within three marine miles of either end of it. A belligerent war-vessel may not remain in such waters for more than twenty-four hours at any one time, except in distress, and may not depart within twenty-four hours from the departure of a war-vessel of the other belligerent. All works necessary to the construction, operation, and maintenance of the canal are to enjoy immunity from attack and injury in time of war as in time of peace.

On November 18, 1903, the so-called Hay-Varilla Treaty¹ was concluded between the United States and the new Republic of Panama, according to which, on the one hand, the United States guarantees and will maintain the independence of the Republic of Panama, and, on the other hand, the Republic of Panama grants to the United States in perpetuity for the construction, administration, and protection of a canal between Colón and Panama the use, occupation, and control of a strip of land required for the construction of the canal, and, further, of land on both sides of the canal to the extent of five miles on either side with the exclusion, however, of the cities of Panama and Colón and the harbours adjacent to these cities.² According to Article 18 of this Treaty the canal and the entrance thereto shall be neutral in perpetuity, and shall be open to vessels of all nations as stipulated by Article 3 of the Hay-Pauncefote Treaty.

The Panama Canal was opened in 1914,³ and rules for its operation and navigation were issued by the United States.⁴

¹ See Martens, *N.R.G.*, 2nd ser., 31, p. 599.

² In the Treaty of March 2, 1936 (ratified in 1939), the United States waived its right to make use of the lands and waters outside the Canal Zone, other than those already under its jurisdiction (Art. 2): *A.J.*, 34 (1940), Suppl., p. 140.

³ By a Treaty between the United States and Nicaragua, signed at Washington on August 5, 1914, and ratified on June 22, 1916, Nicaragua granted to the United States, in return for a sum of \$3,000,000, the exclusive right to construct and manage an inter-

oceanic canal through Nicaragua. See *A.J.*, 10 (1916), Suppl., p. 258, and see Finch in *A.J.* 10 (1916), pp. 344-351; and for a protest against this Treaty see above, § 135 (2).

⁴ After the outbreak of the First World War, on November 13, 1914, a proclamation was issued prescribing rules for its use by belligerent vessels (*A.J.*, 9 (1915), pp. 167-175), and when the United States had entered the war a further proclamation was issued on May 23, 1917 (*A.J.*, 11 (1917), Suppl., pp. 165-168; and see below, vol. II, § 72 (4)). For the various measures taken by the United States in relation to the Panama

VI

MARITIME BELT

Grotius, ii. c. 3, §§ 9-12—Vattel, i. §§ 287-290—Hall, §§ 41, 42—Westlake, i. pp. 187-196—Phillimore, i. §§ 197-201—Moore, i. § 144-152—Wheaton, §§ 177-180—Hyde, i. §§ 141-145, 154—Fenwick, pp. 250-256—Bluntschli, §§ 302, 309-310—Hackworth, i. §§ 92-99—Heffter, § 75—Fauchille, §§ 491-495, 517, 518, 624-626—Sibert, pp. 719-738, 783-787—Despagnot, §§ 403-414—Pradier-Fodéré, ii. §§ 617-639—Nys, i. pp. 540-569—Rivier, i. pp. 145-153—Calvo, i. §§ 353-365—Suarez, §§ 112-114, 121—Fiore, ii. §§ 801-807, and *Code*, §§ 267-271, 276-278, 1030—Martens, i. § 90—De Loutch, i. pp. 389-400, 425-430—Travers, §§ 885-943—Holland, *Lectures*, pp. 139-147—Smith, ii. pp. 124-254—Gidel, *Le droit international public de la mer*, vol. ii. (1932) and vol. iii. (1934) (this is a monumental work indispensable for any detailed study of the question)—Higgins and Colombos, §§ 77-142, 279-286—Bynkershoek, *De Dominio Maris and Quaestiones Juris publici*, i. c. 8—Ortolan, *Diplomatie de la mer* (1856), i. pp. 150-175—Godey, *La mer côtière* (1896)—Schücking, *Das Küstenmeer im internationalen Rechte* (1897)—Perels, § 5—Fulton, *The Sovereignty of the Sea* (1911), pp. 537-603—Raestad, *La mer territoriale* (1913), and in *R.G.*, 10 (1912), pp. 598-623, 21 (1914), pp. 401-420—Hille, *Die Rechtsverhältnisse der Küstengewässer* (1918)—Crocker, *The Extent of the Marginal Sea* (Collection of Official Documents and Views of Representative Publicists (Washington, 1919))—Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927)—Mercker, *Die Küstengewässer im Völkerrecht* (1927)—Masterson, *Jurisdiction in Marginal Seas* (1929)—Bustamante y Sirven, *La mer territoriale* (translated from Spanish, 1930)—Coenen, *Das Küstenmeer im Frieden* (1933)—Munch, *Die technischen Fragen des Küstenmeers* (1934)—Baldoni, *Il mare territoriale nel diritto internazionale comune* (1934)—Cansacchi, *L'occupazione dei mari costieri* (1936)—Meyer, *The Extent of Jurisdiction in Territorial Waters* (1937)—Florio, *Il mare territoriale a la sua delimitazione* (1947)—Martens in *R.G.*, 1 (1894), pp. 32-43—Aubert, *ibid.*, pp. 429-441—Engelhardt in *R.I.*, 26 (1891), pp. 209-213—Godey in *R.G.*, 3 (1896), pp. 224-237—Lapradelle in *R.G.*, 5 (1898), pp. 264-284, 309-347—Kraemer in *Z.V.*, 7 (1913), pp. 123-152—Salmond in *L.Q.R.*, 34 (1918), pp. 235-252—Brown in *A.S. Proceedings*, 1923, pp. 15-31—Nielsen, *ibid.*, pp. 32-39—Paulus in *R.I.*, 3rd ser., 5 (1924), pp. 397-424—Clemmson in *B.Y.*, 1925, pp. 144-158—Fenn in *A.J.*, 20 (1926), pp. 465-482 (historical)—Grey in *L.Q.R.*, 42 (1926), pp. 350-367—Niemyer in *Z.I.*, 36 (1926), pp. 1-40—Report for League Codification Committee by Schücking, de Magalhães, and Wickersham in *A.J.*, 20 (1926), Special Suppl. pp. 62-147

Canal as a neutral and a belligerent in the Second World War see Padelford, *The Panama Canal in Peace and War* (1942), pp. 122-132. When in 1941 Congress provided for the acquisition of domestic and foreign vessels within the jurisdiction of the United States, the President authorised the seizure of foreign vessels lying idle not only in the ports of the United States, but

also in those of the Philippine Islands and of the Panama Canal: see *ibid.*, pp. 177-180. See also generally McCain, *The United States and the Republic of Panama* (1937); Padelford, *op. cit.*, and in *A.J.*, 34 (1940), pp. 416-442, 601-637, and 35 (1941), pp. 54-89; Cosentini in *R.I.F.*, 8 (1939), pp. 175-189.

(an exhaustive study)—Hostie in *R.I.*, 3rd ser., 8 (1927), pp. 215-238—Grey, *ibid.*, pp. 123-142—Wilson in *A.S. Proceedings*, 1928, pp. 93-101—Raestad in *R.I.*, 3rd ser., 11 (1930), pp. 147-163—Kelsen in *Hague Recueil*, vol. 42 (1932) (iv.), pp. 226-234—Hidel, *ibid.*, vol. 48 (1934) (ii.), pp. 137-240—Baty, pp. 145-170 and in *A.J.*, 22 (1928), pp. 503-537—Harvard Draft Convention (and Comment), *A.J.*, 23 (1929) April, Special Number, pp. 243-365—Conference for the Codification of International Law, *Bases of Discussion*, vol. ii Territorial Waters—Walker in *B.Y.*, 22 (1945), pp. 210-231.

§ 185. The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the jurisdiction of the littoral States. But no unanimity exists as to the nature of the jurisdiction of the littoral States.¹ Many writers maintain that it amounts to sovereignty, that the maritime belt is a part of the territory of the littoral State, and that the territorial supremacy of the latter extends over its coast waters. Whereas it is nowadays universally recognised that the open sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the littoral States, although foreign States have a right of innocent passage for their merchantmen through the coast waters.² On the other hand, a minority of writers³ deny the territorial character of the maritime belt, and concede to the littoral States, in the interest of the safety of the coast, only certain powers of control, jurisdiction, police, and the like, but not sovereignty. The practice of States seems to agree with the first-mentioned view. Thus, for instance, in the Air Navigation Convention of 1919⁴ the contracting parties defined State territory as including, amongst others, the territorial waters adjacent

State Property of Maritime Belt contested.

¹ Fauchille, §§ 492-492 (9), discusses the different theories in great detail.

² But these waters are not national but territorial waters: see above, § 172.

³ Their arguments are very ably stated by Lapradelle in *R.G.*, 5 (1898), pp. 273-284 and 300-330. See also the Thireaut case, decided on May 24, 1936, by the French *Conseil d'État* to the effect that territorial waters do not form part of State territory: *R.I. (Paris)*, 17 (1936), pp. 303-310; *Annual Digest*, 1935-1937, Case No

59. And see, to the same effect, the decision of the Civil Tribunal of Brest of April 27, 1939: *ibid.*, 1938-1940, Case No. 48 (*Compagnie Française des Câbles Télégraphiques v. Administration Française des Douanes*).

⁴ See below, p. 519. In the course of the preparatory work of the Hague Codification Conference in 1930 practically all States, including Great Britain, Germany, Italy, and Japan, expressed themselves in favour of the same principle: *Bases of Discussion*, ii, pp. 12-17.

thereto (Article 1). Supporters of that view rightly maintain¹ that the universally recognised fact of the exclusive right of the littoral State to appropriate the natural products of the sea in the coast waters, especially the right to fisheries therein, is consistent only with the territorial character of the maritime belt. The argument of their opponents that, if the belt is to be considered a part of State territory every littoral State must have the right to cede and exchange its coast waters, can properly be met by the statement that territorial waters of all kinds are inalienable appurtenances² of the littoral and riparian States.³

Breadth
of Mari-
time Belt

§ 186. Be that as it may, the question arises how far into the sea those waters extend which are coast waters, and therefore under the jurisdiction of the littoral State. Here, too, no unanimity exists as to the breadth of the belt or the point on the coast from which it is to be measured

(1) With regard to the latter the general, though not the universal, practice has been that territorial waters are drawn along the low-water⁴ mark following the sinuosities of the coast. Although the Hague Conference of 1930 adopted no Convention on the subject of territorial waters, the attitude

¹ Hall, § 41. The question is discussed by Heilborn, *System*, pp. 36-58. Schücking, *op. cit.* pp. 14-20, and Gidel, *in* pp. 23-45, 153-192.

² See above, § 175. Bynkershoek's opinion (*De Dominio Maris*, c. 5) that a littoral State can alienate its maritime belt without the coast itself is at the present day untenable. This question was discussed in connection with the Belgo-Dutch negotiations regarding the Scheldt Treaty and the Passage of Wielingen: see above, § 175, and Fauchille, § 492 (10), p. 172, n. 1.

³ The fact that Article 1 of (Convention 13 (Rights and Duties of Neutral Powers in Maritime War) of the Second Hague Peace Conference, 1907, speaks of 'sovereign rights . . . in neutral waters' would seem to indicate that the States themselves consider their sway over the maritime belt to be of the nature of sovereignty. The Privy Council in *Attorney-General for British Columbia v. Attorney-General*

for Canada [1914] A.C. 153, at p. 174, declared that the question was not settled. And see the Lubeck Bay dispute mentioned below, § 191, p. 505, n. 1.

⁴ Some writers held that the line is to be drawn along the high water mark. Others drew it along the depths where the waters cease to be navigable. However, the general tendency was to treat the low water mark as the starting point. See *Annuaire* 13, p. 329, for a Resolution of the Institute of International Law to that effect. See also *Annuaire*, 25 (1912) pp. 375-396; 26 (1913), pp. 403-412, and 32 (1925), pp. 146-164. See, in particular, Gidel, *in*, pp. 45-152, 493-603. In the *Anglo-Norwegian Fisheries* case the Court 'had no difficulty in finding' that for the purpose of measuring the breadth of the territorial waters the low-water mark—as opposed to the high-water mark or the mean between the two tides—has been generally accepted in practice: *I.C.J. Reports*, 1951, p. 128.

of Governments both prior to and during the Conference disclosed general agreement in support of that method.¹ However, in the *Fisheries* case between the United Kingdom and Norway, decided in 1951, the International Court of Justice held that the belt of territorial waters may follow the general direction of the coast and not necessarily all the sinuosities of the coast. The Court gave its approval to the method of straight base-lines used in the past by some States and consisting in the selection of appropriate points on the low-water mark and drawing straight lines between them. For this reason the Court held to be in conformity with International Law a Norwegian decree of 1935 which delimited the Norwegian fisheries zone² by reference to the latter method. These straight lines of substantial length,³ thus drawn, encompassed large stretches of water which hitherto were generally believed to form part of the high seas.⁴ The principle of straight base-lines following the general direction of the coast must henceforth be regarded as having acquired a prominent place in International Law, though it is probable that only a further elaboration, in the sense of setting a limit to the length of the straight lines and their distance from the coast, of the principles established by the Court in this important Judgment can transform it into a working rule of International Law.⁵

¹ See *Bases of Discussion* ii pp. 35-39, and Boggs in *I J* 24 (1930) pp. 541-548. See also the Dissenting Opinion of Judge McNair in the *Fisheries* case (*I C J. Reports* 1951, p. 162) for an analysis of the replies of Governments. It appears that while seventeen Governments expressed themselves in favour of the practice of following the low-water mark all along the coast, only Norway, Sweden, Poland, Soviet Russia and probably Latvia favoured the system of straight lines connecting selected points of the mainland and islands. The relevant sub-committee of the Hague Conference of 1930 formulated the low-water mark rule as 'following all the sinuosities of the coast'—though it admitted exceptions in the case of bays, islands in the vicinity of coasts, and groups of islands.

² Although the essential issue thus

related to fishery zones the parties, with the concurrence of the Court, appear to have agreed to treat it as decisive of the extent of Norwegian national waters—to which the Court, for reasons which are not apparent, referred as the 'territorial sea' (p. 125).

³ They included lines 19, 25-39 and even 44 miles long.

⁴ As stated by Judge Hsu Mo (at p. 156), in one area, that of Loppthavet, the lines—forty-four miles long—affected an area of seven hundred square miles.

⁵ The Court attached importance to the fact that although the act of delimitation of the sea area is necessarily an unilateral act of the coastal State, the validity of the delimitation depends, in relation to other States, upon International Law. The Court formulated certain basic considera-

(2) With regard to the breadth of the maritime belt, various opinions have in former times been held and quite exorbitant claims have been advanced by different States, such as a range of sixty or a hundred miles, or a range of vision (about fourteen miles). Although Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis*¹ is now generally recognised by theory and practice, and consequently a belt of such breadth is considered under the sway of the littoral State as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing. Since at the end of the eighteenth century the range of artillery was about three miles or one marine league, that distance became generally² recognised as the breadth of the maritime belt.

tions for judging the propriety, from the point of view of International Law, of the delimitation thus undertaken. These considerations include the dependence of the territorial sea upon the land domain so as to avoid any appreciable departure from the general direction of the coast; the question whether sea areas lying within the base-lines are sufficiently linked to the land to be subject to the régime of internal waters; and 'certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage' (at p. 133). It is believed that in view of the wide acceptance, prior to the Judgment of the Court, of the base-line as measured from the sinuities of the coast the legitimacy of the application of the standards formulated by the Court must be made dependent upon the willingness of the State which claims to delimit its waters by the method of straight lines, to submit any disputed delimitation to judicial determination by reference to the tests as laid down by the Court. In the absence of such compulsory adjudication, the system sanctioned by the Court must result in the substitution of a precarious and subjective test for a rule, hitherto generally followed, capable of objective application.

On this and other aspects of the Anglo-Norwegian Fisheries case see Waldoek in *B.Y.*, 28 (1951), pp. 114-171; Johnson in *I.C.L.Q.*, 1 (1952),

pp. 145-180; Wilberforce in *Grotius Society*, 38 (1952), pp. 151-168; Evenson in *A.J.*, 46 (1952) pp. 609-630; Bourquin in *Acta Scandinavica*, 22 (1952), pp. 102-132; Smith in *Year Book of World Affairs*, 1953, pp. 283-307; Auby in *l'Annuaire*, 80 (1953), pp. 25-55; Julliy in *Friedenstaube* 52 (1953), pp. 48-86. And see Boggs in *A.J.*, 45 (1951), pp. 240-266 as to base-lines in relation to the various problems of the delimitation of territorial waters.

¹ For the history of the cannon shot rule see Walker in *B.Y.*, 22 (1915), pp. 210-231.

² But not universally. Thus Norway claims a breadth of four miles and Spain a breadth of six miles. As regards Norway see Aubert in *R.G.*, 1 (1894), pp. 429-441; Boye in *Bulletin de l'Institut Intermédiaire International*, 18 (1) (1928), pp. 2-8; and a Memorandum prepared by the Royal Norwegian Committee in November 1924 and entitled 'The Principal Facts concerning Norwegian Territorial Waters'. As regards Sweden see Gihl in *R.I.*, 3rd ser., 7 (1926), pp. 525-554; *Till Frågan om Gränsen för Sveriges Territorialvatten* (1928) (a publication of the Swedish Foreign Office); Gihl, *Gränsen för Sveriges Territorialvatten* (1930); Söderqvist, *Droit international maritime suédois* (1930). See also generally on the Scandinavian claims Kalijarvi in *A.J.*, 26 (1932), pp. 57-65. As to Iceland, with regard to fisheries, see

But no sooner was a common doctrine originated than the range of projectiles increased with the manufacture of heavier guns. Moreover, technical developments in sea transport and communications, in the range of guns, and other changes have not been altogether without effect upon the three-miles rule.¹ Although the great majority of States, as shown by their attitude during the Hague Codification Conference, adhere to the limit of three miles,² many of them make it dependent upon the recognition of

Bohmert in *Z.V.*, 20 (1936), pp. 385-433; and as regards Denmark, Norway, and Sweden, Stael Holstein in *R.I.*, 3rd ser., 5 (1924), pp. 630-679, and in *Z.I.*, 13 (1926), pp. 321-323. As to Russian claims in the Baltic see Schapiro in *B.V.*, 27 (1950), pp. 439-450. See Anzilotti in *Rivista*, 11 (1917), pp. 107, 108, 166, who considers that no rule of International Law has been developed to take the place of the abandoned 'shore batteries' rule. And see, for several claims to more than three miles for the purpose of neutrality, below, vol. II, § 71. And note the view that there is not one maritime belt but a number of them varying in breadth according to the nature of the interest to be protected: fisheries, sanitation, neutrality, etc. (see Paulus, *op. cit.*). For a statement and examination of the claims of a number of States see Hyde, i, §§ 142, 143; Jessup, *op. cit.*, pp. 49-60; Baty in *A.J.*, 22 (1928), pp. 503-537; Bustamante y Sirven, *La mer territoriale* (1930), pp. 189-200; Gidel, in pp. 493-663; Reeves in *A.J.*, 24 (1930), pp. 491-494; Borchard, *ibid.*, 40 (1946), pp. 56-66. For an extract from the minutes of the Second Committee of the Codification Conference showing the claims of the various States see *A.J.*, 24 (1930), Suppl., pp. 253-257; see also Schücking, *Der Kodifikationsentwurf betreffend die Rechtsverhältnisse des Küstenmeers* (1931); Raestad in *R.I.* (Paris), 7 (1931), pp. 107-146, and the answers of various States in *Bases of Discussion*, II, pp. 22-33. As to Greenland fisheries see Bohmert in *Z.V.*, 21 (1937), pp. 18-35.

¹ See the British reply, at pp. 28, 29 of the *Bases of Discussion*, vol. II.

² Among those adhering to the

three-mile limit were Great Britain and the British Dominions, the United States, France, Germany, Japan, Belgium, Holland, China, and Poland; among the States claiming a six mile limit were Italy, Brazil, Spain, Persia, Roumania, Turkey, and Yugoslavia. It may be helpful to reproduce here the statistical estimate made in 1953 by M. François, the Rapporteur of the International Law Commission, on the subject of the position then prevailing with regard to the claims of various States: (1) Countries following the three mile rule either alone or in combination with a contiguous zone for customs, fiscal or sanitary control not exceeding twelve miles: Australia, Belgium, China, Denmark, Germany, India, Indonesia, Israel, Japan, Liberia, Netherlands, New Zealand, Pakistan, Poland, Union of South Africa, United Kingdom, United States of America. (2) Countries following the four-mile rule: Finland, Iceland, Norway, Sweden. (3) Countries claiming the six-mile rule: Colombia, Cuba, France (3-6 miles), Greece (10 miles for security purposes), Iran (12 miles for security purposes), Italy (12 miles for security purposes), Lebanon (20 kilometres for fishing purposes), Portugal, Saudi Arabia, Spain, Syria, Turkey (30-60 kilometres for certain purposes), Uruguay, Yugoslavia (10 miles for fishing purposes). (4) Countries claiming twelve miles: Bulgaria, Ecuador, Egypt, Guatemala, Roumania, Union of Soviet Socialist Republics. The following States raised claims, by reference to the Continental Shelf, to special rights concerning navigation and (or) fishing: Argentina, Chile, Costa Rica, Honduras, Iceland, Korea (South), Mexico, Nicaragua, Panama, Peru.

a further protective, so-called contiguous, zone which for many purposes is indistinguishable from territorial waters.¹ And even States, like Great Britain, which reject the idea of a contiguous zone not subject to the principle of the freedom of the sea admit that circumstances may arise in which a State cannot tolerate acts performed in the zone contiguous to its territorial sea, and that in these circumstances it is the duty of foreign States to agree to some measure of control over their merchant-vessels on the part of the littoral State.² It was owing to disagreement on the question of the extent of the maritime belt and of the contiguous zone that the Codification Conference of 1930 produced no convention on territorial waters.³

Fisheries,
Cabotage,
Police,
and Maritime Cere-
monials
within the
Belt.

§ 187. There is general agreement as to the following principles⁴ with regard to fisheries, cabotage, police, and maritime ceremonials within the maritime belt:

(1) The littoral State may reserve the fisheries within the maritime belt⁵ exclusively for its own subjects, whether

¹ These include Germany, Belgium, France, and Poland.

² *Loc. cit.* The Institute of International Law has voted in favour of six miles, or two marine leagues, as the breadth of the belt: see *Annuaire*, 13, p. 286. A good survey of the attitude of all maritime States concerning the width of the maritime belt is given by Raestad in *R.G.*, 21 (1914), pp. 401-420; by Crocker, *op. cit.*; and in Report for League Codification Committee, *op. cit.*, pp. 70-76. The Anglo-American Liquor Treaty of 1924 (see below, § 190 (ii)) contains a solemn affirmation of the principle of three marine miles. And see p. 186, n. 2.

³ See below, § 190 (1).

⁴ For a suggestion to create an *Office International des Eaux* for the determination and study of questions connected with territorial waters see the Report by Strupp in *Annuaire*, 35 (1) (1929), pp. 154-181, and the observations by Gidel, *ibid.*, pp. 199-219.

⁵ See Gidel, *ibid.* pp. 222-325 and Higgins and Colombos, §§ 121-130. Most treaties stipulate for the purpose of fisheries a territorial maritime belt

three miles wide. See, for instance, Article 2 of the Hague Convention concerning Police and Fishery in the North Sea of May 6, 1882. Martens, *A.R.G.*, 2nd ser., 9, p. 556. On the British municipal aspect of fisheries within the maritime belt see *Attorney General for British Columbia v. Attorney General for Canada* [1914] A.C. 163. On the history see Fulton, *op. cit.*; Fenn, *Origin of the Right of Fishery in Territorial Waters* (1926), and Bower in *J.C.L.*, 3rd ser., 9 (1927), pp. 220-227. For a comprehensive survey of and comment on various treaties see Daggett in *A.J.*, 28 (1934), pp. 693-717. See also Reid, *International Servitudes* (1932), Chapters vii., viii., and ix. And see the Temporary Fisheries Agreement of May 1930 between Great Britain and Soviet Russia, allowing British boats to fish within three to twelve miles of the northern coasts of Russia: Treaty Series, No. 22 (1930). For a recent example of a treaty regulating the use of the shore see the Convention of 1928 between Japan and Soviet Russia: *L.N.T.S.*, 80, pp. 341-399. As to the Spitzbergen fisheries see Böhmert in *Z.G.V.*, 9 (1939), pp. 317-338, 449-482.

fish or pearls or amber or other products of the sea are under consideration.

(2) The littoral State may, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called *cabotage*,¹ and reserve this *cabotage* exclusively for its own vessels. *Cabotage* meant originally navigation and trade along the same stretch of coast between the ports thereof, such coast belonging to the territory of one and the same State. However, the term *cabotage* or coasting trade as used in commercial treaties comprises now² sea trade between any two ports of the same country, whether on the same coasts or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of colonies or dominions of such countries.

(3) The littoral State may exclusively exercise powers of police and control within its maritime belt in the interest of its customs duties, the secrecy of its coast fortifications, and the like. Thus foreign vessels can be ordered to take certain routes and to avoid others.

(4) The littoral State may make laws and regulations regarding maritime ceremonies to be observed by such foreign merchantmen as enter its territorial maritime belt.³

§ 188. Although the maritime belt is a portion of the territory of the littoral State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for inoffensive navigation, *cabotage* excepted. And it is the common conviction⁴ that every State has by customary International Law the right to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the open sea, for without this right navigation on the open sea by vessels of all nations

¹ See Pradier-Fodéré, v. §§ 2441. 2442.

² See Twiss, i. § 194; Gidel, iii. pp. 193-212; Higgins and Colombos, § 131.

³ See below, § 579.

⁴ See above, § 142.

would in fact be an impossibility. And it is a consequence of this right that no State can levy tolls for the mere passage of foreign vessels through its maritime belt. Although the littoral State may spend a considerable amount of money on the erection and maintenance of lighthouses and other facilities for safe navigation within its maritime belt, it cannot make foreign vessels merely passing pay for such outlays. It is only when foreign ships cast anchor within the belt or enter a port that they can be made to pay dues and tolls by the littoral State. It is occasionally maintained that all nations have the right of inoffensive passage for their merchantmen by usage only, and not by the customary Law of Nations, and that, consequently, in strict law a littoral State may prevent such passage. This view cannot be accepted. An attempt on the part of a littoral State to prevent free navigation through the maritime belt in time of peace would not be legally warranted.

But a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognised.¹ Although many writers assert the existence of such a right, many others emphatically deny it. As a rule, however, in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt.² It may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and, secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war.³ However that may be, *passage* must not be confounded with entering a port or roadstead.

¹ The answer of Governments in this matter in connection with the Codification Conference of 1930 revealed that the differentiation in the treatment of merchant-vessels and men-of-war was smaller than was expected: see *Bases of Discussion*, ii. pp. 65-78. See also Hackworth, i. § 94; Higgins and Colombos, § 215. In the case of *The David* the United

States-Panama Claims Commission held that, notwithstanding any right of innocent passage, the littoral State is entitled to arrest on civil process merchant vessels passing through its territorial waters: *Annual Digest*, 1933-1934, (Case No. 52.)

² Gidel, iii. pp. 277-289.

³ See below, § 449.

No State need allow this, although all States do allow ¹ it under certain conditions and with certain exceptions.

§ 189. That the littoral State has exclusive jurisdiction within the belt as regards mere matters of police and control is universally recognised.⁴ Thus it may exclude foreign pilots, may make custom-house arrangements, sanitary regulations, laws concerning stranded vessels and goods, and the like. But it is a moot point ³ whether such foreign vessels as do not stay but merely pass through the belt are for the time being under this jurisdiction. It is for this reason that the British Territorial Waters Jurisdiction Act of 1878, which claims such jurisdiction, has called forth protests from many writers.⁴ The controversy itself can be decided only by the practice of States. The British Act of 1878, the basis of which is, it is believed sound and reasonable, is an important factor in initiating such a practice; but as yet no common practice of the States can be said to exist.⁵ The jurisdiction of the littoral State over foreign merchantmen which anchor within the maritime belt is discussed below (§ 190c).

Jurisdiction within the Belt.

§ 190 (i). Not to be confused with the territorial maritime belt is the zone of the open sea over which a littoral State extends the operation of its revenue and sanitary laws. Great Britain and the United States, as well as numerous other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on

Zone for Revenue and Sanitary Laws.

¹ The regulations of a number of States concerning visits of foreign men-of-war are printed in *A J.*, 10 (1916), Suppl., pp. 121-178.

² See Gidel, in. pp. 212-277. For an example of a State conceding jurisdictional rights in its own territorial waters to another State see the Treaty of June 13, 1935, between the United States and Mexico, made to facilitate assistance and salvage, by vessels of their own nationality, of vessels of either country in danger or shipwrecked on the coast or within the territorial waters of the other country. See Wilson in *A J.*, 30 (1936), pp. 494, 495.

³ See *Annuaire*, 17 (1898), p. 273, for a 'Règlement sur le régime légal des navires et de leurs équipages

dans les ports (étrangers,' adopted by the Institute of International Law in 1898. The decision of the Supreme Court of the United States of America in the *Ship's Liquor* case (*Cunard Steamship Co. et al. v. Mellon*) asserts jurisdiction over foreign ships entering American territorial waters and does not appear to consider anchoring or entering a port essential (*A J.*, 17 (1923), pp. 501-507 and 563-572; *B Y.*, 1924, pp. 184-187). See also *Zachariassen v. The United States*, decided in 1941 by the United States Court of Claims. *Annual Digest*, 1941-1942, Case No. 71.

⁴ See Perels, pp. 60-77, and *Annuaire*, 13, p. 328.

⁵ See *Bases of Discussion*, ii. pp. 78-87.

such foreign vessels bound for one of their ports as are approaching, but not yet within, their territorial maritime belt.¹ It is maintained by some that in strict law these Municipal Laws have no basis since every State is by the Law of Nations prevented from extending its jurisdiction over the open sea, and that it is only the Comity of Nations which admits tacitly the operation of such Municipal Laws as long as foreign States do not object, and provided that no action is taken within the territorial maritime belt of another nation. However, since Municipal Laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, a customary rule of the Law of Nations may be said to exist which allows littoral States in the interest of their revenue

¹ The matter is treated by Moore, i. § 151; Phillimore, i. § 198; Porels, § 5, pp. 25-28; Raestad, *op. cit.*, pp. 118-120, 128-130, 142-143; Hyde, i. § 235; Higgins and Colombos, §§ 111-120; and, in particular, by Gidel, iii. pp. 361-492, and in *Bases of Discussion*, ii. pp. 87-91. See also Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), §§ 108-109; *Annuaire*, xiii. (1894) p. 135; Smith, ii. pp. 165-221; the British so-called Hovering Acts (9 Geo. 2, c. 35, and 24 Geo. 3, c. 47) have been repealed, and the present English law on the subject is contained in the Customs Consolidation Act, 1876, §§ 53, 147, 179, 181, 189. As to the United States 'Anti-Smuggling' Act of August 5, 1935, see Jessup in *A.J.*, 31 (1937), pp. 101-106, and Briggs in *R.I.*, 3rd ser., 20 (1939), pp. 217-255. The Act, which is printed in *A.J.*, 31 (1937), Suppl., p. 183, provides, *inter alia*, for penalties for vessels not exceeding five hundred net tons and encountered within a twelve-mile limit while not in possession of a certificate of importation into the United States of spirits, wines, or alcoholic liquors. See also *The Reidun* on the interpretation of the term 'customs waters' used in the Act of 1935: 14 F. Supp. 771; 15 F. Supp. 112; *Annual Digest*, 1935-1937, Case No. 81. And see on protective jurisdiction generally *The People v. Stralla*, decided in 1939 by a Cali-

fornian Court: *Annual Digest*, 1938-1940, Case No. 101. In the course of the preparatory work of the Hague Codification Conference the British Government reaffirmed this view with regard both to civil and criminal jurisdiction (*Bases of Discussion*, ii. p. 86). The Final Act of the Hague Codification Conference of 1930, however, approved the rule that 'a coastal State may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel' and that 'a coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State.' The Brussels Convention on the subject, of 10 May 1952, is substantially to the same effect. In a case decided in June 1933, the General Claims Commission between the United States and Panama declined to accept the view adopted in the Hague Final Act as representing a rule of International Law (*Compañía de Navegación Nacional v. The United States of America*); see comment thereon by Jessup in *A.J.*, 27 (1933), pp. 747-760. See also *Charteris* in *R.Y.*, 13 (1932), pp. 125-128.

and sanitary laws to impose certain duties on such foreign vessels bound for their ports as are approaching, although not yet within, their territorial maritime belt.¹

§ 190 (ii). Other instances have occurred of claims to supplement, either by way of anticipation or of subsequent punitive action,² a State's admitted jurisdiction within the maritime belt by acts done outside it in the open sea. The use of force by the littoral State upon a foreign merchantman outside its maritime belt but intending to enter it with a view to injuring the littoral State or its territory or nationals would certainly be excusable as a necessary act of self-preservation upon the conditions already discussed.³ But if the object of the voyage of the foreign merchantman is merely to take part in an attempt to defeat a prohibition by the laws of the littoral State of the importation of articles considered by it to be noxious, such anticipatory force outside the maritime belt could not, it is believed, in

¹ For a collection of relevant legislation and treaties see *Laws and Regulations on the Regime of the High Seas* (United Nations publications), vol. 1, 1951 pp. 51-175. In 1953 the International Law Commission adopted a draft article on contiguous waters which lays down that 'on the high seas adjacent to its territorial waters the coastal State may exercise the control necessary to prevent and punish the infringement within its territory or territorial waters of its customs, immigration fiscal or sanitary regulations' but that 'such control may not be exercised at a distance beyond twelve miles from the baseline from which the width of the territorial sea is measured'. The draft thus formulated is believed to be expressive of the general practice on the subject with regard to both the exercise of the rights in question and the acquiescence therein. It is probable that the intractable subject of the limit of territorial waters may be brought nearer solution within the framework of arrangements such as contiguous zones and the like.

² As to the so-called Right of Pursuit see below, § 266 (3).

³ See above, §§ 120, 130, and 133; Westlake, i. pp. 175, 176,

Hyde i § 235, Brown in *A J.*, 17 (1923), pp. 89-95, and discussion in *Proceedings of American Society of International Law*, 1923, pp. 15-47; Dickinson in *I L R.*, 40 (1926), pp. 1-29, Jessup, *op cit.*, ch. II and v.; Hackworth, i §§ 98-99, and Master-son in *Grohus Society*, 13 (1928), pp. 53-74. See also *Craft v. Dunphy* [1933] A.C. 156, which, however, was decided on a point of British constitutional law. The question of the extent to which International Law recognises the doctrine of the contiguous zone has been recently studied and widely discussed but there is no consensus of opinion. See Jessup, *op cit.*, p. 95, and Master-son, *op cit.*, p. 380, whose answer is in the affirmative but see Barv, pp. 152-156, and the replies of Governments to the questionnaire circulated in connection with the Codification Conference in 1930: C 74 M. 39, 1929. V. See Brierly in *B Y.*, 14 (1933), pp. 155-157. And see for an exhaustive treatment of the question of contiguous zones Gidel in *Hague Recueil*, vol. 48 (1934) (n.), pp. 241-273, and the same, *Le droit international public de la mer*, vol. iii.: *La mer territoriale et la zone contiguë* (1934).

the present state of International Law, be strictly justified, though it is arguable that on grounds of International Comity it should be condoned.¹ This question attracted some attention in connection with the enforcement by the United States of America of its Prohibition Amendment and National Prohibition Act (the Volstead Act), but the British and American Governments by the conclusion of the Anglo-American Liquor Treaty of 1924² placed the exercise of this protective jurisdiction upon a solid conventional basis for the purpose of this particular traffic.³ This Treaty, after recording the firm intention of the contracting parties 'to uphold the principle that three marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters,' proceeded to establish a one-hour zone—that is, a zone represented by the distance capable of being traversed in one hour by the suspected vessel or, where transshipment is intended, by the vessel available for transshipment. Within this one-hour zone Great Britain undertook to raise no objection to the boarding and search of British vessels suspected of endeavouring to import into the United States alcoholic beverages in violation of its laws⁴ The *quid pro quo* obtained in return for this concession was that British vessels were permitted to carry alcoholic liquor under seal

¹ As to Jurisdiction on the Open Sea, see below, §§ 260-271. With regard to vessels lying outside the maritime belt, but communicating by means of small boats with the shore or the territorial waters, see Hughes in *A.J.*, 18 (1924), pp. 232, 233.

² Treaty Series, No. 22 (1924). Cmd. 2194. *B.Y.*, 1924, pp. 187-190; *A.J.*, 18 (1924), Suppl., pp. 127-130.

³ Treaties for the same purpose but not always on the same lines have been concluded by the United States with a number of other countries; see Dickinson in *A.J.*, 20 (1926), pp. 340-346, and Jessup, *op. cit.*, ch. vi.

⁴ Can the conventional limits, thus extended, be treated in all respects as territorial waters? This question arose and was, it seems, answered in

the negative in the *I'm Alone* case in which a Canadian vessel, engaged in the smuggling of alcoholic liquor, was sunk by a United States coast-guard vessel on the high seas more than two hundred miles from the coast of the United States, after having refused to stop or allow herself to be boarded when summoned to do so at a point beyond the three-mile limit but, apparently, within one hour's sailing distance. The question was submitted to two Commissioners who, without giving reasons, held in 1935 that the sinking was not justified either by the terms of the Convention or by International Law; see for the Joint Final Report, *A.J.*, 29 (1935), p. 329; Dennis, *ibid.*, 23 (1928), pp. 351-362; Hyde, *ibid.*, 29 (1935), pp. 296-301; Fitzmaurice in *B.Y.*, 17 (1936), pp. 82-111. And see § 266 (3).

within American ports and territorial waters either as sea stores or as cargo destined for a non-American port.¹

§ 190 (iii). Occasionally States have put forward claims to jurisdiction on the high seas adjacent to their territorial waters for the purpose of safeguarding fisheries against discriminate exploitation. In thus claiming to exercise control over foreign nationals on the high seas States have relied either on the right of self-protection against activities threatening the extinction of an industry vital to the economic life of the nation or on the narrower ground of an alleged right of property in animals attached in some way to the territory or the territorial waters of the States concerned. The latter argument was unsuccessfully invoked by the United States in 1893 before the Tribunal in the *Behring Sea Arbitration* with regard to the protection of the fur seals fishery.² A similar claim by Russia was subsequently successfully challenged by the United States.³ In denying to a State the right to exercise protective jurisdiction over fisheries on the high seas contiguous to its territories, international tribunals were upholding the principle of the freedom of the seas. It is probable that the rigid application, in cases of this nature, of the principle of the freedom of the seas is open to criticism as failing to protect important interests of the littoral State against the unscrupulous exercise of a legal right.⁴ Moreover, although the three mile limit of territorial waters must still be regarded as the rule of

¹ See Brown in *L.Q.R.*, 39 (1923), pp. 327-340; Wilson in *Hague Recueil*, 1923, pp. 164-168; Dickinson, *ibid.*, 20 (1926), pp. 111-117 and 444-462, and in *R.I.*, 3rd ser., 7 (1926), pp. 371-387; Jessup, *op. cit.*, ch. iv. and v. As to measures of co-operation between the British and American Governments to prevent the smuggling of alcoholic liquor see correspondence between them, Cmd. 2647. As to the judicial interpretation of the Treaty see Dickinson in *A.J.*, 21 (1927), pp. 505-509. *Ford v. United States*, 47 Supreme Court Reporter, 531, and *Annual Digest*, 1925-1926, Case No. 110; and Jessup, *op. cit.*, ch. vii.; Cook v. *The United States* (1933), 288 U.S. 102; *A.J.*, 27

(1933), pp. 559-569; *The United States of America v. Santos Flores*, 1 J., 27 (1933), pp. 569-579. See also Jones, *The Eighteenth Amendment and our Foreign Relations* (1933); and Masterson in *Grotius Society*, 14 (1928), pp. 45-56. For a list of the liquor treaties see *A.J.*, 28 (1934), p. 101, n. 1. And see Dickinson, *ibid.*, pp. 101-104, for a refutation of the view that these treaties lapsed as the result of the repeal, in 1933, of the Eighteenth Amendment to the Constitution.

² See Lauterpacht, *Analogies*, § 99.

³ For an account of this dispute see Leonard, *International Protection of Fisheries* (1944), pp. 83-89.

⁴ See Lauterpacht, *Function of Law*, pp. 97-100.

International Law on the subject, it is a rule which is in need of modification in relation to the various interests involved.¹

On the other hand, it is doubtful whether unilateral action, not preceded by serious efforts to obtain an agreed solution of the difficulty, can be regarded as the proper method of bringing about an adequate rule of International Law in the matter. In September 1945 the United States 'in view of the pressing need for conservation and protection of fishery resources' proclaimed the establishment of conservation zones in the areas of the high seas contiguous to the coasts of the United States.² A distinction was made between areas in which fishing activities are maintained by nationals of the United States only and those in which they are conducted jointly by the nationals of the United States and other States. With regard to the first, the United States asserted an exclusive right of regulation and control. With regard to the second, such regulation and control was made subject to agreements to be concluded with other States.³ In announcing that unilateral measure the United States disclaimed any intention of interfering either with the free and unimpeded navigation in the conservation zones thus established or, generally, with their character as part of the high seas.⁴

The considerations adduced in this Section explain the rule formulated by the International Law Commission in 1953 as part of the Draft Articles adopted by it in the matter of fisheries. It proposed that States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area on the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential

¹ See above, p. 497, n. 1.

² For the text of the Presidential Proclamation and of executive orders see *Bulletin of Department of State*, 13 (1945), pp. 484-487; *A.J.*, 40 (1946), Suppl., pp. 45-48.

³ It was announced in the Proclamation that the United States would concede to other States a similar right to establish conservation zones off their shores provided that corresponding recognition would be

given to fishery interests of nationals of the United States.

⁴ For a discussion of the Proclamation see Borohard in *A.J.*, 40 (1946), pp. 53-70. And see generally on the protection of coastal fisheries Hyde, §§ 143-144; Bingham, *Report on the International Law of Pacific Coastal Fisheries* (1938); Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942); Leonard, *International Regulation of Fisheries* (1944).

for the purpose of protecting fisheries against waste or extermination. While the rule thus formulated goes beyond existing International Law, it was emphasised that it is expressive of a general principle of law inasmuch as it is based on the prohibition of abuse of rights¹ by States availing themselves of the principle of the freedom of the seas in a manner neglectful of the legitimate rights of other States and of the general international interest.

§ 190a. Since the most important lighthouses are built outside the maritime belt of the littoral States, the question arises whether a State can claim a maritime belt around its lighthouses in the open sea—a question which Sir Charles Russell,² the British Attorney-General, in the *Behring Sea Seal Fisheries* case answered in the affirmative. It is tempting to compare such lighthouses with islands,³ and argue in favour of a maritime belt around them; but such an identification is misleading. Lighthouses must be treated on the same lines as anchored lightships. Just as a State may not claim sovereignty over a maritime belt around an anchored lightship, so it may not make such a claim in the case of a lighthouse in the open sea.⁴

§ 190b. As the part of the sea which forms the maritime belt is the property of the littoral State,⁵ the surface and

Maritime Belt around Lighthouses in the Sea.

The Surface and Subsoil of the Sea Bed beneath the Maritime Belt.

¹ See above § 155a. And see below §§ 281-283a, on regulation of fisheries on the high seas.

² See Moore, *Arbitrations*, 1 pp. 900-901; and see below, § 284.

³ See Smith, vol. II, pp. 221-241. It does not matter that the island in question is uninhabited: *Middleton v. United States* (United States Circuit Court of Appeals) (1929), 32 F. (2d) 239; *Annual Digest*, 1929-1930, Case No. 59. See also *Basin of Discussion*, II, pp. 48-55. And see *Rez v. Conrad*, decided in 1938 by the Supreme Court of Nova Scotia; *Annual Digest*, 1938, 1940, Case No. 51; *State v. Ruvido*, decided in 1940 by the Supreme Judicial Court of Maine. *ibid.*, Case No. 51.

⁴ See to the same effect Westlake, I, pp. 119, 190. See also Lindley, pp. 60, 67, who arrives at a similar conclusion on a different ground, namely,

that the occupation of a rock or barren island not 'for its own sake but merely to facilitate fishing and navigation in the surrounding ocean' is not 'a sufficient justification for extending the sovereignty of the occupying State over those waters.' As to fortified rocks and islands in the open sea see Lindley, pp. 65-68. And see Johnson in *J.L.Q.*, 4 (1951), pp. 203-215. Article 6 of the Draft articles on the Continental Shelf adopted in 1953 by the International Law Commission (see below, § 287d) lays down expressly that the installations on the high seas erected for the purpose of exploiting the resources of the subsoil or bed of the sea, although under the jurisdiction of the coastal State, do not possess the status of islands and that they have no territorial waters of their own.

⁵ See above, § 185.

subsoil of the sea bed under the maritime belt is also the property of the littoral State and cannot be appropriated by any other State.¹ Some deny this, and prefer to say that it is capable of becoming the property of the littoral State by occupation.² There seems to be no valid legal foundation for that view. It is the practice of States to reserve for their own Government or nationals the exploitation both of the surface—for instance, by means of sedentary fisheries—and of the subsoil—for instance, by mining for coal and other minerals—and to assume by their legal systems that they have the exclusive property in both.³ The surface and the subsoil beneath the open sea form the subject of different considerations, and are discussed later.⁴

Ports,
Harbours,
and Road-
steads.

§ 190c. The status of the waters in ports, harbours, roadsteads, and the mouths of rivers is, however, different from that of the waters of the maritime belt, as has been explained above; for the former are national or internal, and the latter territorial. Consequently the jurisdiction over foreign merchantmen passing through the maritime belt, which has already been mentioned, is different from the jurisdiction over such vessels when they enter a port, harbour, roadstead, or mouth of a river.⁵ In such cases, and also when

¹ See Westlake, i. p. 188; and River, i. p. 148 (as to fisheries, sedentary and otherwise).

² See Fauchille § 494.

³ See as to Great Britain, Hurst in *B.Y.*, 1923-1924, pp. 36-43. The Privy Council, in *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] A.C. 153, declined to express an opinion. The draft Convention attached to the Report of the League Codification Committee on Territorial Waters, *op. cit.*, at pp. 141 and 143, is in accord with the view stated above. In *United States v. State of California*—(1947) 332 U.S. 19; *Annual Digest*, 1947, Case No. 20—it was held that the United States, and not the State members of the Union, owned and exercised jurisdiction over the subsoil of the territorial waters and its resources. However, in a subsequent decision an United States District Court held that the fisheries within the territorial waters

were under the exclusive jurisdiction of the adjoining State (and not of the United States): *Toomer v. Witell* (1947) 73 F. Supp. 371; *Annual Digest*, 1947, Case No. 21.

⁴ See below, § 287bb, as to the surface, and § 287c as to the subsoil.

⁵ For a review of the practice of a number of States see *Charteris in B.Y.*, 1920-1921, pp. 45-96, and Praag, §§ 260-270. And see Hyde, i. §§ 221-226, and Jessup, *op. cit.*, pp. 144-194, on the difference between the so-called French rule and the British practice; see also a decision of the Supreme Court of the Philippines of October 19, 1922 (as to the possession of opium on a foreign vessel), reported in *Bulletin de l'Institut Intermédiaire International*, 12 (1925), p. 285. See also Report of Committee in *International Law Association's Thirty-fourth Report* (1927), pp. 449-458. And see in particular Gidel, vol. ii, pp. 39-252.

a foreign merchant-ship casts anchor ¹ within the maritime belt, the vessels, and the persons thereon, fall under the jurisdiction of the littoral State in case peace and order outside the ship are disturbed, or persons other than crew or passengers are affected. But many writers maintain, and the practice of France and some other States supports their view, that the littoral State has no jurisdiction when only the internal order of the ship is affected or the relations between members of the crew or passengers are alone concerned.² However, there is no rule of International Law which limits its jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen as have cast anchor within the maritime belt or entered a port, together with the persons on board.³ On the other hand, the littoral State is not compelled to exercise such jurisdiction, and many States have therefore by commercial and consular treaties ⁴ stipulated that in such cases as those in which the internal order of the ship is alone concerned, jurisdiction should be exercised not by the littoral State but by the home State through its consul. But it should be mentioned that, even where a littoral

¹ There is probably no right of anchorage in the maritime belt: see Hurst in *B Y* 1922 1923 at pp 53-4

² For instance, in 1925 the chief officer of a Canadian Pacific liner who shot the commander of the vessel on board while in the port of Antwerp was tried for murder in England: *London Times* newspaper, November 19, 1925

³ On the question of the jurisdiction of the littoral State over persons under detention on board foreign merchantmen entering its ports see Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), at p 81; *R v Keyn* (1876) 2 Ex D at p 83; and the case of *Tulop and Sziber* in New South Wales in May 1922, discussed by Charteris in *J C L*, 3rd ser., 8 (1926), pp 246-249. And see *Bases of Discussion*, ii pp 97-101. As to the *Eisler* case see *B Y*, 26 (1919), p 468. See also, in connection with the *Ineull* case (see below p 701 n. 1), *Makarov* in *Z o. I.*, 4 (1934) pp. 618-625. By the *La Follette* Sea-

men's Act (46 U.S.C.A. sec 597) United States courts were given jurisdiction with regard to claims to wages on the part of foreign seamen within a port of the United States (including the payment of wages upon the completion of a voyage ending in a United States port). See for an application of the Act to war bonus, *Lakos et al. v. Salvaris*, *Annual Digest*, 1941-1942, Case No 38.

⁴ See Hall, § 58, Moore, ii 204-208, Stoerk in *Holtendorff*, ii pp. 446-453, Despagnet, §§ 429-430; De Louter, i pp 425-429; Nielsen in *A J*, 13 (1919), pp 5-12; Hackworth, ii §§ 139-149 (on jurisdiction in and over ports generally). Higgins and Colombos, §§ 279-286. See also the American case of *Wildenhues* (1886) 120 U.S. 1; *Hudson, Cases*, p 602. As to the jurisdiction over nationals with regard to offences committed on national vessels within the territorial limits of a foreign State see *United States v. Flores* (1932) 289 U.S. 137.

State claims full jurisdiction over foreign merchantmen in its ports, this jurisdiction is to a certain small extent limited when the vessel has been compelled to enter a port in distress.¹

A Convention and Statute respecting the International Régime of Maritime Ports² was signed at Geneva on December 9, 1923. It has been ratified by a number of States, including Great Britain, and is now in force. It provides that on a basis of reciprocity the sea-going vessels of the contracting parties shall enjoy equality of treatment in, and freedom of access to, their maritime ports that is, 'all ports which are normally frequented by sea-going vessels and used for foreign trade.' The Statute applies to 'all vessels, whether publicly or privately owned or controlled,' other than 'warships or vessels performing police or administrative functions' (Article 13) or fishing-vessels (Article 14); but it does not apply to the 'maritime coasting trade'—that is, *cabotage*³ (Article 9)—nor does it prescribe the rights and duties of belligerents and neutrals in time of war (Article 18).⁴

VII

GULFS AND BAYS

Grotius, n. c. 3 § 8—Vattel, i. § 291—Hall, § 41—Westlake, i. pp. 187-196—Lawrence, § 72—Phillimore, i. §§ 201-201a—Twiss, i. §§ 181, 182—Hackworth, i. §§ 100-102—Wharton, i. §§ 27-28—Moore, i. § 153—Wheaton §§ 181-189—Hyde, i. §§ 146-148—Bluntschli, §§ 309, 310—Fauchille, §§ 516-518 (10)—Despagnet §§ 405-408—Mérigniac n. pp. 394-398—Pradier-Fodere, ii. §§ 601-681—Nys, i. pp. 177-183—Rivier

¹ See Moore, ii. § 208, the award in the case of the *Enterprise* in Moore, *Arbitrations*, iv. p. 4349. As to immunities of vessels in distress see *The Rebecca*, decided on April 2, 1929, by the United States Mexican Claims Commission. *Annual Digest*, 1929-1930, Case No. 82. And see *The May v. The King, The Queen City v. The King and other ships*; (1931) *Can. S.C.R.* 374, 387; (1931) 3 *D.L.R.* 15, 147; and *Cashin v. The King, Canada Law Reports* [1935] *Ex. C.R.* 103, on the meaning of 'stress of weather and other unavoidable cause.' See also Laing in *A.J.*, 26 (1932), pp. 374-379. And see Lord Stowell in *The Eleanor* (1809), *Edward's Admir*

alty Reports, 135, at pp. 159, 160. 'Real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws.'

² Treaty Series, No. 24 (1925), *Cmd.* 2419, *L.N.T.S.* 58, p. 284, summary in *R.Y.*, 1924, pp. 200, 201. By Article 103 of the Treaty of Lausanne of 1923 Turkey undertook to adhere to this Convention. See Laun, *Le droit international des ports* (1928). And see below, p. 592, n. 2.

³ See above, § 187.

⁴ See Fauchille, § 517.(3), and Hostie in *R.I.* 3rd ser. 5 (1924), pp. 681-708, and *ibid.*, 6 (1925), pp. 115-154.

i. pp. 153-157—Calvo, i. §§ 366, 367—Fiore, ii. §§ 808-815, and *Code*, §§ 279-283—Cavaglieri, pp. 285-288—Martens, i. § 100—Perels, § 5—Keith's Wheaton, pp. 361-369—Baty, pp. 70-80—Smith, ii. pp. 243-250—Higgins and Colombos, §§ 143-156—Fulton, *The Sovereignty of the Sea* (1911), pp. 586-589 and 717-734—Schücking, *Das Küstenmeer im internationalen Rechte* (1897), pp. 20-24—Mochot, *Le régime des baies et des golfes en droit international* (1938)—Barelay in *Annuaire*, 12, pp. 127-129—Charteris in *International Law Association's Reports*, 23 (1907), pp. 103-132, and 27 (1912), pp. 107-127—Wilson in *Hague Recueil*, 1923, pp. 140-154—Jensen, *Law of Territorial Waters* (1927), ch. viii. (discussing a number of particular bays)—Oppenheim in *Z V.*, 1 (1907), pp. 579-587, and 5 (1911), pp. 74-95—Salmond in *L.Q.R.*, 34 (1918), pp. 235-252—Hurst in *B.Y.*, 1922-1923, pp. 42-54—Kahjarvi in *A.J.*, 26 (1931), pp. 55-69 (as to Scandinavian countries) *Bays of Discussion* ii. pp. 39-45—Waldock in *B.Y.*, 28 (1951) pp. 137-142

§ 191. Such gulfs and bays as are enclosed by the land of one and the same littoral State, and have an entrance from the sea not more than six miles wide, are certainly territorial¹; those, on the other hand, that have an entrance too wide to be commanded by coast batteries erected on one or both sides of it, even though enclosed by one and the same littoral State, are certainly not territorial. These two propositions may safely be maintained. It is, however, controversial how far bays and gulfs encompassed by a single littoral State and possessing an entrance more than six miles wide, yet not too wide to be commanded by coast batteries, can be territorial. Some writers² state that no

Territorial
Gulfs and
Bays.

¹ The expression 'territorial bay' must not be allowed to obscure the facts (1) that the waters contained in territorial bays, and in the territorial portions of bays not wholly territorial, are not territorial waters and part of the maritime belt, but national waters, and (2) that the limit of the national waters is the datum line for the measurement of the maritime belt: see Hurst, *op. cit.*, and above, § 172. As to this dividing line see also the following: *Annuaire*, 13 (1894), pp. 291-296; Despagnet, § 406; Fauchille, § 516 (9); Taylor, § 229; Westlake, i. p. 191; Lawrence, § 72; Lapradelle in *R.G.*, 5 (1898), p. 264; Hatachek, pp. 198, 199; Villeneuve, *De la détermination de la ligne séparative des eaux nationales et de la mer territoriale, spécialement dans les baies* (1914); Boggs in *A.J.*, 24 (1930), pp. 541

555. In the dispute between Mecklenburg-Schwerin and Mecklenburg-Schwerin, decided by the German *Staatsgerichtshof* in July 1928, the Court expressed preference for the view that sovereignty over the same part of the bay may be divided functionally, i.e. one State may exercise sovereignty with respect to some matters and the other State with respect to others: *Annual Digest*, 1927-1928, Case No. 88.

² See Walker (§ 18). Westlake (i. p. 191) cannot be cited in favour of it, since he distinguishes between bays and gulfs in such a way as is not generally done by international lawyers, and as is certainly not recognised by geography; for the very examples which he enumerates as *gulfs* are all called *bays*, namely, those of Concepcion, of Cancale, of Chesapeake, and of Delaware.

such gulf or bay can be territorial, and Lord Fitzmaurice declared in the House of Lords on February 21, 1907, in the name of the British Government, that only bays with an entrance *not* more than six miles wide were to be regarded as territorial. But in the *North Atlantic Coast Fisheries* case, which was decided by the Permanent Court of Arbitration at The Hague in 1910, Great Britain disowned¹ the declaration by Lord Fitzmaurice. The United States contended for its accuracy, but the Court refused to agree. Other writers maintain that gulfs and bays with an entrance more than ten miles wide (or three and a third marine leagues) cannot belong to the territory of the littoral State, and the practice of several States, such as Germany, Belgium, and Holland, accords with this opinion. But the practice of other countries, approved by many writers, goes beyond this limit. Thus France holds the Bay of Caudale to be territorial, although its entrance is seventeen miles wide; Canada holds the Bay of Conception² in Newfoundland and the Bays of Chaleurs³ and Miramichi in Canada to be territorial, although the width between their headlands is twenty, sixteen, and fourteen miles respectively.⁴ Even the Hudson Bay in Canada, which embraces about 580,000 square miles and the entrance to which is fifty miles wide, is claimed as territorial by Canada.⁵ Norway claims the Varanger Fiord as territorial, although its entrance is thirty-two miles wide. The United States claims the Chesapeake and Delaware Bays, as well as other inlets of

¹ See *Oral Argument*, Part 1. pp. 270-271.

² See *Direct U.S. Cable Co. v. Anglo-American Telegraph Co.* (1877) L.R. 2, App. Ca 394.

³ See *Mowat v. McFee* (1880) 5 Can. S.C., 86, cited by Hurst, *op. cit.*, at p. 47.

⁴ In *The Fagernes* [1927] P. 311, the Court of Appeal, considering itself bound by a statement made by the Attorney-General on behalf of the Crown, held that a particular spot in the Bristol Channel where it is twenty miles in width was 'not within the limits to which the territorial sovereignty of His Majesty

extends,' and thus differed from the view stated in *Roy v. Cunningham* (1850) Bell's Crown Cases 72, to the effect that the whole of the Bristol Channel was within the bodies of the adjacent counties (The spot in question in the latter case was much higher up than in *The Fagernes*). See Beckett and Bellot in *B.Y.*, 1928, pp. 120-126.

⁵ But the claim is denied by the United States. See Balch in *R.I.*, 2nd ser., 13 (1911), pp. 539-586, 15 (1913), pp. 153-172, and in *A.J.*, 6 (1912), pp. 409-459, 7 (1913), pp. 546-565; Kenneth Johnston in *B.Y.*, 15 (1934), pp. 1-20.

the same character, as territorial,¹ although the entrance to the one is twelve miles wide and to the other ten miles. The Institute of International Law has voted in favour of a twelve-miles-wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have been considered territorial for more than one hundred years.² In the *Anglo-Norwegian Fisheries* case the International Court of Justice declined to admit that the ten-mile rule, favoured by the majority of States participating in the Hague Codification Conference of 1930, had acquired the authority of a general rule of International Law. This was so 'although the ten-miles rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between themselves.'³ The Court did not suggest that there exists any other limit. Although the Judgment of the Court, inasmuch as it sanctions the principle of the 'general direction of the coast' for the purpose of the delimitation of territorial waters, lends itself to the interpretation that it abandons altogether the legal conception of a bay,⁴ this was probably not the intention of the Court.⁵ However, it is clear—especially having regard to the position created by the Judgment of the Court—that some further judicial clarification or international regulation of the subject is urgently desirable.

As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not. Examples of territorial bays in Europe are: the Zuider Zee,⁶ which is Dutch; and the Bay of Stettin, in the Baltic, which is

¹ See Taylor, § 229; Wharton, i. §§ 27, 28; Moore, i. § 153; and *The Alleganean* (1885), Scott, *Cases*, p. 232. See also *United States v. Carillo*, D.C. (1935) 13 F. Supp. 121. *Annual Digest*, 1935-1937, Case No. 56 (as to the Bay of San Pedro in California); *State v. Ruvido* (1940), 15 A. (2d) 293; *Annual Digest*, 1938-1940, Case No. 51 (as to the Penobscot Bay in the State of Maine); *The People v. Stralla and Adams* (1939), 96 Pac. (2d) 94; *Annual Digest*, 1938-1940, Case No. 52 (as to the Santa Monica Bay in California).

² See *Annuaire*, 13, p. 329.

³ *I.C.J. Reports*, 1951, p. 131.

⁴ See Waldock in *B.Y.* 28 (1951) p. 139.

⁵ It is possible that, far from holding that the size of the bay is irrelevant, the intention of the Court was to lay down that if the shores are very far apart then they must be considered as separate coasts to which, therefore, the principle of the general direction of the coast does not apply.

⁶ See Jessup, *op. cit.*, at p. 438.

German, as is also the Jade Bay in the North Sea.¹ It is unlikely that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers,² which include portions of the sea between lines drawn from headland to headland.

Non-territorial
Gulfs and
Bays.

§ 192. Gulfs and bays surrounded by the land of one and the same littoral State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, as a rule,³ all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial.⁴ They are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated⁵; they are in time of peace and

¹ For a purely domestic dispute between two German States regarding Lübeck Bay, in the course of which the rules of International Law were involved see Wenzel, *Die Hoheitsrechte in der Lübecker Bucht* (1926), and *Annual Digest*, 1925-1926.

² Whereas Hall (§ 41, p. 159) says: 'England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers,' Phillimore (i. § 200) still keeps up this claim, as did the Attorney-General before the Hague Court of Arbitration in the *North Atlantic Coast Fisheries* case (see *Oral Arguments*, Part II, p. 1308). The attitude of the British Government in the *Moray Firth* case (see below, § 192)—would seem to demonstrate that this claim is no longer upheld, but see Atkin L.J. in *The Fagernes* [1927] P. at p. 326. See also Lawrence, § 87; Westlake i. p. 192; Grant in *L.Q.R.*, 31 (1915), pp. 410-422. Fulton, *op. cit.*, p. 121, gives a facsimile of a chart prepared by Trinity House in 1604 showing the bearings of the King's Chambers.

³ For an exception to the rule, see the next note as to the Gulf of Fonseca.

⁴ This is not uncontested. A few writers—see, for instance, Twiss, i. § 181—assert that narrow gulfs and bays surrounded by the land of two different States are territorial, the central line dividing the territorial portions. However, the majority of writers do not accept this opinion,

and it would seem that the practice of States likewise rejects it, except in the case of such bays as possess the characteristics of a closed sea. Thus, in the case of *San Salvador v. Nicaragua*, the International Court of the Central American Republics (see *A.J.*, 11 (1917), pp. 693, 700-717) decided in 1917 that, taking into consideration its geographical and historical conditions, as well as its situation, extent, and configuration, the Gulf of Fonseca must be regarded as 'an historic bay possessed of the characteristics of a closed sea,' and that it therefore was part of the territories of San Salvador, Honduras, and Nicaragua. The decision of this Court has, of course, only force with regard to the three Central American States concerned; but the United States acknowledges the territorial character of this gulf. The attitude of other States is not known.

As regards the Bay of Fundy see *The Schooner Washington*, British-American Claims Commission, 1853-1855. Report of Decisions, p. 170, Scott, *Cases*, p. 229.

⁵ See, however, Hurst, *op. cit.*, at p. 54, who contends that if and when a non-territorial inlet narrows 'to such an extent as to be obviously a bay,' say, ten miles in width, the water in the upper and narrower portion are national waters, and the maritime belt will be drawn from the imaginary limit of the national waters. And note the following documents in support of this view

war open to vessels of all nations, including men-of-war, and foreign fishing-vessels cannot therefore be compelled to comply with municipal regulations of the littoral State concerning the mode of fishing.¹

§ 193. As regards navigation, fisheries, and jurisdiction in territorial gulfs and bays the majority—rightly, it is believed—contend that the same rules of the Law of Nations are valid as in the case of navigation and fisheries within the territorial maritime belt. The right of fishery may, therefore, be reserved exclusively for subjects of the littoral State.²

Navigation,
Fishery,
and Jurisdiction in
Territorial
Gulfs and
Bays.

the North Sea Fisheries Convention, 1882 (see *B. Y.*, 1922-1923, at p. 42, and below, p. 509, n. 2), the draft of general treaty between Great Britain and Soviet Russia of 1924 (Cmd 2215), ch. II Annex, Section II, and Article 4 of the draft convention in the Report on Territorial Waters adopted by the League Codification Committee (*A. J.*, 20 (July 1926), Special Suppl., p. 142). In the Temporary Fisheries Agreement between Great Britain and Soviet Russia of May 22, 1930, it was provided that as regards bays the distance of three miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed ten miles: Treaty Series, No. 22 (1930), Cmd 3583.

¹ An illustrative case is that of the fisheries in the Moray Firth, *Mortensen v. Peters* (1906) 14 Sc. L.T. 227. By Article 6 of the Herring Fishery (Scotland) Act, 1889, beam and otter trawling is prohibited within certain limits of the Scottish coast, and the Moray Firth inside a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire is included in the prohibited area. In 1905, Mortensen, the captain of a Norwegian fishing vessel, but a Danish subject, was prosecuted for an offence against the above-mentioned Article 6, convicted, and fined by the Sheriff's Court at Dornoch, although he contended that the incriminating act was committed outside three miles from the coast. He appealed to the High Court of Judiciary, which, however, confirmed the verdict of the Sheriff

Court, correctly asserting that, whether or not the Moray Firth could be considered as a British territorial bay, the Court was bound by a British Act of Parliament even if such Act violates a rule of International Law. The British Government, while recognising that the Scottish courts were bound by the Act of Parliament concerned, likewise recognised that, the Moray Firth not being a British territorial bay, foreign fishing-vessels could not be compelled to comply with an Act of Parliament regulating the mode of fishing in the Moray Firth beyond three miles from the coast, and therefore remitted Mortensen's fine.

To remedy the conflict between Article 6 of the above mentioned Herring Fishery (Scotland) Act, 1889, and the requirements of International Law, Parliament passed the Trawling in Prohibited Areas Prevention Act, 1909, according to which no prosecution can take place for the exercise of prohibited fishing methods beyond three miles from the coast, but the fish so caught may not be landed or sold in the United Kingdom (see Oppenheim in *Z. I.*, 5 (1911), pp. 74-96).

² The Hague Convention concerning Police and Fishery in the North Sea, concluded on May 6, 1892, between Great Britain, Belgium, Denmark, France, Germany, and Holland, by Article 2 reserves the fishery for subjects of the littoral States of such bays as have an entrance from the sea not wider than ten miles, but reserves likewise a maritime belt of three miles to be measured from the line where the

And navigation, *cabotage* excepted, must be open¹ to merchantmen of all nations, though foreign men-of-war need not be admitted unless the gulfs or bays in question form part of the highways of international traffic. But the matter is not settled, and there are some who maintain that foreign vessels may be excluded altogether from territorial gulfs and bays, or admitted only on payment of dues, rates, etc.²

VIII

STRAITS

Grotius, ii. c. 3, § 8—Vattel, i. § 292—Hall, § 41—Westlake, i. pp. 197-201—Lawrence, §§ 87-89—Phillimore, i. §§ 180-196—Twiss, i. §§ 183, 184, 189—Strupp, *Éléments*, § 90—Fauchille, §§ 506-510 (6)—Sibert pp. 745-763—Despagnet, §§ 415-417—Pradier-Fodère ii. §§ 650-656—Nys, i. pp. 492-515—Rivier, i. pp. 157-159—Calvo, i. §§ 368-372—Oruchaga, §§ 142-153—Cavaglieri, pp. 288-291—Fiore, ii. §§ 745-754, and *Code* §§ 285-287—Martens, i. § 101—Keith's Wheaton, pp. 375-384—Smith, ii. pp. 255-272—Gidel, iii. pp. 728-764—Higgins and Colombos, §§ 159-175—Holland, *Studies*, pp. 277-279—Laun, *Die internationalisierung der Meeresengen und Kanäle* (1918)—Bruehl, *International Straits*, 2 vols. (1947)—Wilson in *Hague Recueil*, 1923, pp. 155-163—Salmond in *L.Q.R.*, 34 (1918), pp. 235-252—F. de Visser in *R.I.*, 3rd ser., 4 (1923), pp. 537-572, and *ibid.*, vol. 5 (1924), pp. 13-57—Guerra in *R.G.*, 31 (1924), pp. 232-254—Rougier, *ibid.*, pp. 309-338—*Bases of Discussion*, ii. pp. 55-59.

What
Straits
are Terri-
torial.

§ 194. All straits which are not more than six miles wide are certainly territorial. Therefore, straits of this kind which divide the land of one and the same State belong to the territory of such State. Thus the Solent, which divides the Isle of Wight from England, and the Menai Strait, which divides Anglesey from Wales, are British; the Straits of Messina are Italian; and the Great Belt, which divides the islands of Fyn and Sjaelland, is Danish. On the other hand, if such narrow strait divides the land of two different States, it belongs to the territory of both, and the boundary

entrance is ten miles wide. Practically the fishery is therefore reserved for subjects of the littoral State within bays with an entrance much wider than ten miles. See Martens,

N.R.G., 2nd ser., 9, p. 598.

¹ But this is not universally recognized. See, for instance, Twiss, i. § 181; Calvo, i. § 267.

² See above, § 191.

line runs, in default of a special treaty making another arrangement, through the mid-channel.¹

It is, however, controversial whether a strait more than six miles wide, yet narrow enough to be commanded by coast batteries erected on one or both sides of the strait, can be territorial. The majority of writers, including Hall² and Hershey,³ assert that it can; but a minority, including Westlake⁴ and Taylor,⁵ maintain that it cannot.

However this may be, it would seem that claims of States over wider straits than those which can be commanded by guns from coast batteries can no longer be upheld. Thus Great Britain used formerly to claim the Narrow Seas—namely, the St. George's Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial; and Phillimore asserts that the exclusive right of Great Britain over these Narrow Seas is uncontested. But it must be emphasised that this right is contested, and though it was put forward in 1910 by the Attorney General in the *North Atlantic Coast Fisheries* case, it is doubtful how far Great Britain would now persist in upholding her former claim.⁶ The Territorial Waters Jurisdiction Act, 1878, does not mention it.

§ 195. All rules of the Law of Nations concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits. Foreign merchantmen, therefore, cannot⁷ be excluded. The right of fishery may be reserved exclusively for subjects of the littoral State; and the latter can exercise jurisdiction over all foreign merchantmen passing through the straits. Foreign men-of-war must be admitted to such

Navigation,
Fishery,
and Jurisdiction in
Straits.

¹ See below, § 190. As to the Passage of Wieringen, which is the subject of a difference between Belgium and Holland, see Charles de Visser and Ganshof in *R.I.*, 3rd ser., 1 (1920) pp. 293-328, and see above, § 178.

² § 41.

³ At p. 303

⁴ Vol. i. p. 197.

⁵ § 230

⁶ See Phillimore, i. § 189, and above, § 191 (King's Chambers) In *Attorney-General for British Columbia v. Attorney-General for Canada* [1914]

A.C. at p. 174, the Privy Council considered that the 'narrow seas' limit discussed by the older authorities 'such as Selden and Hale... may safely be said to be now obsolete.'

⁷ The claim advanced by Russia—see Waulton in *R.G.*, 15 (1908), p. 410 to have a right to exclude foreign merchantmen from passage through the Kara and the Yugor Straits was therefore unfounded. As regards the Kara Sea see below, § 253.

straits as form part of the highways for international traffic.¹ In the *Corfu Channel* case between the United Kingdom and Albania the International Court of Justice re-affirmed and amplified that rule.² It held that, provided the passage is innocent,³ such right of passage can be exercised without previous authorisation of a coastal State; that, unless otherwise provided in a treaty, the coastal State is not entitled to prohibit such passage in time of peace although, in exceptional circumstances, it is justified in issuing regulations in respect of the passage; and that it is irrelevant that the strait is not a necessary but only an alternative route between two parts of the high seas. It is sufficient that it has been a useful route for international maritime traffic.

If the narrow strait divides the land of two different States, jurisdiction and fishery are reserved for each littoral State within the boundary line running through the mid-channel, unless otherwise arranged by treaty.

It must, however, be stated that the rule that foreign merchantmen cannot be excluded from passage through territorial straits applies only when they connect two parts of the open sea. Where a territorial strait belonging to one and the same State connects a part of the open sea with a territorial gulf or bay, or with a territorial land-locked sea belonging to the same State—as, for instance, the Strait of Kertch,⁴ and formerly the Bosphorus and the Dardanelles⁵—foreign vessels can be excluded.

¹ As, for instance, the Straits of Magellan. These straits were neutralised in 1881—see below, vol. ii. § 72—by a treaty between Chile and Argentina. See Abrihat, *Le détroit de Magellan au point de vue international* (1902). Nvs., i pp. 511-515; Moore, i. § 131, Fauchille, §§ 510-510 (6); Cruchaga, § 452; Smith, ii. pp. 267-262; and see below, vol. ii. § 72 (5) (n. 1). See also Escudero Guzman, *La Situation juridique internationale des eaux du détroit de Magellan* (1930). As to Gibraltar see Abbott, *An Introduction to the Documents Relating to the International Status of Gibraltar, 1704-1934* (1935).

² *I.C.J. Reports*, 1949, pp. 28, 29. And see Bruel in 'Gegenwärtige

probleme,' *Laun Festschrift* (1953), pp. 250-278.

³ For a lucid formulation of the rules, based on the findings of the Court, as to what constitutes innocent passage see Fitzmaurice in *B.Y.*, 27 (1950), pp. 28, 29. It would appear that, as there suggested, the passage is innocent even if minesweeping operations are conducted, so long as such operations are incidental to the passage in cases where the presence of a minefield is suspected. The passage ceases to be innocent when warships are sent into the waters of the territorial State without its consent for the purpose of conducting minesweeping operations.

⁴ See below, § 292, and Fauchille, § 506 (2), 2. ⁵ See below, § 197.

§ 196. See below.¹

§ 197. The Bosphorus and Dardanelles, the two territorial straits which connect the Black Sea with the Mediterranean, must be specially mentioned.² So long as the Black Sea was entirely enclosed by Turkish territory, and was therefore a portion of this territory, Turkey could exclude foreign vessels from the Bosphorus and the Dardanelles altogether, unless prevented by special treaties. But when in the eighteenth century Russia became a littoral State of the Black Sea, which, therefore, ceased to be entirely a territorial sea, Turkey, by several treaties with foreign Powers, conceded free navigation through the Bosphorus

The
Former
Sound
Dues.
The Bos-
phorus
and the
Dar-
danelles.

¹ § 196. *The Former Sound Dues*
The rule that foreign merchantmen must be allowed inoffensive passage through territorial straits without any dues and tolls whatever, has one exception until the year 1857. From time immemorial, Denmark had not allowed foreign vessels the passage through the two Belts and the Sound, a narrow strait which divides Denmark from Sweden and connects the Kattegat with the Baltic, without payment of a toll, the so called Sound Dues (see the details, which have historical interest only, in Twiss, i § 188, Phillimore, i § 179, Wharton, i § 29, Scherer, *Der Sundzoll* (1845), Hill, *The Danish Sound Dues and the Command of the Baltic* (1926), and in *Hague Recueil*, vol 45 (1933) (iii), pp 529 552, Brûel in *Z I* 41 (1929), pp 76 97, Stael-Holstein in *R I*, 3rd ser., 13 (1932), pp 800 812; Müller, *International Law* (Part I 1931), p 206, note). And see, on the Little Belt, in connection with the construction in 1935 of a bridge over it, Brûel in *Nordisk T.A.*, 6 (1935), pp 142 156 and Favilli in *R I*, 3rd ser., 17 (1936), pp 633 644. Whereas in former centuries these dues were not opposed, they were not considered any longer admissible as soon as the principle of free navigation on the sea became generally recognised, but Denmark nevertheless insisted upon the dues. In 1857, however, an arrangement (the Treaty of Copenhagen of March 14, 1857, see Martens, *N.R.G.* 16,

Part II p 345) was completed between the maritime Powers of Europe and Denmark by which the Sound Dues were abolished against a heavy indemnity paid by the signatory States to Denmark. And in the same year the United States entered into the Convention of Washington of April 11, 1857 (see Martens *N.R.G.*, 17, part i p 210), with Denmark for the free passage of their vessels and likewise paid an indemnity. For suggestions as to the future regulation of the Danish straits see Brûel in *Z I*, 36 (1924) pp 185 196. And see, generally, on the Danish Straits in International Law, the same in *Hague Recueil*, vol 55 (1936) (i), pp 599 690.

² See Holland, *The European Concert in the Eastern Question* (1897), pp 224 226, Pichs, p 29, Goriamon, *Le Bosphore et les Dardanelles* (1910), Dasterra, *La question du Bosphore et des Dardanelles* (1915), Philippon and Buxton, *The Question of the Bosphorus and the Dardanelles* (1919), Shotwell, *International Conciliation Pamphlet*, No 180 (1922) (a short history), Headlam Morley, *Studies in Diplomatic History* (1930), pp 212 253, Kabbira *Le régime des détroits (Bosphore et Dardanelles)* (1929), de Lapradelle and others, *Constantinople et les détroits*, 2 vols (1931). For a valuable historical account of Russian policy see Mandelstam in *Hague Recueil*, vol 47 (1934) (i), pp 603 798.

³ See above, § 195.

and the Dardanelles to foreign merchantmen. But she always upheld the rule that foreign men-of-war should be excluded from these straits; and by Article 1 of the Convention of London of July 13, 1841, between Turkey, Great Britain, Austria, France, Prussia, and Russia, this rule was definitely accepted. Article 10 of the Peace Treaty of Paris of 1856 and the Convention No. 1 annexed to this Treaty, and, further, Article 2 of the Treaty of London, 1871, again confirmed the rule, and all those Powers which were not parties to these Treaties nevertheless submitted to it.¹ According to the Treaty of London of 1871, however, the Porte could open the straits in time of peace to the men-of-war of friendly and allied Powers for the purpose, if necessary, of securing the execution of the stipulations of the Peace Treaty of Paris of 1856.²

The Treaty of Lausanne of 1923 removed most of the limitations hitherto weighing upon non-Black Sea Powers and imposed in turn far-reaching restrictions upon Turkey including the demilitarisation of the Straits zone and

¹ As to the United States see Wharton, i § 29, pp 79, 80, and Moore, i § 134, pp. 666 608. See also Roxburgh, *International Conventions and Third States* (1917), p 29.

² On the whole, the rule was in practice upheld by Turkey. Foreign light public vessels in the service of foreign diplomatic envoys at Constantinople could be admitted by the provisions of the Peace Treaty of Paris of 1856; and on several occasions when Turkey admitted a foreign man-of-war carrying a foreign monarch on a visit to Constantinople, there was no opposition by the Powers (see Perels, p 30). But there were cases when foreign warships passed the straits in violation of the rule. For instance, in 1847 Turkey permitted two French men-of-war to pass the straits for the purpose of towing some corn vessels from the Black Sea to France; the Powers protested, although Turkey had given permission on humanitarian grounds alone. Again, in 1858 the United States Government, which had obtained permission to send a light war

vessel for the service of the American Legation at Constantinople, sent the *Wabash*, a large frigate armed with fifty guns, the other Powers protested, whereupon the *Wabash* departed. See Swisher in *4 J.*, 45 (1951), pp 564 571. Further, in 1902, Turkey allowed four Russian torpedo destroyers to pass through the straits on condition that these vessels should be disarmed and sail under the Russian commercial flag, and Great Britain protested. When, in 1904, during the Russo-Japanese War, *Peterburg* and *Smolensk*, two vessels belonging to the Russian volunteer fleet in the Black Sea, were allowed to pass through to the Mediterranean, no protest was raised, because it was impossible to assume that these vessels, which were flying the Russian commercial flag, would later on convert themselves into men-of-war by hoisting the Russian war flag (see below, vol ii § 84). During the First World War Turkey, before she became a belligerent, permitted two German cruisers, the *Göden* and the *Breslau*, to pass through the straits to Constantinople.

supervision by an International Commission.¹ Both were abolished by the Convention of Montreux of July 20, 1936.² That Convention provides for complete freedom of transit and navigation for merchant-vessels of all nations in time of peace and war, subject only to charges and sanitary measures authorised by the Convention and to the right to refuse passage to merchant-vessels of States at war with Turkey.

With regard to war vessels permitted to enter the Black Sea the Convention distinguishes between their passage in time of peace and in time of war. *In time of peace* the aggregate tonnage of non-Black Sea Powers permitted to enter the Black Sea must not exceed 30,000 tons or, in certain circumstances, 45,000 tons; the tonnage of any one non-Black Sea Power is limited to two-thirds of the aggregate tonnage of these Powers. As to passage through the Straits, the aggregate tonnage of all foreign naval vessels in course of transit through the Straits must not exceed 15,000 (Article 14), but Black Sea Powers may send capital ships through the Straits without restriction of tonnage provided that they pass through the Straits singly, escorted by not more than two destroyers (Article 11). These restrictions do not apply to light surface vessels, minor war vessels and auxiliary vessels either of Black Sea or of non-Black Sea Powers.

In time of war, when Turkey is not a belligerent, warships of belligerents enjoy freedom of passage only in so far, it appears, as their passage takes place in conformity with the obligations of the Covenant of the League of Nation.³ or in cases of assistance rendered to an attacked State in pursuance

¹ Treaty Series, No. 16 (1923), Cmd. 1929. See also *Off. J.*, 1928 pp. 951-974.

² Cmd. 5249, Turkey No. 1 (1936); *A.J.*, 31 (1937), Special Suppl., p. 1; Hudson, *Legislation*, vii. p. 386. And see Suche, *Der Meerengenvertrag von Montreux* (1936); Kirkpatrick in *Geneva Special Studies*, vii. No. 6 (1936); Wansam, *La convention des Détroits (Montreux, 1936)* (1937); Djonker, *La Bosphore et les Dardanelles* (1938); Jenks in *The New Commonwealth Quarterly*, 2 (1936), pp.

242-253. Fenwick in *A.J.*, 30 (1936), pp. 701-706; Colhard in *R.I. (Paris)*, 18 (1936), pp. 121-152; De Visscher in *R.I.*, 3rd ser., 17 (1936), pp. 669-718; Herz in *Friedenswarte*, 37 (1937), pp. 126-144; Routh in Toynbee, *Survey*, 1936, pp. 584-651; Fitzmaurice in *B.Y.*, 18 (1937), pp. 186-191.

³ The relevant provision of Article 25 of the Convention is somewhat obscure and refers, apparently, to the rights and obligations of Article 16 of the Covenant.

of a treaty of mutual assistance binding upon Turkey and concluded within the framework of the Covenant (Article 19). There is no right of passage, except by permission of the Turkish Government, when Turkey is a belligerent (Article 20) or when she considers herself to be threatened with imminent danger of war. But in the latter case the Council of the League, acting by a two-thirds majority, might decide that the measure was not justified, and it had thereupon to be discontinued by Turkey (Article 21). It is probable that when the Convention is revised the relevant functions of the League will be taken over by the United Nations.¹

IX

THE AIR AND AERIAL NAVIGATION

Hyde, i. §§ 188-193—Fenwick, pp. 311-316—Keith's Wheaton, pp. 414-416—Fauchille, §§ 531 (2)-531 (21), 626-629 (4)—Nys, i. pp. 568, 587—De Louter, i. pp. 321-326—Suarez, §§ 132-136—Fauchille, *Le domaine aérien* (1901)—Sibert, pp. 832-853—Grünwald, *Das Luftschiff*, etc. (1908)—Meil, *Das Luftschiff*, etc. (1908)—Meurer, *Luftschiffahrtrecht* (1909)—Meyer, *Die Erschliessung des Luftraums in ihren rechtlichen Folgen* (1909)—Magnani, *Il diritto sullo spazio aereo e l' aeronautica* (1909)—Hazeltine, *The Law of the Air* (1911)—Bielenberg, *Die Freiheit des Luftraums* (1911)—Catellani, *Il diritto aereo* (1911) (French translation published in Paris, 1912)—Sperl, *Die Luftschiffahrt*, etc. (1911)—Lambeyre, *Les principes du droit aérien* (1911)—Thibaut, *Le domaine aérien des États en temps de paix* (1911)—D'Hooghe, *Droit aérien* (1912)—Erle Richards, *Sovereignty over the Air* (1912)—Spaight, *Aircraft in Peace and the Law* (1919)—Spiropoulos, *Der Luftraum integrierender Bestandteil des Staatsgebietes* (1922)—Henry-Codannier, *Examen de principe de la convention internationale de 13 octobre 1919* (1922)—Garner, *Developments*, pp. 141-188—Charles de Visscher, *Le droit international des communications* (1924), pp. 135-151—Dupuis in *Hague Recueil*, 1924, i. pp. 274-280—Lauterpacht, §§ 47, 48—Henry-Codannier, *Éléments créateurs du droit aérien* (1929)—Volkman, *Internationales Luftrecht* (1930)—Colegrove, *International Control of Aviation* (1930)—Haupt, *Der Luftraum* (1931)—McNair, *The Law of the Air* (2nd ed. by Kerr and MacCrimmon, 1953)—Bruns, *Der Begriff des freien Luftraums im Völkerrecht* (1932)—Giannini, *Saggi di diritto aeronautico* (1932)—Le Goff, *Traité théorique et pratique de droit aérien* (1934)—Kroell, *Traité de droit international public aérien*, 2 vols. (1934)—Jaschke, *International Air Transport and National Policy* (1942)—Mance, *International Air Transport* (1943)—Guiliano, *La navigazione aerea nel diritto internazionale generale* (1941)—Schoenhorn in *Hague Recueil*, vol. 30 (1929) (v.), pp. 151-158—Hudson in *A.J.*, 24 (1930), pp. 228-240—*Ibid.*, 25 (1931), pp. 234-251—Hise in *Iowa Law Review*, 16 (1930-1931), pp. 169-194

¹ See Tchirkovitch in *R.G.*, 56 (1952), pp. 189-227.

—*Annuaire*, 21 (1906), pp. 327-329; 24 (1911), pp. 23-126, 303-345—Zollmann, *Law of the Air* (1927)—Fauchille in *Annuaire*, 19 (1902), pp. 19-114, 24 (1911), pp. 23-126, and in *R.G.*, 8 (1901), pp. 414-485, 17 (1910), pp. 55-62—Zitelmann in *Zeitschrift für internationales privatrecht und öffentliches Recht*, 19 (1909), pp. 458-496—Baldwin and Kuhn in *A.J.*, 4 (1910), pp. 95-108, 109-132—Baldwin in *Z.V.*, 5 (1911) pp. 394-399—Sperl in *R.G.*, 18 (1911), pp. 473-491—Hershey in *A.J.*, 6 (1912), pp. 381-388—Lee in *A.J.*, 7 (1913), pp. 470-496—Hazelton in *J.C.L.*, 3rd ser., 1 (1919), pp. 76-89—Kuhn in *A.J.*, 14 (1920), pp. 369-381—de Montmorency in *B.Y.*, 1921-1922, pp. 167-173—Garner in *R.I.*, 3rd ser., 4 (1923), pp. 356-394, 628-652—Ripert in 50 (*lunet*) (1923), pp. 775-784—Homburg in *R.I.*, 3rd ser., 5 (1924), pp. 231-240—Schleicher in *Z.I.*, 33 (1924-1925) pp. 1-16—F. de Visscher in *R.I.*, 3rd ser., 8 (1927), pp. 182-214—Goedhuis in *R.I.*, 3rd ser., 17 (1936), pp. 379-405, and in *A.J.*, 36 (1942), pp. 596-613—Jennings in *B.Y.*, 22 (1945) pp. 191-209, and 23 (1946), pp. 358-363—Lathford in *A.J.*, 46 (1946), pp. 280-302—Cooper in *Yale Law Journal*, 55 (1946), pp. 1191-1213—Prentice in *Bulletin of State Department*, 16 (1947), pp. 1145-1151—Pepin in *Hague Recueil*, 71 (1947) (ii.), pp. 481-543—Rhyne in *Michigan Law Review*, 47 (1949), pp. 41-66—Jennings in *Hague Recueil*, 75 (1949) (ii.), pp. 513-586—Wilberforce in *Grotius Society*, 35 (1950), pp. 73-90—*International Law Association Report*, 45 (1952), pp. 112-137—Goedhuis in *Hague Recueil*, 81 (1952) (ii.), pp. 204-305—And see articles in the *Revue juridique internationale de la locomotion aérienne*, *Revue générale de droit aérienne*, *Revue aéronautique internationale*, and some of the works cited below, vol. II § 214a

§ 197a. The development of aerial navigation in the early years of the present century gave rise to much speculation as to the juridical nature of the air space and the extent of rights in it. That the air space over the open sea and over unoccupied territory is free and in the former case incapable of appropriation may be taken as almost universally admitted.¹ With regard, however, to the air space over occupied land and waters, both national and territorial, there have been a number of competing theories, which may be summarised as follows: (1) that the air space is entirely free²; (2) that upon the analogy of the maritime belt there is a lower zone of territorial air space and a higher unlimited zone of free air space³; (3) that the air space to an unlimited height is entirely within the sovereignty of the subjacent State, which is an application—though not

¹ See Hazelton, *Law of the Air* (1911), p. 9.

² Grotius (ii. c. 2, § 3) refers incidentally to the air, and seems to suggest that in his opinion it should be likened to the open sea and be incapable of appropriation.

³ How far upward in space does the territory of the State extend? The question has been said to have become topical in connection with high altitude rockets. See Cooper in *I.L.Q.*, 4 (1951), pp. 411-418.

necessarily the correct application¹—of the private law maxim *cujus est solum ejus est usque ad coelum et ad inferos*; (4) that the air space is within the sovereignty of the subjacent State subject to a servitude² of innocent passage for foreign civil, but not military, aircraft.³

British
Legisla-
tion.

§ 197b. Aerial navigation, both by British nationals and by aliens, over the land and waters, both national and territorial, of Great Britain and Northern Ireland is now governed by the Air Navigation Act, 1920, and the Orders in Council made thereunder. This Act, which asserts that 'the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air' superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto, may be extended by Order in Council to any part of the British Empire other than India and the Self-Governing Dominions, and 'to any territory under His Majesty's protection.' Its main purpose is to empower the Crown to make such Orders in Council as may be necessary for giving effect to the Convention for the Regulation of Aerial Navigation of 1919 about to be discussed.⁵

Conven-
tion of
1919 for
the Regu-
lation of
Aerial
Navigation.

§ 197c. International aerial navigation is at present governed by (i) the Convention for the Regulation of Aerial

¹ Hazeltine, *op. cit.*, pp. 54-77; Lauterpacht, *Analogue*, § 48. And see Cooper in *McGill Law Journal*, 1 (1952), pp. 23-65, and Richardson in *Canadian Bar Review*, 31 (1953), pp. 117-149.

² See below, §§ 203-208.

³ As to the stratosphere above the air column see Korovine in *R.G.*, 41 (1934), pp. 675-686.

⁴ See as to this the general discussion by Gidel, *iii*, pp. 333-338.

⁵ It is worth noticing that Section 9 of the Act relating to actions for trespass or nuisance rejects the literal application of the maxim *cujus est solum ejus est usque ad coelum et ad inferos* by providing that no action for trespass or for nuisance shall lie 'by reason only of the flight of aircraft over any property at a height above the ground which, having regard to wind, weather, and all the

circumstances of the case, is reasonable'; but nevertheless the same section imposes upon the owner of an aircraft an absolute liability for any material damage caused to any person or property on land or water by the aircraft in flight, taking off, or landing, or by any article falling from the aircraft, except where the damage was caused or contributed to by the person by whom it was suffered. And see Section 15 of the Air Navigation Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 44) for a limitation of that liability, as well as Section 21 providing for Orders in Council deemed necessary to give effect to the Rome Convention of May 29, 1933, for the unification of certain rules relating to damage caused by aircraft to third parties. As to the legal position in other countries see Kaftan, *La responsabilité pour dommage causé par les aéronefs aux tiers à la surface* (1933).

Navigation of 1919,¹ a number of amending Protocols,² and the Convention on International Civil Aviation of 1944 and accompanying Agreements (see § 197eb); (ii) other conventions, either bilateral or plurilateral, supplementing or replacing the Conventions of 1919 and 1944³; or (iii) customary International Law.

The Convention of 1919 was drawn up at the Peace Conference of 1919, and signed on October 13, 1919. It applies to the time of peace only, and does not affect the freedom of action of the parties in time of war, either as belligerents or neutrals (Article 38). Its principal provisions are as follows⁴:

(a) *Sovereignty over the Air.* - It recognises that 'every State has complete and exclusive sovereignty in the air space above its territory and territorial waters,' but each party undertakes to accord in time of peace freedom of innocent passage to the private aircraft of other parties⁵ so long as they comply with the rules made by, or under the authority of, the Convention. Any regulations laid down by a party in accordance with the Convention as to the admission of such aircraft are to be applied without distinction of nationality.⁶ Each contracting State, however, reserves the right to prohibit all private flying over certain areas for military reasons or for public safety.⁷

(b) *Nationality of Aircraft.* Aircraft must be registered in the State of which their owners are nationals, and in that State alone. Their nationality is that of the State in which they are registered, and they must bear their nationality and registration marks, and the name and residence of their owner, when engaged in international navigation.⁸

¹ Treaty Series, No. 2 (1922), Cmd. 1609.

² October 27, 1922, Cmd. 2328, and June 30, 1923, Cmd. 2329. For the Amendment adopted in June and December 1929 see Treaty Series, No. 33 (1933), Cmd. 4423; *British and Foreign State Papers*, 134, pp. 432, 437. And see (1936) Cmd. 5332 for the texts of various Protocols amending the 1919 Convention.⁴

³ See e.g. the Convention on Commercial Aviation adopted in 1928 by the Sixth International American Conference: *A.J.*, Suppl., 22 (1928), pp. 124-133; Hudson, *Legislation*, iv, p. 2364. The Convention contains provisions analogous to those of the

Air Navigation Convention of 1919.

⁵ See Lee in *H.L.R.*, 33 (1919), pp. 23-28; Roper, *La Convention internationale du 13 octobre 1919* (1930); Pessereau, *Des modifications à la Convention du 13 octobre 1919* (1935).

⁶ As to permitting transit by the aircraft of non-contracting parties, see Article 5 as amended by the Protocol of Amendment of October 27, 1922, which has been signed and ratified by a considerable number of States.

⁷ Articles 1-2.

⁸ Article 3.

⁹ Articles 5-10. As to the flags of aircraft see Müller in *Z.V.*, 13 (1926), pp. 233-266, 353-397; F. de

(c) *International Navigation by Private Aircraft*.—Every private aircraft engaged in international navigation must carry: (1) a certificate of registration; (2) a certificate of airworthiness from the State to which it belongs; (3) certificates of competency and licences in respect of each member of the operating crew; (4) a list of passengers (if any); (5) bills of lading and manifest for freight (if any); (6) log books; (7) special licences for wireless equipment and for the wireless operators (if any). Private aircraft exercising their right of innocent passage across another State without landing must follow the route prescribed by the State flown over, and must land even against their will if ordered to do so. Private aircraft intending to land in another State must land at the aerodromes appointed for the purpose, if the regulations of the State concerned so require. But except for this provision, every aerodrome in a contracting State which upon payment of charges is open to public use by its national aircraft is likewise to be open to the aircraft of all other contracting States. The establishment of international airways is to be subject to the consent of the States flown over.¹ *Cabotage*² is reserved for aircraft of the territorial State, Article 16 providing that it shall have the right to reserve to its national aircraft the 'carriage of persons and goods for hire between two points on its territory.' With regard to aircraft wrecked at sea, the rules applicable to salvage of ships will apply, in the absence of agreement to the contrary³; aircraft of contracting States are to enjoy the measures of assistance for landing accorded to national aircraft, particularly in case of distress.⁴

(d) *Jurisdiction over Private Aircraft*.—The authorities of the territorial State have the right to visit every foreign private aircraft, and verify its documents, upon landing and upon departure. Each contracting State undertakes to adopt measures to ensure that every aircraft flying over its territory, and every aircraft bearing its nationality marks, wherever it may be, complies with the rules of navigation formulated by the Convention. It also undertakes to ensure the prosecution and punishment of all persons contravening them.⁵

Visser in *Hague Recueil*, vol. 48 (1934) (ii.), pp. 285-304. On the project of a convention on the juridical status of commanders of aircraft, adopted in 1931 by the International Technical Committee of Experts in Aerial Law, see Goodhuis in *R.I.*, 3rd ser., 14 (1933), pp. 134-150. As to flying boats see Oppikoff in *Archiv für Luftrecht*, 1934, ii. pp. 81 et seq.; Goodhuis in *R.I.*, 3rd ser., 17 (1936), pp. 376-377.

¹ Article 15, Article 24.

² See above, § 187 (2).

³ See below, § 271; and Article 23.

⁴ Article 22.

⁵ The first draft of the Convention had further laid down general rules for jurisdiction over private aircraft; but objection was taken to them and they were deleted. Consequently, all questions of jurisdiction which are not covered by the stipulations just mentioned must be settled by refer-

(e) *State Aircraft*.—State aircraft are of two classes: (1) *military*, i.e. those 'commanded by a person in military service detailed for the purpose,' and (2) *non-military*, but exclusively employed in State service, such as posts, customs, and police.

(1) *Military aircraft* may not fly over, or land in, the territory of another party without special authorisation; but having obtained such authorisation, they are to enjoy in principle, in the absence of special stipulation, the privileges of extritoriality customarily accorded to foreign warships.¹ On the other hand, a military aircraft landing on the territory of another party in any other circumstances can claim no such privileges.

(2) *Non-military*. With regard to police and customs aircraft, the States are to arrange among themselves the conditions upon which they may cross the frontier. Such aircraft are not in any case to enjoy extritoriality. All other non-military State aircraft are to be treated as private aircraft.²

(f) *The International Commission*.—The Convention established an International Commission for Air Navigation³ as a permanent commission under the direction of the League of Nations. Its principal duties were to receive or make proposals for amending the Convention, to amend the technical annexes, to carry out duties assigned to it by the Convention, to collect and disseminate information bearing upon air navigation, to publish air maps, and to give an opinion on questions submitted to it for examination.⁴

ence to the general principles of International Law. (See above, §§ 123-124, 143-145.) As to crimes committed in the air outside the territory of the aircraft's State of registration see Travers, §§ 280-284, and M. Nair, *The Law of the Air* (2nd ed., 1953), pp. 117-124. See also Morpurgo in *Revue juridique internationale de la locomotion aérienne*, 12 (1928), p. 399; Hirschberg in *Z.I.*, 42 (1930), pp. 138-207; Volkmann in *Droit aérien*, 15 (1931), pp. 26 et seq.; F. de Visscher in *Hague Recueil*, vol. 48 (1934) (II), pp. 324-379, and in *R.I.*, 3rd ser., 17 (1936), pp. 118-137; *Harvard Research* (1935), pp. 509-519; Fenston and De Saussure in *McGill Law Journal*, 1 (1952) pp. 86-89. In *United States v. Corliss*—(1950) 89 F. Supp. 298; *A.J.*, 45 (1951) p. 373—it was held that a statute which gave the courts of the United States jurisdiction over crimes committed upon the high seas did not extend to the air space above them. For the Resolution of the Seventh Pan-

American Conference of December 1933 on offences committed on board aircraft see *A.J.*, 28 (1934), Suppl., pp. 54, 55.

¹ See below, § 450. And see Klein, *Staatschiffe und Staatsluftfahrzeuge im Völkerrecht* (1934).

² Articles 30-33.

³ By Article 34, as amended by the Protocol of Amendment of June 30, 1923, which was signed and ratified by a considerable number of States, the Commission consisted of two representatives of the United States of America, France, Italy, and Japan, one representative of Great Britain and one of each of the British Dominions and of India, and one representative of each of the other contracting States. On the work and the organisation of the Commission see Gibson in *Temple Law Quarterly*, 5 (1930-1931), pp. 562-583; Pignochet, *La Commission internationale de Navigation aérienne* (1935).

⁴ Article 34, as amended (see note 3 above).

(g) *Amendments to the Convention*.—While the International Commission can, by the requisite majority, itself amend the annexes, it cannot do more than recommend an amendment of the Convention.¹

Other
Inter-
national
Con-
ventions.

§ 197d. A large number of other conventions have been entered into both by signatories of the last-mentioned Convention of 1919 with non-signatory States and by non-signatory States amongst themselves providing for mutual rights of innocent passage and landing² for civil aircraft subject to compliance with regulations.³ In February 1928 a number of American States, including the United States, concluded a Convention on Commercial Aviation which followed the general lines of the Paris Convention without, however, creating a special international organisation.⁴ Of special importance is the Convention for the Unification of Certain Rules regarding International Air Transport signed at Warsaw on October 12, 1929.⁵

¹ See Spaight in *B.Y.*, 1924, pp. 183, 184.

² Unruh, *Flughafenrecht* (1934).

³ See Fauchille, § 531 (15). An instance is the Convention between Great Britain and Germany of June 29, 1927, ratifications exchanged on December 1, 1927: Cmd. 3010. For a survey of air navigation agreements see Gibson in *Temple Law Quarterly*, 6 (1931-1932), pp. 57-86 (bipartite), and 5 (1930-1931), pp. 404-424 (multipartite). See also Maschino in 59 *Clunet* (1932), pp. 569-588; Goedhuis in *R.I.*, 3rd ser., 17 (1930), pp. 383-394; Slotemaker, *Freedom of Passage for International Air Services* (1932). With regard to the position prior to 1919 see Gibson in *Temple Law Quarterly*, 5 (1930-1931), pp. 161-184. And see Wegerdt in *R.I. (Paris)*, 3 (1929), pp. 131-162 (with regard to Germany). In some cases treaties provide for the establishment of special air transport lines: see e.g. the Convention of December 7, 1934, between Great Britain and Italy: Treaty Series, No. 2 (1935), Cmd. 4808.

⁴ Hudson, *Legislation*, iv. p. 2354. On the various bilateral agreements see Tomba, *International Organisation in European Air Transport and National Policy* (1942).

⁵ The object of the Convention is to regulate in a uniform manner the

conditions of international carriage by air with regard to documents of carriage and the responsibility of the carrier. It contains detailed provisions concerning passengers and luggage, pilots, air consignment notes, the liability of the carrier, and combined carriage: Treaty Series, No. 11 (1933), Cmd. 4284; *British and Foreign State Papers*, 131, p. 406; *L.N.T.S.*, 137, p. 11; Hudson, *Legislation*, v. p. 100; *A.J.*, 28 (1934), Suppl., pp. 84-96; Giannini, *La Convenzione di Varsavia* (1929); Blanc-Dannery, *La Convention de Varsovie* (1933); Goedhuis, *La Convention de Varsovie* (1933); the same, *National Air Legislation and the Warsaw Convention* (1937); Maschino in *Droit arien*, 14 (1930), pp. 4-26; Ripert in *Clunet*, 57 (1930), pp. 90-100; Sack in *Air Law Review*, 4 (1933), pp. 345-388. And see, as to Great Britain, Carriage by Air Act, 1932 (22 and 23 Geo. 5, c. 36). See also *Grein v. Imperial Airways* (1936) 55 Ll.L. 318, [1937] 1 K.B. 50; *Annual Digest*, 1935-1937, Case No. 214. See also below, § 610, n. For an Agreement concerning Customs Regulations applicable to Air Traffic signed on May 5, 1926, see Treaty Series, No. 12 (1926), Cmd. 2664; Hudson, *Legislation*, iii. p. 1878. For the International Sanitary Convention for Aerial Navigation of 1944 modifying

§ 197e. Where there is no convention permitting the transit and landing of foreign aircraft, the position is governed by customary International Law. The practice of States seems to accord with the theory of the sovereignty of the subjacent State in the air space over its territory and waters, both national and territorial, unmitigated by any servitude or other right of innocent passage.¹ It is possible that with the development of International Law and the extension of obligatory jurisdiction of international tribunals the principle prohibiting the abuse of rights² will be effectively resorted to as a means of checking unjustifiably obstructive action on the part of States relying on the right of sovereignty over the air. In the meantime, however, the grant of the right of passage and landing is often used as a bargaining weapon for obtaining economic advantages or even as an instrument of political pressure or prejudice. While a network of bilateral treaties has to some extent alleviated the consequences of the customary law as at present understood, no corresponding progress has as yet been achieved by way of general treaties.³

§ 197ea. The Air Navigation Convention of 1919, although of great significance as the first attempt, on a large scale, at international regulation of aerial navigation, constituted only nominal progress with regard to the most important aspects of the problem which it set out to solve. In the first instance, although the Contracting Parties undertook

The Draw-backs of the Air Navigation Convention of 1919.

the Convention of 1933 see Cmd 6036. For the Convention of May 29, 1933, concerning the unification of certain rules relating to damage caused by aircraft to third parties on the surface and concluded at the Third International Conference on Private Air Law held at Rome see Hudson, *Legislation*, vi, p. 334. And see Tombs, *International Organization in European Air Transport* (1936). The Fourth International Conference on Private Air Law, held in Brussels in September 1938, adopted a Convention for the unification of certain rules relating to assistance and salvage of aircraft or by aircraft at sea. For details see Hackworth, iv, § 367. See also *Watson v. R.C.A. Victor Company*

(1934), 50 Ll. L. Rep 77—an action for salvage in connection with the rescue by a British fishing vessel of a seaplane which was compelled to descend on the sea near Greenland. In 1948 the Assembly of the International Civil Aviation Organization adopted a Convention on the International Recognition of Rights in Aircraft.

¹ As to the Persian action in 1927 with regard to the air route between Great Britain and India see Toynbee, *Survey*, 1928, pp. 351-354.

² See above, § 156aa.

³ As to aviation and jurisdiction over Arctic airspace see Plushke in *American Political Science Review*, 37 (1943), pp. 999-1013.

in time of peace to accord freedom of innocent passage above their territories to the aircraft of other Contracting Parties,¹ such right of innocent passage did not necessarily include the right to land (except, probably, for aircraft not engaged in international scheduled services).² Secondly, the Convention authorised the parties to prohibit 'for military reasons or in the interest of safety' the passage of aircraft over their territories.³ That permissive provision has been interpreted in practice in such a way as to limit substantially the right of innocent passage.⁴ Thirdly, the Convention reserved for the Parties the right to establish restrictions in favour of their own aircraft with regard to so-called *cabotage*, i.e. carriage of persons and goods between two points of their territory.⁵ While *cabotage* in the sphere of maritime transport covers only traffic along the coast-line, *cabotage* in relation to aerial navigation is of much wider application and may cover distant points in metropolitan territory as well as places between the latter and the colonies of the State concerned. Finally, and most significantly, the right of innocent passage was expressly excluded with regard to 'international airways.'⁶ The right of passage for such international—regular and scheduled—services was made subject to the consent of the States concerned. As the result, the Convention excluded the most important aspect of international air transport from the operation of its principal provision. Governments did not hesitate to avail themselves of the freedom of action which the Convention left them in this respect. In 1939 Spain refused to British aircraft permission to cross Spanish territory *en route* to Portugal.⁷

¹ Article 2.

² Article 13 provided that 'any aircraft of a contracting State has the right to cross the airspace of another State without landing.' Another implied limitation of the right of landing, if any, was contained in Article 2 (2), which laid down that regulations as to admission of foreign aircraft shall be applied without distinction of nationality.

³ Article 3.

⁴ See Jennings in *B.Y.*, 22 (1945), p. 204, who points out that, for instance, on the North Italian frontier

the prohibited areas before the Second World War were so extensive that only a few limited corridors remained open.

⁵ Article 16.

⁶ Article 15, paragraph 2.

⁷ Apparently on the ground that such right ought to be reserved for countries which assisted the Spanish Government, then in power, during the Civil War of 1936-1939. See Goedhuis in *A.J.*, 36 (1942), p. 603, who gives an account of the attitude of a number of States which were not

It is thus clear that the Air Navigation Convention of 1919 left unsettled, to a large extent, one of the principal problems of international civil aviation, namely, the securing of freedom of passage for international air services. Moreover, the Convention failed to take into account the close connection between freedom of passage for international traffic and the necessity of international regulation of civil aviation in the economic sphere. The latter would include the elimination of wasteful competition and the safeguarding of the legitimate interests of the countries granting freedom of passage by means of international agreement providing for scheduled international routes and for the allocation of the total number of services—so-called 'frequencies'—on such routes, as well as for the abandonment of the system of uneconomic subsidies for air lines for the sake of national prestige or military considerations.¹ An agreement on these lines might involve the creation of an international authority having the power to license services and to prescribe routes. The view is widely held that only the internationalisation of air lines operated under the control of an international organ, set up on a universal or regional basis, would be adequate to cope with the intricacies of the problem presented by international aviation.

§ 197eb. The circumstance that the International Civil Aviation Conference, convened at Chicago in November 1944, was unable to take into account the inter-connection between freedom of passage and other aspects of international regulation of aviation accounts for its comparative failure to effect the much-needed improvement on the Convention of 1919.² The Conference adopted a widely signed con-

The Chicago Civil Aviation Agreements of 1944.

parties to the Convention of 1919. Thus Persia obstructed the plan of British Imperial Airways for a service to India. The United States, by refusing to foreign aircraft permission to land at Hawaii, acquired a virtual monopoly of trans-Pacific services. The United States, China, Germany, Brazil, Persia, as well as some other countries, have not acceded to the Convention of 1919. See also Christensen, *Der Grundsatz der Verkehrsfreiheit im*

überseeischen Luftverkehr (1939).

¹ For a lucid statement of the policy of the British Government for the regulation of air transport on these lines see Cmd 6561 (1944).

² This applies, for instance, to nationality and registration of aircraft (Articles 17-21 of the Chicago Convention). However, in so far as the existing provisions render it difficult, if not impossible, to afford the benefits of the Convention to aircraft

vention on International Civil Aviation¹ which follows, on the whole, the lines of the Convention of 1919. The Convention entered into force in April 1947. By August 1947 forty-three States were bound by the Convention. In addition to the Final Act, which includes resolutions and recommendations on various technical matters, such as transfer of title to aircraft and a standard form of agreement for provisional air routes,² the Conference also adopted :

(1) An *Interim Agreement on International Civil Aviation*.³ The Agreement, which is intended to operate pending the entry into force of the principal Convention, lays down some general principles adopted in the latter and establishes between the parties a provisional international organisation of a technical and advisory nature for the purpose of collaboration in the field of international aviation. The organisation, whose seat is in Canada, consists of an Interim Assembly and Interim Council. Among the duties of the latter is the setting up of committees on air transport, on air navigation, and on an international convention on civil aviation. The function of these bodies is to collect informa-

owned and operated by international bodies, Article 77 of the Convention opens the possibility of a less rigid regulation by enjoining the Council to determine in what manner the provisions of the Convention relating to nationality of aircraft 'shall apply to aircraft operated by international operating agencies.' For a useful discussion of the question of nationality of aircraft see Jennings, *op. cit.*, pp. 206-208. With regard to *cabotage*, Article 7 of the Convention limits, to some extent, possible abuses by prohibiting the exclusive grant of the privilege of *cabotage* to any single State. With regard to prohibited areas, Article 7 of the Chicago Convention permits their establishment only 'for reasons of military necessity or public safety' (Article 3 of the Paris Convention referred to military 'reasons'). The same Article requires that prohibited areas 'shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation,' and that prohibitions and restrictions shall apply 'uniformly to the aircraft of other

States.' Finally, with regard to aircraft not engaged in scheduled international service, Article 5 lays down that no prior authorisation shall be required either for transit or for landing for non-traffic purposes; the term 'innocent passage' does not occur in the Convention. However, with regard to landing for non-traffic purposes, the privilege of taking on or discharging passengers, cargo, or mail is subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions, or limitations as it may consider desirable. For a comparison of the Chicago Agreements with the Conventions of Paris and Havana see Latchford in *Department of State Bulletin*, No. 298, 12 (1945), pp. 411-420.

¹ Treaty Series, No. 8 (1953), Cmd. 8742. And see (Cooper, *The Right to Fly* (1947).

² Printed in *A.J.*, 39 (1945), Suppl., p. 111. And see for the Final Act of the Conference and the Appendices, Cmd. 8614 (1945).

³ *A.J.*, 39 (1945), Suppl., p. 123.

tion, to study and to advise on various aspects of international aviation

(2) An *International Air Transport Agreement* (so-called 'five-freedoms agreement'). That Agreement, intended to fill with regard to scheduled international services the gap left by the general Convention, provides for the following five freedoms for such services: (1) the privilege to fly across the territory of a State without landing; (2) the privilege to land for non-traffic purposes; (3) the privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses¹; (4) the privilege to take on passengers, mail, and cargo for the territory of that State²; (5) the privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.³ The 'freedoms' enumerated in (3), (4) and (5) were, however, limited to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses.⁴

This Agreement, although signed by nineteen States was not accepted by Great Britain and some other countries in a position to provide facilities for transit.⁵ It was spon-

¹ *E.g.* the right of British aircraft to put down in France (assuming that she is a party to the Convention) passengers taken on in Great Britain.

² *E.g.* the right of British aircraft to take on in France passengers for Great Britain.

³ *E.g.* the right of British aircraft to take on in France passengers for the territory of any contracting Party and to set down in France passengers taken on in the territory of any contracting Party.

⁴ Section 3 of Article 3 provides that a Party which offers to the air lines of another contracting State the privilege of landing for non-traffic purposes may require these air-lines to offer reasonable commercial service at the points of landing.

⁵ Following upon the Chicago Convention a number of States concluded bilateral treaties in which the 'fifth freedom' was granted subject to

certain limitations and conditions. See *e.g.* the Bilateral Civil Aviation Agreement between Great Britain and the United States of February 11, 1946. The Agreement gives to parties the right to carry 'fifth freedom' traffic in accordance with defined principles. It provides that rates to be charged by air carriers operating between points in the United Kingdom and points in the United States shall be subject to governmental review. It lays down that each country shall have the right to determine the frequency of operation of its air-lines. See *Bulletin of State Department*, 14 (1946), p. 302. However, by the end of 1946 little progress had been made in bringing into effect the general 'five-freedoms agreement.' In July 1946 the United States announced its withdrawal from the Agreement. Some other countries, including China, did the same.

sored mainly by the United States, who throughout the Conference identified itself most conspicuously with the principle of freedom of international navigation without, however, being prepared to accept what must be regarded as the necessary concomitant of that principle, namely, a substantial measure of regulation by or under the auspices of an international authority.¹

(3) An *International Air Service Transit Agreement* (so-called 'two-freedoms agreement') in which the parties agreed to grant to international air services the privilege to fly across their territory without landing and to land for non-traffic purposes (i.e. for refuelling and repairs). This Agreement, which was adopted by way of compromise, was signed, by February 1945, by thirty-three States including the principal transit States with the exception of Australia, China, Brazil and Soviet Russia.²

¹ While the United States advocated unrestricted free competition in the exploitation of international air-lines, Australia and New Zealand proposed full international control and operation of international airways. Canada put forward a compromise plan which combined the concession of the first four freedoms (see above) with the control of air-line frequencies by an international body—a Board of Directors acting as the executive committee of the International Air Assembly—authorised to allocate frequencies to national airlines in accordance with agreed principles. In particular, each line was to be entitled to increase its frequencies on showing that, for a considerable time, more than 65 per cent. of its total carrying capacity had been occupied by revenue-paying commercial load. On the other hand, the lines were to suffer a diminution of their frequencies if the proportion of revenue-paying cargo was less than 40 per cent. The British plan for a new Convention—as outlined in a White Paper (Cmd. 6561) published in October 1944—proposed that the Convention should:

'(iii) define the international air routes which should be subject to international regulation; these would be reviewed

from time to time as necessary,

- (iv) provide for the elimination of uneconomic competition by the determination of frequencies (total services of all countries operating on any international route), the distribution of those frequencies between the countries concerned, and the fixing of rates of carriage in relation to standards of speed and accommodation.
- (v) provide for the licensing of international air operators who undertook to observe the Convention and to abide by the rulings of the appropriate authority, and for the withdrawal of the licence in the event of a breach of the obligations,
- (vi) provide for the denial of facilities to any unlicensed operator.'

The plan included a recognition of the first four freedoms.

² The latter did not participate in the Conference. It may be noted that both the 'two-freedoms agreement' (Article 2, § 1) and the 'five-freedoms agreement' (Article 4, § 2) give the International Civil Aviation Organisation powers of a quasi-judicial nature

It would thus appear that the solution of the problem of international civil aviation is still a matter of the future. Aviation, more perhaps than any other aspect of international economic relations, exemplifies the interdependence of States in modern conditions. Such interdependence cannot be effectively recognised by international agreement unless States are willing to limit their sovereignty in this respect, not only by permitting freedom of transit but also by acquiescing in a measure of international regulation without which freedom of transit may be productive both of the disregard of legitimate economic interests of countries granting the right of transit and of the danger of unchecked economic supremacy of some States. The close connection between the latter and considerations of military security tend to emphasise the desirability of a substantial measure of international control of civil aviation. The objects, in this and other matters, and the constitution of the International Civil Aviation Organisation set up by the Convention on International Civil Aviation¹ are surveyed below.²

§ 197f. The principle of exclusive sovereignty in the air space for the subjacent State, which has received general approval in connection with aerial navigation, enables that State to prohibit the disturbance of the air space over its territory by means of Herzian waves caused for the purpose of wireless communication and emanating from a foreign source. Neither the Washington Convention of November 25, 1927,³ nor the General Radio Communication Regulations attached to the International Telecommunication Con-

Wireless
Communications.

to deal with situations arising out of a complaint that the action of one party to the Agreement causes injustice or hardship to another. The Council of the Organisation, after investigating the complaint, may make appropriate recommendations and, if the State concerned fails to take 'suitable corrective action,' the Council may recommend to the Assembly, acting by a two-thirds majority, that the recalcitrant State 'be suspended from its rights and

privileges under the Agreement until such action has been taken.' The question of international co-ordination is also likely to arise in the matter of the relation of sea transport to air transport.

¹ The Convention came into force in 1947 after having been ratified by twenty-six States. The Organisation was set up thirty days later.

² See Appendix, pp. 1011-1014.

³ See above, § 174 and below, §§ 287a, 287b.

vention concluded in Madrid on December 9, 1932,¹ and revised there in the course of the Conference held between February 1 and April 9, 1938, nor the European Broadcasting Conventions of June 19, 1933,² and September 15, 1948,³ derogate from that principle. But these Conventions mark the beginning of attempts to introduce a substantial element of legal regulation in a domain of human activity which by its very nature transcends the borders of the territorial State. The last-named Convention, in which the Parties have undertaken definite obligations with regard to the operation and installation of broadcasting stations, is an important step in this direction. It is possible that the growing number of treaties in this field will contribute to the more general acceptance of the principle prohibiting the abuse of rights⁴ with regard to both the emission⁵ and the passage of waves.⁶

X

BOUNDARIES OF STATE TERRITORY

Grotius, *ii* c. 3, §§ 16-18—Vattel, *i*, § 266—Hall, § 38—Westlake, *i* pp 144, 145—Moore *i* §§ 151-162 Hackworth, *i* §§ 103-107 Hyde *i* § 151

¹ *L.N.T.S.*, 151 p. 7. That Convention includes also the important Telegraph and Telephone Regulations.

² Hudson, *Legislation* vi p. 345.

³ Treaty Series, No. 30 (1950), Cmd. 7946.

⁴ See above, §§ 155*aa* and 174.

⁵ As to the Convention of 1936 concerning the use of Broadcasting in the Cause of Peace see above, § 127 (n). For the South American Regional Agreement on Radiocommunications of June 20, 1937, see Hudson, *Legislation*, vii, p. 767. And see *ibid.*, p. 900, for the Inter-American Radiocommunications Convention of December 13, 1937; p. 923 for the Inter-American Arrangement of the same date concerning Radiocommunications; and p. 962 for the North American Regional Broadcasting Agreement signed at Havana on December 13, 1932. See also Hackworth, *iv*, § 354, for other American regional agreements.

⁶ See, in addition to the writers referred to above in § 174, Hackworth, *iv*, §§ 353-358; Grande, *La radiotelegrafia nel diritto internazionale* (1927);

Friedmann, *International Radiotelegraph Conference of Washington, 1927* (1928), Stenaut, *La radiophonie et le droit international public* (1932), Habaru, *L'organisation internationale de la radiodiffusion* (1934), Tomlinson, *The International Control of Radio Communications* (1945), Codding, *The International Telecommunications Union* (1952), Stewart in *A.J.*, 22 (1924) pp. 24-49, and 25 (1931), pp. 644-693; Cavaglieri in *R.I. (Paris)*, 2 (1928), pp. 860-872; Davis in *Geographical Law Journal* June 1928, pp. 400-414; Brenot in *Revue juridique internationale de la radio électrique* 1928 No. 14 pp. 83 *et seq.*, Amelio and Ginepro, *ibid.*, No. 16, pp. 247 *et seq.*, (Mannini, *ibid.*, pp. 255 *et seq.*, Fabelli in *R.I. (Paris)*, 12 (1933), pp. 566-590, Hostie in *R.I.*, 3rd ser., 18 (1937), pp. 10-33; Le Roy in *A.J.*, 32 (1938), pp. 719-737; Colt de Wolf in *Yale Law Journal*, 55 (1946), pp. 1291-1290, Joeden in *Jahrbuch für Internationales Recht*, 3 (1954), pp. 85-128. And see *ibid.*, pp. 211-219, for a list of relevant treaties.

Bluntschli, §§ 296-302. Anecl in *Hague Recueil*, vol 55 (1936) (i.), pp. 207-294—Verdross, pp. 195-196 Fauchille, §§ 486-489 (7), 606 (1)-606 (6)—Sibert, pp. 709-713 Despuget, § 377—Pradier Fodere ii. §§ 759-777—Mérignhac, ii. pp. 358—Nys, i. pp. 446-472—Rivier, i. § 11—Calvo, i. § 342—Fiore, ii. §§ 799-806, and *Code*, §§ 1045-1054—Martens, i. § 89—Cruchaga, §§ 421-430—De Louter, i. pp. 311-336 Lindley, pp. 270-283—Ralston, §§ 566-572, 574a—Lord Curzon of Kedleston, *Frontiers* (Romanes lecture of 1907)—Holdich, *Political Frontiers and Boundary Making* (1915)—Schultheuss, *Das internationale Wasserrecht* (1915)—Fawcett, *Frontiers* (1918)—Lederle, *Das Recht der internationalen Gewässer* (1920), pp. 9-38—Adami, *National Frontiers in relation to International Law* (1927) (translation from the Italian) P. de Lapradelle, *La Frontière* (1928), and in *Répertoire*, viii pp. 487-514—Flaës, *Das Problem der Territorialkonflikte* (1929) Boggs, *International Boundaries* (1940)—Ireland, *Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean* (1941)—S. B. Jones, *Boundary Making* (1945) Carpenter in *A.J.*, 19 (1925), pp. 517-529—Sir John Simon in *International Affairs*, 12 (1933) pp. 701-723 Duncan Hall in *I.J.*, 12 (1918), pp. 42-65—Rousseau in *R.O.*, 58 (1954), pp. 23-52.

§ 198. Boundaries of State territory are the imaginary ^{Natural and Arti} lines on the surface of the earth which separate the territory ^{ficial} of one State from that of another, or from unappropriated ^{Bound-} territory, or from the open sea.¹ The course of the boundary ^{aries.} lines may or may not be indicated by boundary signs. These signs may be natural or artificial, and one speaks, therefore, of natural in contradistinction to artificial boundaries. *Natural*² boundaries may consist of water, a range of rocks or mountains, deserts, forests, and the like. *Artificial* boundaries are such signs as have been purposely put up to indicate the way of the imaginary boundary line. They may consist of posts, stones, bars, walls,³ trenches,

¹ On the importance of fixed boundaries for the recognition of a State *de jure* see *Deutsche Continental Gas Gesellschaft v. Polish State* decided by the Germano-Polish Mixed Arbitral Tribunal on August 1, 1929. *Annual Digest*, 1929-1930, Case No. 5. The Tribunal held that statehood is not absolutely dependent on the existence of rigidly fixed boundaries.

² § 202 *Natural Boundaries sensu politico*. Whereas the term 'natural boundaries' in the theory and practice of the Law of Nations means natural signs which indicate the course of boundary lines, the same term is used politically (see Rivier, i. p. 166) in various different meanings. Thus the French often speak of the river

Rhine as their 'natural' boundary, as the Italians do of the Alps. Thus, further, the zones within which the language of a nation is spoken are frequently termed that nation's 'natural' boundary. Again, the line enclosing such parts of the land as afford great facilities for defence against an attack is often called the 'natural' boundary of a State, whether or not these parts belong to the territory of that State. But such conceptions are political and are outside the domain of International Law.

³ The Romans of antiquity very often constructed boundary walls, and the Chinese Wall may also be cited as an example.

roads, canals, buoys in water, and the like. It must, however, be borne in mind that the distinction between artificial and natural boundaries is not sharp, in so far as some natural boundaries can be artificially created. Thus a forest may be planted, and a desert may be created, as was the frequent practice of the Romans of antiquity, for the purpose of marking the frontier.¹

Boundary
Waters.

§ 199. Natural boundaries consisting of water must be specially discussed on account of the different kinds of boundary waters. Such kinds are rivers, lakes, land-locked seas, and the maritime belt.

(1) Boundary rivers² are such rivers as separate two different States from each other.³ If such a river is not navigable, the imaginary boundary line as a rule runs down the middle of the river,⁴ following all turnings of the border line of both banks of the river. If navigable, the boundary line as a rule runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river,⁵ and this general rule was adopted by the Treaties of Peace of 1919, except in special cases.⁶ But it is possible that the boundary

¹ The usual practice adopted by the Peace Conference in 1919 with regard to boundaries was to specify them in words, so far as was practicable, and leave the actual delimitation to Boundary Commissions, which were to fix the frontier line on the spot in conformity with the provisions of the treaties. Maps were used to illustrate the boundaries; but in case of a discrepancy between the text of a treaty and a map, the text was to prevail. On maps as evidence in international boundary disputes see Hyde in *A.J.*, 27 (1933) pp. 311-316. See also Timm, *The International Boundary Commission United States and Mexico* (1941).

² See Huber in *Z.V.*, 1 (1907), pp. 29-52 and 150-217; Hyde in *A.J.*, 6 (1912), pp. 901-909; Schulthess, *op. cit.*, pp. 8-16 and 19-24; Adami, *op. cit.*, pp. 13-27. Kerrea, *Die Staatsgrenzen in den Staatsflüssen* (1916); Gleditsch in *Acta Scandinavia*, 22 (1952), pp. 14-32.

³ This case is not to be confused with that in which a river runs through the lands of two different

States. In this latter case the boundary line runs across the river.

⁴ Or its principal arm, if it has more than one.

⁵ Or its principal channel, if it has more than one. For an interesting application of the rule relating to the *Thalweg* see *State of New Jersey v. State of Delaware* (1934) 291 U.S. 361; *Annual Digest*, 1933-1934, Case No. 48; *A.J.*, 29 (1935), p. 331, and comment by Garner, *ibid.*, p. 399, and Hyde in *B.Y.*, 18 (1937), pp. 4, 5. See also *Wisconsin v. Michigan* (1935) 295 U.S. 455; *Annual Digest*, 1935-1937, Case No. 54; *Iowa v. Illinois* (1893) 147 U.S. 1, and Dickinson, *Cases*, p. 336; *Louisiana v. Mississippi* (1906) 202 U.S. 1, and Dickinson, *Cases*, p. 351; *Arkansas v. Mississippi* (1919) 240 U.S. 39; *Arkansas v. Tennessee* (1940) 310 U.S. 563; *A.J.*, 35 (1941), p. 154. And see *In re Village of Fort Erie and Buffalo*, decided in December 1927 by the Supreme Court of Ontario: *Annual Digest*, 1927-1928, Case No. 82.

⁶ E.g. by the Treaty of Peace (1919) with Germany, Article 90.

line is one bank of the river, so that the whole bed belongs to one of the riparian States only.¹ This is an exceptional case created by immemorial possession, by treaty, or by the fact that a State has occupied the lands on one side of a river at a time prior to the occupation of the lands on the other side by some other State.² And it must be remembered that, since a river sometimes changes its course more or less, the boundary line is thereby also altered.³ When a bridge is built over a boundary river, the boundary line runs, failing special treaty arrangements,⁴ through the middle of the bridge.⁵

(2) Boundary lakes and land-locked seas are such as separate the lands of two or more different States from each other. The boundary line runs through the middle of these lakes and seas, but as a rule special treaties portion off such lakes and seas between riparian States.⁶

¹ See above, § 175.

² See Lewis, 1 §§ 147 and 148, Westlake, 1 p 145, Hyde in 1 J, 6 (1912) p 905, and Schultze, *op cit*, pp 8-10.

³ Unless it is otherwise provided by treaty (see, for example, Treaty of Peace (1919) with Germany, Article 30). Moreover, if a boundary river suddenly leaves its old bed and forms a new one, the boundary line remains in its old place. See *Dermot v. Sergeant Bluff Consolidated Independent School District* (1935) 261 N.W. 636, decided by the Supreme Court of Iowa. And see, for a further qualification of the rule stated in the text, *Hogue v. Strucker Land and Timber Co.* (1934) 69 1 (2d) 167, decided by the United States Court of Appeal (5th Circuit).

The statement in the text means that if a river changes its course as the result of gradual accretion on one bank and destruction of the other (see Rivier, 1. p. 169, 'changements lents, opérés peu à peu, lesquels entraînent forcément le changement de la frontière'), the boundary line continues to be the middle of the river or of mid-channel, but nevertheless that line shifts. See below, § 235, and *Arkansas v. Tennessee* (1918) 246 U.S. 188; *Arkansas v. Mississippi* (1919) 250 U.S. 39; the *Chamical Arbitration between the United States*

of America and Mexico in 1 J, 5 (1911), pp. 752-833, *Kansas v. Missouri*, 1 J, 39 (1945), p. 122, Hyde, 1 § 135, and Carpenter in 1 J, 19 (1925), at p. 523. For an example of international regulation and rectification of a river boundary exposed to frequent fluctuations and constituting a danger of flooding see the Convention of February 1, 1933, between the United States and Mexico for the rectification of the Rio Grande in the El Paso-Juarez Valley. 1 J, 28 (1934), Suppl., p. 98. See also Reinhard, *ibid*, 31 (1937), pp. 5-54.

⁴ For an example see Treaty of Peace (1919) with Germany, Article 66, under which existing bridges across the Rhine within the limits of Alsace-Lorraine are to belong to France. The meaning of this article is controversial. See Lederle in Z.I., 12 (1923), pp. 298, 299; Schwall, *ibid*, pp. 365-368; Norden, *Die Rechts- und Verkehrsverhältnisse der Rheinbrücken zwischen Baden und Elsass-Lothringen nach dem Versailler Vertrag* (1921), and Goellner, *Les ponts français sur le Rhin* (1933).

⁵ As regards the boundary lines running through islands rising in boundary rivers and through the abandoned beds of such rivers see below, §§ 234, 235.

⁶ See above, § 179, and Schultze, *op. cit.*, pp. 16-18.

(3) The boundary line of the maritime belt is, according to details given above (§ 186), uncertain, since no unanimity prevails with regard to the width of the belt. It is, however, certain that the boundary line runs not nearer to the shore than three miles, or one marine league, from the low-water mark.

(4) In a narrow strait separating the lands of two different States the boundary line runs either through the middle or through the mid-channel,¹ unless special treaties make different arrangements.

**Boundary
Moun-
tains.**

§ 200. Boundary mountains or hills are such natural elevations from the common level of the ground as separate the territories of two or more States from each other. Failing special treaty arrangements, the boundary line runs on the mountain ridge along with the watershed. But it is quite possible for boundary mountains to belong wholly to one of the States which they separate.²

**Boundary
Disputes.**

§ 201. Boundary lines are, for many reasons, of such vital importance, that disputes relating thereto are inevitably very frequent and have often led to war. During the nineteenth century, however, a tendency began to prevail to settle such disputes peaceably.³ The simplest way in which this can be done is always by a boundary treaty provided the parties can come to terms.⁴ In other

¹ See Twiss, 1. §§ 183, 184, and above, § 194. See 18 and 19 (Geo. 5, c. 23, approving an agreement with the Sultan of Johore determining the boundary in the territorial waters between the Straits Settlement and the State and Territory of Johore. For an instance of regulation of a maritime boundary see the Convention of July 8, 1932, between Great Britain and the United States concerning the boundary between the Philippine Archipelago and the State of North Borneo: Treaty Series, No. 2 (1932), Cmd. 4241.

² See Fiore, II. § 800, and Adams, *op. cit.*, pp. 7-12.

³ As to the doctrine of *uti possidetis* adopted by the Spanish-American States for the purpose of avoiding and solving boundary disputes see Alvarez, *Le droit international américain* (1910), p. 65, and the arbitration between Colombia and Venezuela

decided in 1922 by the Swiss Federal Council and quoted in Ralston, § 574a, and reported in *Annual Digest*, 1919-1922, Case No. 51. See for a discussion and application of that doctrine the *Opinion and Award of the Special Boundary Tribunal between Guatemala and Honduras* (Washington, D.C., 1933, and *Annual Digest*, 1933-1934, Case No. 46 (at pp. 117, 118) and comment thereon by Fisher in *A.J.*, 27 (1933), pp. 403-427. And see Hackworth, I. § 106 and Waldock in *B.Y.*, 25 (1915), pp. 325-327. See also as to the boundary dispute between Peru and Ecuador in 1936 Woolsey in *A.J.*, 31 (1937), pp. 97-100.

⁴ A good example of such a boundary treaty is that between Great Britain and the United States of America respecting the demarcation of the international boundary between the United States and the Dominion of Canada, signed at

cases arbitration can settle the matter, as, for instance, in the Alaska Boundary dispute between Great Britain (representing Canada) and the United States, settled in 1903.¹ Sometimes International Commissions are specially appointed to settle the boundary lines.² After the First World War, Boundary Commissions were constituted by the Treaties of Peace to settle many frontiers.³

§ 202. Natural Boundaries *sensu politico* (See above, *Natural Boundaries sensu politico*. § 198.)

XI

STATE SERVITUDES

Vattel, n. § 89 -Hall, § 42* -Westlake i p 61 -Phillimore i §§ 281 283--
Moore i §§ 1 105 ii § 177 Hyde i §§ 152 153 Tenwick pp 288 295,
305 311 -Bluntschli §§ 353 359 Louville §§ 339 344 (2) Sibert pp.
377 389 Tenwick pp 387 393 402 408 McLaughlin ii pp 366 368--
Pradier-Fodère ii §§ 84 845 1038 Kappeler i pp 296 303 Nys ii.
pp 119 330 O'Connell i 1583 Fries i 380 and *Codi* §§ 1100 1102
Martens i § 94 95 Keith's Wheat i pp 416 420 Billadore Palheri,
pp 449 456 Scelle i pp 113 117 De Lunter i pp 336 339 Lauter-
pacht §§ 51 52 106 108 Henrich *Theorie des Staatsgebildes* (1922),
pp 85 96 Claus *Die Lehre in der Staatslektur* (1894) Fabres
Des servitudes dans le droit international (1901) Hollatz *Begriff und*
Wesen der Staats servitudes (1919) Labrousse *Des servitudes en droit*
international public (1911) Münch *Lehrbuch des öffentlichen*
Servitut festzuhalten (1931) Paul *International Servitudes in Law and*
Practice (1932) and in *Harvard Review* vol 40 (1933) (iii) pp 568 Váň
Servitudes of International Law (1933) Mercur *Les servitudes internation*

Washington on April 11, 1908 (see Martens, *A R G*, 3rd ser, iv p 191) For numerous boundary arbitrations between South American States see Cruchaga, §§ 429, 430, Woolsey in *A J*, 25 (1931), pp 324 331 and Accioly in *R I (Paris)*, 15 (1937), pp 36 45 As to Brazilian boundary disputes see *Bulletin of the American Union*, 1935, pp 155 168 As to boundary disputes generally see Fauchille, §§ 489 (3), 489 (4) The delimitation of boundaries formed the subject matter of two Advisory Opinions of the Permanent Court, *Publications of the Court*, Series B, No 8 (Poland and Czechoslovakia), and No. 9 (Albania and the Serb

Great Slovene State)

¹ See Balch, *The Alaska Frontier* (1903) For a useful synopsis of disputed boundaries and territories see Strupp, *Wort* in pp 1187 1199 See also Ireland, referred to above, p 531, *Hill Claims to Territory in International Law and Relations* (1914)

² For an example of a boundary agreement following upon the delimitation of the boundary by a joint commission see the Agreement of May 6, 1929, between Great Britain and France concerning the boundary between Senegal and Gambia *Treaty Series*, No 13 (1929), Cmd 3340

³ See above, § 198.

ales (1939)—Nys in *R.I.*, 2nd ser., 7 (1905), pp. 118-125, and 13 (1911), pp. 314-323—Basdevant in *R.G.*, 19 (1912), pp. 512-521—Potter in *A.J.*, 9 (1915), pp. 627-641—de Stael-Holstein in *R.I.*, 3rd ser., 3 (1922), pp. 424-462, and in *R.G.*, 41 (1934), pp. 5-21—McNair in *B.Y.*, 1925, pp. 111-127—Crusen in *Hague Recueil* vol. 22 (1928) (ii.), pp. 1-74—O'Connell in *Canadian Bar Review*, 30 (1952), pp. 807-818.

Concep-
tion of
State Ser-
vitudes.

§ 203. State servitudes are those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State. Thus a State may by a convention be obliged to allow the passage of troops of a neighbouring State, or may in the interest of a neighbouring State be prevented from fortifying a certain town near the frontier.

Servitudes must not be confused¹ with those general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike. These restrictions are named 'natural' restrictions of territorial supremacy (*servitudes juris gentium naturales*), in contradistinction to the conventional restrictions (*servitudes juris gentium voluntariæ*) which constitute State servitudes in the technical sense of the term. Thus, for instance, it is not a State servitude but a 'natural' restriction on territorial supremacy that a State is obliged to admit the free passage of foreign merchantmen through its territorial maritime belt.

The majority² of writers and the practice of States³

¹ This is done, for instance, by Heffter (§ 43), Martens (§ 94), Nys (ii. pp. 320 ff.), and Hall (§ 42*); Hall speaks of the right of innocent use of territorial seas as a servitude. On 'administrative lines' as distinguished from a boundary in cases where the frontier is disputed see, with special reference to the Polish-Lithuanian frontier, Natkevicus in *R.G.*, 38 (1931), pp. 633-662. See also Advisory Opinion of October 15, 1931, Series A/B. No. 42.

² Hyde, i. § 153, dislikes the use of the term. McNair, in *B.Y.*, 1925, pp. 111-127, takes the view that the application of the terminology and conceptions of the Roman law of servitudes to such treaty restrictions

upon territorial supremacy is regrettable, and that the effect of these restrictions can usually be achieved by means of the application of other and less controversial principles.

³ For a modern instance of the use of the term 'servitude' see the final settlement of May 15, 1929, of the Tacna-Arica controversy between Chile and Peru which expressly provides that certain canals passing through Chilean territory 'shall enjoy the most complete servitude in perpetuity in favour of Peru.' The servitude includes the right to widen the canals, change their course, and to appropriate all their waters passing through Chilean territory: *A.J.*, 23 (1929), Suppl., p. 183.

accept the conception of State servitudes, although they do not agree upon its definition or extent, and are often divided as to whether a particular restriction upon territorial supremacy is or is not a State servitude. Some passages in the award of the Permanent Court of Arbitration in the case of the *North Atlantic Fisheries* (1910) created the impression that the Court rejected the conception of servitudes. In fact, the Court was prepared to accept it, but, for reasons which gave rise to some criticism,¹ it demanded an express grant to that effect. It is now being increasingly recognised that whatever may be the terminological objections militating against the use of the term 'servitude,' neighbourly adjustments in the shape of restrictions of sovereignty in the economic or even military sphere often constitute a better means of obviating international friction than cessions of territory pure and simple.² Purely terri-

¹ Mainly upon three grounds: (1) that a servitude in International Law predicated an express grant of a sovereign right; (2) that the doctrine of international servitudes originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire; (3) that, being little suited to the principle of sovereignty which prevails in States under a constitutional Government and to the present international relations of sovereign States, it had found little, if any, support from modern writers. In answer to this it may be pointed out that the fact that it originated in the peculiar conditions of the Holy Roman Empire does not make it unfit for the conditions of modern life if its practical value can be demonstrated. The assertion that it is but little suited to the principle of sovereignty which prevails in States under a constitutional Government, and has therefore found little, if any, support from modern writers, does not agree with the facts. See the official report of the case, pp. 115, 116; Hogg in *L.Q.R.*, 26 (1910), pp. 415-417; Richards in *J.C.L.*, New Ser., 11 (1910), pp. 18-27; Lansing in *A.J.*, 5 (1911), pp. 1-31; Balch and Loutin in *R.I.*, 2nd ser., 13 (1911), pp. 5-23, 131-157; Drago and Baedevant in *R.G.*, 19 (1912),

pp. 5 and 421; Anderson in *A.J.*, 7 (1913), pp. 1-10; Scott in Schücking, *Das Werk von Haug*, 2nd ser., 1, part 2 (1915-1917), particularly pp. 248-312; Niereyer in *Strupp, Wirt.*, 1, pp. 116, 117; Lauterpacht, *Analogies*, pp. 119-124. For an elaboration of the distinction between real and personal rights in International Law see Chertazzi *Diritti reali nell'ordinamento internazionale* (1919).

² See below, § 206 (1). The existence of State servitudes was recognised by the Cologne Court of Appeal in 1914 (see *A.J.*, 8 (1914), pp. 858-860, 907-913). It was also recognised, to the extent of implying a partial abandonment of sovereignty, by the Swiss Federal Council in the case of *Canton of Thurgau v. Canton of St. Gallen*, decided on February 10, 1923: *Annual Digest*, 1927-1928, Case No. 289. See also the judgment of the District Labour Court of Karlsruhe of June 1928, in the *German Railway Station at Basel* case: *ibid.*, Case No. 90. As to the discussion upon servitudes in the *Wimbledon* ca. before the Permanent Court in 1923, Series A, No. 1, see McNair, *op. cit.*, at pp. 115, 116, and particularly Judge Schücking's dissenting judgment as to the rules of restrictive interpretation and *circulus vitæ*.

torial changes frequently create as many difficulties as they remove.¹

Subjects
of State
Servit-
tudes.

§ 204. Subjects of State servitudes are States only and exclusively, since State servitudes can exist between States only (*territorium dominans* and *territorium serviens*). Whatever rights may be granted by a State to foreign individuals and corporations, such rights can never constitute State servitudes.

Object of
State Ser-
vitudes.

§ 205. The object of State servitudes is always the whole or a part of the territory of the State the territorial supremacy of which is restricted by any such servitude. Since the territory of a State includes not only the land, but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these, as well as the service of the land itself, can be an object of State servitudes. Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to make and use a tunnel through a boundary mountain, and the like. Or again, a State servitude might be created through a State acquiring a perpetual right to send military aircraft through the territorial atmosphere of a neighbouring State or to keep a military force in its territory. The open sea can never be the object of a State servitude, since it is no State's territory.

Since the object of State servitudes is the territory of a State, such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of another State are not State servitudes. The territory as the object is the mark of distinction between State servitudes and other restric-

¹ For an interesting example of the elasticity of jurisdictional arrangements see the Treaty of March 2, 1936 (ratified in 1937), between Panama and the United States, Article VIII of which provides for a corridor in favour of Panama and subject to Panama's jurisdiction across the United States Zone and for a right of transit for the United States across

the corridor thus set aside for Panama: *A.J.*, 31 (1940), Suppl., p. 144. In March 1942 the United States and Canada agreed that the former should build through Canada a military highway to Alaska. No rights over the highway were to be acquired by the United States. For the Exchange of Notes see *A.J.*, 36 (1942), Suppl., p. 153, and *U.N.T.S.*, 29, p. 200.

tions on the territorial supremacy. Thus the perpetual restriction imposed upon a State by a treaty not to keep military, naval, or air forces, or not to keep an army, navy, or air force¹ beyond a certain size, is certainly a restriction on territorial supremacy, but is not, as some writers² maintain, a State servitude, because it does not make the territory of one State serve an interest of another. On the other hand, when a State submits to a perpetual right enjoyed by another State of passage of troops, or to the duty not to fortify a certain town, region, place, or island,³ or to the claim of another State for its subjects to be allowed a right of fishing within the former's territorial belt,⁴

¹ See, for example, Part V of the *Treaties of Peace with Germany and Austria*.

² See, for instance, Bluntschli, § 356.

³ As to the Åland Islands in the Baltic see Article 32 of the Peace Treaty of Paris, 1856, and the annexed Convention of March 30, 1856 (Martens, *N.R.G.*, 15 pp. 780 and 783). See also below, § 522, p. 927, n. 2, and vol. II § 72. Waultrin in *R.G.*, 14, pp. 517-533, and *A.J.*, 2 (1908), p. 397. As to the dispute between Finland and Sweden concerning these islands before the Council of the League in 1920 and their neutralisation and demilitarisation by the Convention of October 20, 1921, see below, vol. II §§ 25f and 72 (8); McNair in *B.J.*, 1925, at pp. 114, 115, and literature cited at p. 127; Strupp in *Strupp, Wort.*, I, pp. 19-22, and Vlucht, *La question des îles d'Åland, considérations juridiques par le rapport des juristes* (1921), Söderhjelm *Idemilitarisation et neutralisation des îles d'Åland en 1856 et 1921* (1928), Maury, *La question des îles d'Åland* (1930), Vortisch, *Die Ålandfrage* (1933), Rensperger, *Die Rechtslage der Ålandsinseln* (1933), Wrede in *Nordisk T.*, 1, 3 (1932), pp. 123-143, see also vol. II § 72. As to the coastal zone in Morocco see Treaty between France and Spain of November 27, 1912, Article 6 (Martens, *N.R.G.*, 3rd ser., 7, p. 323). As to the banks of the Rhine see Treaty of Peace (1919) with Germany, Articles 42-44 and 180. As

to Heligoland see *ibid.* Article 115. See also Articles 45-51 of the Peace Treaty with Italy of 1947, and Article 12 of the Peace Treaty with Bulgaria of the same year. Thus Article 47 of the Treaty with Italy prohibits permanent fortifications on the Franco-Italian frontier where weapons capable of firing into French territory can be employed.

⁴ Examples of such fishery servitudes are:

(a) The former French fishery rights in Newfoundland, which were based on Article 13 of the Treaty of Utrecht, 1713, and on the Treaty of Versailles, 1783. See the details regarding the Newfoundland Fishery Dispute in Phillimore, I, 195; *Clauses op. cit.*, pp. 17-31, G. C. C. in *R.I.*, 22, p. 217. Brodhurst in *Law Magazine and Review*, 24, p. 67. The French literature on the question is quoted in Fouché, § 342 (n. 1). The dispute was settled by France's renunciation of the privileges due to her according to Article 13 of the Treaty of Utrecht, which took place by Article 1 of the Anglo-French Convention signed in London on April 8, 1904 (see Martens, *N.R.G.*, 2nd ser., 32 p. 29). But France retains, according to Article 2 of the latter convention, for her subjects the right of fishing in certain parts of the territorial waters of Newfoundland.

(b) The fishery rights granted by Great Britain to the United States of America in certain parts of the British North Atlantic Coast by

in all these and similar¹ cases the territorial supremacy of a State is in such a way restricted that a part or the whole of its territory is made to serve an interest of another State, and such restrictions are therefore State servitudes.²

Different
Kinds of
State Ser-
vitudes.

§ 206. According to different qualities different kinds of State servitudes must be distinguished :

(1) Affirmative, active, or positive servitudes are those which give the right to a State to perform certain acts on the territory of another State, such as to build and work a railway, to establish a custom-house, to send an armed force through a certain territory (*droit d'écluse*), to keep troops in a certain fortress, to use a port or an island as a coaling station, and the like. Also affirmative are those servitudes which give the right to a State to demand that its subjects shall be allowed to perform certain acts on the territory of another State, such as to fish within certain territorial waters etc.³

(2) Negative servitudes are such as give a right to a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways. Thus a State can have a right to demand that a neighbouring State shall not fortify certain towns near the frontier, or that another State shall not allow foreign men-of-war in a certain harbour.⁴

Article 1 of the Treaty of 1818, which gave rise to disputes extending over a long period. The dispute was settled by an award of the Hague Permanent Court of Arbitration given in September 1910, in which (see above, § 203) the Court refused to recognise the existence of a servitude in the Treaty of 1818

Clauss, *op. cit.* (p. 167), in the affirmative, but by Ullmann (§ 90), correctly, it is believed, in the negative. But a distinction must be drawn between neutralisation of a whole State and neutralisation of certain parts of a State. In the latter case a State servitude is indeed created.

¹ Phillimore (i. § 283) quotes two interesting State servitudes which belong to the past. According to Articles 4 and 10 of the Treaty of Utrecht, 1713, France was, in the interest of Great Britain, not to allow the Stuart Pretender to reside on French territory, and Great Britain was, in the interest of Spain, not to allow Moors and Jews to reside in Gibraltar.

² See above, § 203. Article 47 of the Treaty of Peace with Italy of 1947 provides for the prohibition of construction of permanent fortifications where weapons capable of firing into French territory or territorial waters can be emplaced.

³ The controversial question whether neutralisation of a State creates a State servitude is answered by

⁴ Article 7 of the Lateran Treaty of February 1929 between the Vatican City and Italy, in which Italy undertakes to prohibit the construction within the territory surrounding the Vatican City of any new buildings which might overlook the latter;

(3) Military State servitudes are those which are acquired for military purposes, such as the right to keep troops in foreign territory, or to send an armed force through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like.¹

(4) Economic servitudes are those which are acquired for the purpose of commercial interests, traffic, and intercourse in general, such as the right to fish in foreign territorial waters, to enjoy the advantages of a free zone for customs purposes² or of free navigation on a river,³ to build a railway on or lay a telegraph cable through foreign territory, and the like.⁴

§ 207. Since State servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent in the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change. Therefore, if, after the creation of a State servitude, the

Validity
of State
Servi-
tudes.

Documents, 1930, p. 21. Affirmative State servitudes consist in *patiendi*, negative servitudes in *non faciendo*. The rule of Roman Law *servitus in faciendo consistere nequit* has been adopted by the Law of Nations.

¹ See e.g. Articles 4 and 5 of and Annex to the Treaty of Alliance of June 30, 1940, between Great Britain and Iraq in which Iraq grants to Great Britain the use of railways, rivers, ports, and aerodromes in time of war, and certain air bases and the right to maintain armed forces in certain localities in time of peace. *Documents*, 1930, p. 132; Treaty Series, No. 15 (1931), Cmd. 3707. Article 8 of the Treaty of Alliance between Great Britain and Egypt of August 26, 1936, provided for the stationing, for a period of twenty years in the first instance, of British forces in the vicinity of the Suez Canal with the view to ensuring co-operation with the Egyptian forces in the defence of the canal. These clauses were abrogated by an Agreement concluded in 1954 between the United Kingdom and Egypt and providing for the withdrawal of British forces from the Canal Zone. See also Annex to the Treaty of Alliance of

March 22, 1946, between the United Kingdom and Trans Jordan providing that the former may station armed forces in Trans Jordan and that the latter shall grant facilities at all times for the movement and training of British armed forces. Cmd. 6779 (1946). As to the use of the port of Wei-Hai Wei see the Convention of April 18, 1901, between Great Britain and China for the restoration of the territory (Annex, Article 3); Treaty Series, No. 50 (1930), Cmd. 3741.

² See below, § 208, as to the Free Zones of Upper Savoy and the District of Gex.

³ E.g. Finland's right of navigation on the river Neva by virtue of the Treaty of June 5, 1923, with Russia: *L.N.T.S.*, vol. 18, p. 205.

⁴ See, for instance, in the Treaty of Peace with Germany (1919), Article 50 (Saar Annex, 22), and Article 89 (the Polish Corridor), and see Hatachek, pp. 159-161. For an example of grant of extensive rights in connection with international communications see the Agreements of 1943, 1944 and 1946 between Great Britain and Portugal concerning facilities in the Azores: Cmd. 6864 (1946).

part of the territory affected comes by subjugation or cession under the territorial supremacy of another State, such servitude remains in force. Thus, when the Alsatian town of Huningen became German in 1871, and again when it became French in 1918, the State servitude created by the Peace Treaty of Paris, 1815, that Huningen should, in the interest of the Swiss canton of Basle, never be fortified, was not extinguished.¹ Thus, further, when in 1860 the former Sardinian provinces of Chablais and Faucigny and the whole of the territory of Savoy to the north of Ugine, became French, the State servitude created by Article 92 of the Act of the Congress of Vienna, 1815, that Switzerland should during war have the right temporarily to locate troops in these provinces, was not extinguished.²

It is a moot point whether military State servitudes can be exercised in time of war by a belligerent if the State with whose territory they are connected remains neutral. Must such State, for the purpose of upholding its neutrality, prevent the belligerent from exercising the respective servitude—for instance, the right of passage of troops? There ought to be no doubt that the answer must be in the affirmative, unless, of course, the servitude is granted expressly for the case of war.⁴

Extinction of State Servitudes.

§ 208. State servitudes are extinguished by agreement between the States concerned, or by express or tacit³ renunciation on the part of the State in whose interest they were created. They are not, according to the correct

¹ Details in Clausen, *op. cit.*, pp. 15-17, and Kleiner, *Schweizerisches Bundesstaatsrecht* (1923), p. 717.

² Details in Clausen, *op. cit.*, pp. 8-15. However, by Article 435 of the Treaty of Peace with Germany, the High Contracting Parties have declared that the provisions of Article 92 of the Final Act of the Vienna Congress and other provisions relating to the neutralised zone of Savoy are no longer consistent with present conditions, and note the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations

relating to this zone, which are and remain abrogated.

³ This question became practical when in 1900, during the South African War, Great Britain claimed, and Portugal was ready to grant, passage of troops through Portuguese territory in South Africa. See below, vol. ii. §§ 306 and 323. Clausen, *op. cit.*, pp. 212-217; and Dufour in *R.G.*, 16 (1909) pp. 289-316.

⁴ See above, p. 541, n. 4.

⁵ See Bluntschli, § 359b. The opposition of Clausen, *op. cit.* (p. 219), and others to this sound statement of Bluntschli is not justified.

opinion, extinguished by reason of the territory involved coming under the territorial supremacy of another State. But it is difficult to understand why, although State servitudes are called into existence through treaties, it is sometimes maintained that the clause *rebus sic stantibus*¹ cannot be applied in case a vital change of circumstances makes the exercise of a State servitude unbearable. Thus it was invoked by France in 1932 before the Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and the District of Gex* established in 1815.² The fact that the Court answered on its merits the French claim based on the doctrine *rebus sic stantibus* shows that it did not regard the nature of the right enjoyed by Switzerland as precluding an appeal to the doctrine *rebus sic stantibus*.³

XII

MODES OF ACQUIRING STATE TERRITORY

Vattel, 1 §§ 203 207—Hall, § 31—Westlake, 1 pp 89 119—Lawrence, §§ 74—
Phillimore 1 §§ 222 225 Wheaton §§ 161 163—Hyde 1 § 98—
Bluntschli §§ 275 291—Tanaka §§ 532 532 (3)—Pradier-Fodere II §§ 781
783—Morgenthau II pp 410 413—River 1 § 12—Nys II pp 14—Calvo 1

¹ See below, § 539.

² Series A B, No 46, p 158, and see below, § 539. See also Series C, No 19 (1), pp 192 199. The second paragraph of Article 435 of the Treaty of Versailles provided that these provisions were no longer consistent with the present conditions, and that it was for France and Switzerland to agree as to the future position of these territories. The negotiations which started in 1920 between the two States were not successful, and in 1923 France passed a decree purporting to terminate the regime of free zones and advanced her customs boundary to the political frontier. In October 1924 the parties concluded a special agreement asking the Court to declare, *inter alia*, whether the effect of Article 435 was to abrogate the régime of free zones. The Court in two pronouncements (see below, p 540) answered this question in the negative. See Waldkirch, *Art 435 des*

Versailles Verträge (1924), Grassin, *Les zones franches du pays de Gex et de Savoie* (1924). Rougier in *I G*, 27 (1920), pp 40 45, Paulus in *I J*, 3rd ser, 5 (1924), pp 59-101, Chavallier in *R.I. (Paris)*, 2 (1928), pp 251 274. And see for further literature below, vol II p 82, n 3. The present régime of the free zones is governed by an arbitral award, the so called Territet Award of 1933, given in pursuance of the judgment of the Permanent Court. The Award lays down the principles governing the exchange of goods between the free zones and Switzerland. See *Recueil officiel des Lois et Ordonnances de la Confédération Suisse*, Nouvelle Série, 13 (1933), pp 1028 et seq.

³ As regards the question whether a neutralised State is, by its neutralisation, prevented from acquiring territory see above, § 96, and below, § 215.

§ 263—Fiore, ii. §§ 838-840—Martens, i § 90—Balladore Pallieri, pp. 410-422—Heimburger, *Der Erwerb der Gebietshoheit* (1888)—Jerusalem, *Ueber völkerrechtliche Erwerbsgründe* (1911)—Lauterpacht, §§ 41-44—Lindley, pp. 82-113—Schätzkel, *Völkerbund und Gebietserwerb* (1919), and *Die Annexion im Völkerrecht* (1921), and in Strupp, *Wort.*, i. pp. 366-369—Bleiber, *Die Entdeckung im Völkerrecht* (1933), pp. 67-74.

Who can
acquire
State
Territory?

§ 209. The acquisition of territory by an existing State and member of the international community must not be confused, first, with the foundation of a new State, or, secondly, with the acquisition by private individuals or corporations¹ of territory and of sovereignty over territory which lies outside the dominion of the Law of Nations.

(1) Whenever a multitude of individuals, living on, or entering into, a part of the surface of the globe which does not belong to the territory of any existing State, constitute themselves a State and nation on that part of the globe, a new State comes into existence. This State is not, merely by reason of its birth, a member of the international community. The formation of a new State is, as will be remembered from former statements,² a matter of fact and not of law. It is through recognition, which is a matter of law, that such new State becomes a subject of International Law. As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory was acquired before the recognition.

(2) Not essentially different is the case in which a private individual or a corporation acquires land (together with sovereignty over it) in countries which are not under the territorial supremacy of any State. In all such cases acquisition is in practice made either by occupation of hitherto uninhabited land, for instance an island or by cession from a native tribe living on the land. Unless

¹ For an affirmation, in a different sphere, of the principle that the independent activity of private individuals is of little legal relevance unless it takes place in pursuance of a licence or some other authority received from their Governments see the Dissenting Judgment of Judge McNair in the *Anglo-Norwegian Fisheries* case: *I.C.J. Reports*, 1951, p. 184. As to

the position of the large colonising corporations, such as the British South Africa Company, see Lawrence, § 42; Lindley, pp. 91-113; Hershey, § 89; Smith, ii. pp. 76-103. For two Law Officers' Opinions on the subject see McNair in *B.Y.*, 26 (1949), pp. 41-44.

² See above, § 71.

the corporation in question is invested by its State with the public power of acquisition and administration,¹ acquisition of territory and sovereignty thereon takes place outside the dominion of the Law of Nations, and the rules of this law, therefore, cannot be applied. If the individual or corporation which has made the acquisition requires protection, he or it must either declare a new State to be in existence and ask for its recognition by the Powers, as in the case of the former Congo Free State,² or must ask an existing State to acknowledge the acquisition as having been made on its behalf.³

§ 210. No unanimity exists with regard to the modes of acquiring territory on the part of the members of the international community. The topic owes its controversial character to the fact that the conception of State territory has undergone a great change since the appearance of the science of the Law of Nations. When Grotius laid the foundations of modern International Law, State territory was still, as in the Middle Ages, more or less identified with the private property of the monarch of the State. Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States.⁴ Nowadays, however, the acquisition of territory by a State can mean nothing else than the acquisition of *sovereignty* over such territory. In these circumstances the rules of Roman Law con-

Former
Doctrine
concern-
ing Acqui-
sition of
Territory.

¹ See the account in the *Island of Palmas* Arbitration between the United States and Holland of April 4, 1928: *Annual Digest*, 1927-1928, Case No. 70.

² See above, § 101. The case of Sir James Brooke, who in 1841 acquired Sarawak, in North Borneo, and established an independent State there, of which he became the sovereign, may also be cited. Sarawak was a British protectorate till 1946 when, by voluntary though somewhat disputed cession it became a Crown colony. This case is discussed at some length by Landley (pp 80-84), Keith in *J.C.L.*, 3rd ser., 8 (1926), p. 306, and Lindley, *ibid.*, 9 (1927),

pp. 138, 139. See also Smith, *ibid.*, pp. 77-83.

³ Heimbürger, *op. cit.*, pp. 44-77, who defends the opinion represented in the text against Twiss (i. Preface, p. x., also in *R.I.*, 15, p. 547, and 16, p. 237) and other writers. See also Ullmann, § 93.

⁴ See above, § 168. The distinction between *imperium* and *dominium* in Seneca's dictum, *omni res imperio resudet, singuli domino*, was well known, and Grotius, *ib. c. 3*, § 4, mentions it, but the consequences thereof were nevertheless not deduced. (See Westlake, *Papers*, pp. 129-133, and Westlake, *ibid.*, pp. 86-90.)

cerning the acquisition of private property can no longer be applied. Yet the fact that they have been applied in the past has left traces which can hardly be obliterated; and they need not be obliterated, since they contain a good deal of truth in agreement with the actual facts. But the different modes of acquiring territory must be taken from the real practice of the States, and not from Roman Law, although the latter's terminology and common-sense basis are not without usefulness.

Modes of
Acquisition
of
Territory.

§ 211. States as living organisms grow and decrease in territory. If the facts of history are taken into consideration, different reasons may be found to account for the exercise of sovereignty by a State over the different sections of its territory. One section may have been ceded by another State, another section may have come into the possession of the owner in consequence of accretion, a third through subjugation, a fourth through occupation of no State's land. Finally, a State may assert that it has exercised its sovereignty over territory for so long a period that the fact of having had it in undisturbed possession is a sufficient title of ownership. Accordingly, five ¹ modes of acquiring territory may be distinguished, namely cession, occupation, accretion, subjugation, and prescription.

Original
and Derivative
Modes of
Acquisition.

§ 212. The modes of acquiring territory may be divided according as the title they give is derived from the title of a prior owner-State, or not. Cession is therefore a derivative mode of acquisition, whereas occupation, accretion, subjugation, and prescription are original modes.

XIII

CESSION

Grotius, n. c. 6—Hall, § 35—Lawrence, § 76—Phillimore, i. §§ 262 276—
—Moore, i. §§ 83 86—Bluntschli §§ 285 287—Hoffter §§ 69 and 142
Holtendorff in *Holtendorff* ii pp 269 271—Luchille §§ 53 (1) 557 (4);

¹ Of the question whether 'adjudication'—that is, the award of an international tribunal ought to be regarded as a mode of acquisition see Lauterpacht, p. 107, n. 3, and Strupp, *Elements*, p. 155. On the

adjudication by Pope Alexander vi. in the matter of the West Indies between Spain and Portugal see Staedler in *Z I*, 50 (1936), pp. 315 334)

557 (13)-579—Mérignac, ii. pp. 487-497—Despagnet, §§ 381-391—Pradier-Fodéré, ii. §§ 817-819—Rivier, i. pp. 197-217—Sibert, pp. 871-887—Nya, ii. pp. 10-37—Calvo, i. § 266—Fiore, ii. §§ 860-862, and *Code*, §§ 147-164 and 1058—Cavaglieri, pp. 299-313—Martens, i. § 91—De Louter, i. pp. 362-371—Cruchaga, §§ 497-518—Fenwick, pp. 358-367—Lindley, pp. 166-177—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp. 110-120—Phillipson, *Termination of War and Treaties of Peace* (1916), pp. 277-334—Kaackenbeck, *Le règlement conventionnel des conséquences de remanements territoriaux* (1910)—Schoenborn in Strupp, *Wort.*, iii. pp. 652-660—Audinet in *Repertoire*, i. pp. 572, 573, 627-642.

§ 213. Cession of State territory is the transfer of sovereignty over State territory by the owner-State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules¹ for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law.² But if such municipal rules contain constitutional restrictions on the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by Heads of States or Governments as violate these restrictions are not binding.³

§ 214. Since cession is a bilateral transaction, it has two subjects—namely, the ceding and the acquiring State. Both subjects must be States, and only those cessions in which both subjects are States concern the Law of Nations. Cessions of territory made to private persons and to corporations⁴ by native tribes or by States outside the dominion of the Law of Nations do not fall within the sphere of International Law. Neither do cessions of territory by native tribes made to States⁵ which are members of the international community. On the other hand, cession of territory

¹ See above, § 169.

² See above, § 21.

³ See below, § 497. A State may, however, on acquiring territory by cession undertake by treaty not to alienate it, or only to do so *sub modo*; see the case of the cession to

Denmark 1920 of a portion of Slesvig, Treaty Series, No. 17 (1922), Cmd. 1585; *A.J.*, 17 (1923), Suppl., pp. 42-45.

⁴ See above, § 209 (2), and the qualification there noted.

⁵ See below, §§ 221 and 222.

made to an independent State by a State not yet recognised as such is, unless it is in the nature of total merger, a real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a State enjoying a certain position in international law.

Object of
Cession.

§ 215. The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of the land, they cannot be ceded without a piece of land.¹

Form of
Cession.

§ 216. The only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be made with or without compensation.

If a cession of territory is the outcome of war, it is the treaty of peace which stipulates the cession among its other provisions. Such cession is regularly one without compensation, although certain duties may be imposed upon the acquiring State, as, for instance, of taking over a part of the debts of the ceding State corresponding to the extent and importance of the ceded territory, or that of giving the individuals domiciled on the ceded territory the option to retain their old citizenship or, at least, to emigrate.

Cessions which are the outcome of peaceable negotiations may be agreed upon by the interested States from different motives and for different purposes, for instance *gift* or *voluntary merger*. Thus Austria, during war with Prussia

¹ See above, §§ 175 and 185. The controverted question whether permanently neutralised parts of a not permanently neutralised State can be ceded to another State must be answered in the affirmative—thus in 1860 Sardinia ceded her neutralised provinces of Chablais and Faucigny to France (see above, § 207)—although

the guaranteeing States certainly can legitimately intervene. On the other hand, a permanently neutralised State cannot, except in the case of mere frontier regulation, cede a part of its neutralised territory to another State without the consent of the guaranteeing States (see above, § 96, and the literature there quoted).

and Italy in 1866, ceded Venice to France as a *gift*, and some weeks afterwards France on her part ceded Venice to Italy. The Duchy of Courland ceded in 1795 its whole territory to, and *voluntarily merged* thereby in, Russia; in the same way the then Free Town of Mulhouse merged in France in 1798, the Congo Free State in Belgium in 1908, and the Empire of Korea in Japan in 1910.¹ Cessions have in the past often been effected by transactions which are analogous to transactions in private business life. As long as absolutism was reigning over Europe, it was not at all rare for territory to be ceded in *marriage contracts* or by *testamentary dispositions*.² In the interest of frontier regulation, but also for other purposes, *exchanges* of territory on occasions take place.³ *Sales* of territory have occurred: as late as 1867 Russia sold her Alaskan territory in America to the United States for 7,200,000 dollars; in 1899 Spain sold the Caroline Islands to Germany for 25,000,000 pesetas; and in 1916 Denmark sold the islands of St. Thomas, St. John and St. Croix in the West Indies to the United States for 25,000,000 dollars.⁴ *Pledge* and *lease* do also take place. Thus, the then Republic of Genoa pledged Corsica to France in 1768; Sweden pledged Wismar⁵ to Mecklenburg in 1803; China⁷ leased in 1898 Kiaochow to Germany,⁸ Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang-chow Wan to France, and Port Arthur to Russia.⁹

Whatever may be the motive and the purpose of the transaction, and whatever may be the compensation, if any, for the cession, the ceded territory is transferred to the new

¹ See Lindley, pp. 218, 219, for details of the events which led up to this cession.

² See Phillimore, i. §§ 274-276.

³ Particularly in the rectification of frontiers: see De Louter, i. p. 363, Rapisardi Mirabelli in *R.I.*, 3rd ser., 4 (1923), pp. 603-605.

⁴ See Tansill, *The Purchase of the Danish West Indies* (1932).

⁵ For an attempt to lease territory which is subject to the lessor's sphere of influence see Lindley, pp. 215, 240, and, as to leases generally, pp. 237-244. And see above, § 171.

⁶ See above, § 171 (3).

⁷ See above, § 171 (3). Perhaps in the case of such leases what is ceded is the exercise of sovereignty rather than sovereignty itself. Cession may also take place under the guise of an agreement according to which territory comes under the 'administration' or, under the 'use, occupation, and control' of a foreign State. See also above, § 171 (2) and (4).

⁸ See Martens, *N.R.G.*, 2nd ser., 30, p. 326.

⁹ See Martens, *N.R.G.*, 2nd ser., 32, pp. 89, 90.

sovereign with all the international obligations¹ locally connected with the territory (*res transit cum suo onere*, and *nemo plus juris transferre potest quam ipse habet*).

Tradition
of the
Ceded
Territory.

§ 217. The treaty of cession must be followed by actual tradition² of the territory to the new owner-State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded. But the validity of the cession does not depend upon tradition,³ the cession being completed by ratification of the treaty of cession,⁴ and thus enabling the new owner to cede the acquired territory to a third State at once without taking actual possession of it.⁵ But of course the new owner-State cannot exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory.

Veto of
Third
Powers.

§ 218. As a rule, no third Power has the right of *veto* with regard to a cession of territory. Exceptionally, however, such right may exist. It may be that a third Power has by a previous treaty acquired a right of pre-emption⁶ concerning the ceded territory.⁷ There is a clear right to refuse recognition when a State seeks to obtain title by means contrary to international law, (e.g. by unlawful resort to war. But even where no right of *veto* exists, a third Power might intervene for political reasons. For there is no duty on the part of third States to acquiesce in such cessions of territory

¹ See above, § 84. The transfer of sovereignty by cession or by subjugation does not *ipso facto* affect rights of private property, though the subsequent legislation of the new sovereign may affect them; see above § 84, and below, § 240; Hyde, l. §§ 132, 133.

² This was indirectly recognised by Sir W. Scott in *The Pamu* (1804) 5 O. Rob. 108.

³ This is controversial. Many writers—see, for instance, Rivier, l. p. 203—oppose the opinion presented in the text. The Swiss Federal Council in its Award of March 24, 1922, in the dispute between Colombia and Venezuela refused to adopt the view that tradition is essential; see *Sentence Arbitrale*, p. 103, and *Annual*

Digest, 1919-1922, Case No. 54.

⁴ In *The Bosphorus* [1933] P. 22, it was held that the Hungarian Government was competent to bind the people of Fiume at the date of the signature of the Treaty of Trianon (June 4, 1920) although at that time the *de facto* control of Fiume no longer rested with Hungary.

⁵ Thus France, to whom Austria ceded in 1859 Lombardy, ceded this territory on her part to Sardinia without previously having actually taken possession of it.

⁶ See Lindley, pp. 168, 169, for instances and as to the transferability of a right of pre-emption with the consent of the State which has granted it.

⁷ See above, § 215.

as endanger the balance of power or are otherwise of vital importance.¹ Thus in 1940 the States of the American continent made clear their intention not to recognise transfers of territory which then appeared probable in connection with the war in Europe.²

§ 219. As the object of cession is sovereignty over the *Plebiscite*. ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto*³ by the cession subjects⁴ of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to a new sovereign whether they like it or not, has created a movement in favour of the claim that no cession shall be valid until the inhabitants have by a plebiscite⁵ given their consent to the cession. And several treaties⁶ of cession concluded during the nineteenth century stipulated that the cession should only be valid provided the inhabitants consented to it through a plebiscite. But it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a

¹ See above, § 138.

² See above, § 75c.

³ But there are exceptions: see Fleischmann in Lasz, § 17 (n. 7), when the parties stipulate otherwise by treaty; for instance, in the Treaty of Versailles Article 79 Annex paragraph 3, as to Germans born or domiciled in Alsace Lorraine and Article 122; see Niboyet, *La nationalité d'après les traités le pair* (1921); Schätzle, *Der Wechsel des Staatsangehörigkeit infolge der deutschen Heilsabtretungen* (1921), pp. 23-52, 98-100; and Isay, *Die privaten Rechte im Friedensvertrag* (3rd ed.) (1923), §§ 297-304. For an instance of the collective naturalisation of the domiciled inhabitants of territory subject to a mandate (South-West Africa) see above, § 94e (1), and B.Y., 1925 pp. 188-191.

⁴ See Keith, *The Theory of State Succession*, etc. (1907), pp. 12-45; Cogordan, *La nationalité* (1890), pp. 317-398; Moore, *id.* § 379; Gettys in A.J., 21 (1927), pp. 266-278; and, as to corporations, Jemolo in *Rivista*, 3rd ser., 1. (1921-1922),

pp. 81-109. For an able survey of this question by reference to Turkey see Ghah, *Les nationalités détachées de l'Empire Ottoman à la suite de la guerre* (1934).

⁵ See Higgins in Hal', 1: 54 (n.) (and literature cited there); Hyde, 1. §§ 104, 109 (on the principle of self-determination); Scelle, *id.* pp. 257-297; Rivier, 1 p. 204; Fauchille, §§ 561-577; Despagnet, § 391; Stoerk, *Option und Plebisit* (1879); Freudenthal *Die Volksabstimmung bei Gebietsabtretungen und Eroberungen* (1891); *Plebiscites* (Foreign Office Peace Handbook No. 25) (1920); Wambaugh, *Monograph on Plebiscites* (1920); Mattern, *Employment of the Plebiscite in the Determination of Sovereignty* (1920); Gonssollin, *Le plébiscite dans le droit international actuel* (1921); Butler and Maccolly, *The Development of International Law* (1928), ch. x.; Heatley in J.C.L., 3rd ser., 3 (1921), pp. 255-272; de Auer in *Grotius Society*, 6 (1921), pp. 45-56; Sofrone in *R.I. (Genova)* 12 (1934), pp. 21-44, 87-118.

⁶ See Rivier, 1. p. 210.

plebiscite.¹ The necessities of international policy may on occasions allow or even demand such a plebiscite, but in some cases they will not allow it.²

Option of
National-
ality and
of Emi-
gration.

§ 219a. The hardship of the inhabitants being handed over to a new sovereign against their will can be lessened by a provision in the treaty of cession binding the acquiring State to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration.³ Many treaties of cession concluded during the second half of the nineteenth century contained this provision. But it must be emphasised that, failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens and endanger the safety of the acquiring State.⁴

¹ Although Grotius (ii c. vi § 4) thought this to be necessary.

² By the Treaties of Peace after the First World War the method of a plebiscite was adopted in a number of cases; for instance, as to certain areas, in the Treaty with Germany, Articles 34 (Eupen and Malmédy), 49 (Saar Basin), 88 (part of Upper Silesia), 94 (part of East Prussia), 109 (part of Schleswig), and as to certain areas in the treaties with Austria and Hungary; see some of the literature cited above, p. 531, n. 5, and Lipartiti in *Rivista*, 3rd ser., 5 (1926), pp. 205-232, and Blogovevitch, *Le principe de nationalité dans les Traités de Paix de Versailles et de Saint-Germain* (1922). And see, in particular, Wambaugh, *Plebiscites since the World War* (2 vols., 1933). As to the Saar plebiscite in 1935 see Wambaugh, *The Saar Plebiscite* (1940); *Documents*, 1934, pp. 1-97; Toynebee, *Survey*, 1934, pp. 578-627; *Z.V.*, 18 (1931), pp. 339-363, and 19 (1935), pp. 221-242; Mouskhéli in *R.G.*, 42 (1935), pp. 361-410; *ibid.*, pp. 708-718. As to the plebiscite in Tacna-Arica see Toynebee, *Survey*, 1927, pp. 523-531, and 1930, pp. 418-421; *A.J.*, 20 (1926), pp. 605-625; Woolsey, *ibid.*, 23 (1929), pp. 605-610. The French Constitution of 1946 lays down that no new territory shall

be added to France without the consent of its inhabitants (Article 26). In pursuance of that provision a plebiscite was held in 1947 in the villages of Tenda and Briga ceded to France in the Peace Treaty with Italy.

³ As to option see Fauchille, §§ 428-431 (4), 578; Kunz, *Die völkerrechtliche Option*, i. (1923), ii (1928), in *Hague Recueil*, vol. 31 (1930) (i.), pp. 111-176, and in *Strupp, Wort*, ii, pp. 177-180; Schonborn in *Z.I.*, 13 (1926), pp. 16-27 (historical), and, after the First World War, also Niboyet, *La nationalité après les traités de paix* (1921); Audinet in 48 *l'Annuaire* (1921), pp. 377-398; Bruns, *Staatsangehörigkeitswechsel und Option im Friedensvertrag von Versailles* (1921); Schätzel, *Der Wechsel der Staatsangehörigkeit infolge der deutschen Gebietsabtretungen* (1921), *Die elsass-lothringische Staatsangehörigkeitsregelung und das Völkerrecht* (1929), and in *Z.V.*, 12 (1923), pp. 86-116; Sielle, ii, pp. 152-171; Sibert, pp. 547-551.

⁴ On the provisions concerning option in the treaties concluded by Germany between 1939 and 1942 in the matter of the evacuation of German minorities from Soviet Russia, Italy, and some other countries see Schechtmann in *A.J.*, 38 (1944), pp. 363-374.

The option ¹ to emigrate within a certain period, which is frequently stipulated in favour of the inhabitants of ceded territory, is another means of averting the charge that inhabitants are handed over to a new sovereign against their will. Thus Article 2 of the Peace Treaty of Frankfort, 1871, which ended the Franco-Prussian War, stipulated that the French inhabitants of the ceded territory of Alsace and Lorraine should up to October 1, 1872, enjoy the privilege of transferring their domicile from the ceded territory to French soil.²

In many cases an option of nationality was accorded in the Treaties of Peace following the conclusion of the two World Wars to the inhabitants of territories ceded under them. The terms of the option vary in each particular case.

¹ As to the compulsory exchange of populations see Convention vi. attached to the Treaty of Lausanne of 1923, and Advisory Opinion of the Permanent Court, Series B, No. 10, and Ténékidès in *R.Q.*, 31 (1924), pp. 72-88. See also the Convention of November 27, 1919, between Bulgaria and Greece: *L.N.T.S.*, I, p. 68; Streit, *Der Lausanner Vertrag und der griechisch-türkische Bevölkerungsaustausch* (1929); Wurf-bain, *L'échange Gréco Bulgare des Minorités ethniques* (1930); Kiosseglou, *L'échange forcé des minorités* (1930); Devedji, *L'échange obligatoire des minorités* (1930); Iudas, *The Exchange of Minorities: Bulgaria, Greece and Turkey* (1932); Höxter, *Bevölkerungsaustausch als Institution des Völkerrechts* (1932); Schechtman, *European Population Transfers* (1946); Ghali, *op. cit.*, pp. 303-320; Ténékidès in *R.Q.*, 31 (1924), pp. 72-88; Scelle, ii, pp. 174-186; Séfériadès in *Hague Recueil*, vol. 24 (1928), (iv.), pp. 311-430; Leontiadès in *Z.o.V.*, 5 (1935), pp. 546-576 (with a bibliography); Politis in *L'Esprit International*, No. 54 (1940), pp. 163-186. On the work of the Greek Refugee Settlement Commission see Simpson in *International Affairs*, 8 (1920), pp. 583-601. See also Ginesi, *La seconde Guerre Mondiale et les Déplacements de Populations* (1940). And see Balladore Pallieri and others in *Annuaire*, 44 (1952) (2), pp. 138-199, for a dis-

cussion, *inter alia*, of the question to what extent compulsory exchange of populations is consistent with the incipient recognition of fundamental human rights as part of International Law.

² The question whether subjects of the ceding State who are born on the ceded territory but have their domicile abroad become *ipso facto* by the cession subjects of the acquiring State, must be answered in the negative, unless special treaty arrangements stipulate the contrary. Therefore, Frenchmen born in Alsace but domiciled at the time of the cession in Great Britain, would not have lost their French citizenship through the cession to Germany but for Article 1, part 2, of the Treaty of December 11, 1871, additional to the Peace Treaty of Frankfort: Martens, *N.R.G.*, 20, p. 847. See Fauchille, § 427; Cogordan, *La nationalité, etc.* (1890), p. 361; Dicey, p. 174, n. (6); and Kunz, *Die völkerrechtliche Option*, i, (1925), pp. 100-110. See also *Murray v. Parkes* [1942] 2 K.B. 123; Mann in *Modern Law Review*, 5 (1942), pp. 218-224, and Graupner in *L.Q.R.*, 61 (1945), pp. 161-178. And see Kaekenbeck, *Le règlement conventionnel des conséquences de remaniements territoriaux* (1940), pp. 11-30. See also below, p. 664, n. 1. And see below, § 240, in connection with annexation.

In general, persons over eighteen years of age may opt for their old nationality. But while in the Peace Treaties of 1919 the option of the husband covered his wife, the Treaty with Italy of 1947 lays down that the option of the husband shall not constitute an option on the part of the wife.¹ The person exercising the right of option may be required, usually within one year of the exercise of the option, to move to the country for the nationality of which he has opted.

XIV

OCCUPATION

Hall, §§ 32-34—Westlake, i. pp. 98-113, 121-135—Lawrence, § 74—Phillimore, i. §§ 226-250—Walker, § 9—Wharton, i. § 2—Moore, i, §§ 80, 81—Wheaton, §§ 165-174—Hyde, i. §§ 99-104—Bluntschli, §§ 278-283—Haworth, i. §§ 58, 59—Fauchille, §§ 534-550—Despagnet, §§ 392-399—Mérignhac, ii. pp. 419-487—Pradier-Fodéré, ii. §§ 784-802—Rivier, i. pp. 188-197—Nys, ii. pp. 58-122—Calvo, i. §§ 266-282—Fiore, ii. §§ 841-849, and *Code*, §§ 1059-1072—Martens, i. § 90—De Loutch i. pp. 345-361—Sibert, pp. 860-871—Cruchaga, §§ 484-496—Lindley, pp. 124-159, 181-246—Suarez, §§ 30, 30 (a)—Fenwick, pp. 250-258—Smith, ii. pp. 1-75—Tartarin, *Traité de l'occupation* (1873)—Westlake, *Chapters*, pp. 155-187—Heimburger, *Der Erwerb der Gebulshoheit* (1888), pp. 103-155—Salomon, *L'occupation des territoires sans maître* (1889)—Rice, *Étude théorique et pratique sur l'occupation*, etc. (1896)—Siebert, *Begriff und Arten der Okkupation im Völkerrecht* (1920)—Goebel, *The Struggle for the Falkland Islands* (1927), pp. 47-119—Bleiber, *Die Entdeckung im Völkerrecht* (1933)—Ago, *Il significato dell'effettività dell'occupazione in diritto internazionale* (1934)—Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty through Symbolic Acts, 1100-1800* (1938)—Hill, *Claims to Territory in International Law and Relations* (1944)—Macdonell in *J.C.L.*, New Ser., 1 (1899), pp. 276-296—Waultrin in *R.G.*, 15 (1908), pp. 78-185-101—Jessup in *A.J.*, 22 (1928), pp. 737-747—Genet in *R.I.*, 3rd ser., 14 (1934), pp. 285-324, 416-450—Heyde in *A.J.*, 20 (1935), pp. 448-471—Ottolenghi in *Rivista*, 15 (1936), pp. 2-33, 361-403—Simsonian in *Political Science Quarterly*, 53 (1938), pp. 111-128—Orient and Reinsch in *A.J.*, 35 (1941), pp. 443-461—Waldock in *B.Y.*, 25 (1948), pp. 310-353—Lauterpacht, *ibid.* 27 (1950), pp. 415-431.

¹ Article 19. Moreover, in that Treaty the right to opt for Italian nationality is restricted to persons whose customary language is Italian. The Treaty also departs from the previous practice inasmuch as the inhabitants of the ceded Italian territory do not acquire the new nationality automatically. The Treaty lays

down that they shall become citizens of the State to which the territory is transferred in accordance with the legislation of that State to be enacted within three months from the coming into force of the Treaty. They lose Italian nationality only on becoming citizens of the State concerned.

§ 220. Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. Occupation as a mode of acquisition differs from subjugation¹ chiefly in that the subjugated territory previously belonged to another State. Again, occupation differs from cession in that through cession the acquiring State receives sovereignty over the territory concerned from the former owner-State. Cession, therefore, is a derivative mode of acquisition, whereas occupation is an original mode. And it must be emphasised that occupation can only take place by and for a State²; it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.

§ 221. Only such territory can be the object of occupation as belongs to no State, whether it is entirely uninhabited, for instance, an island, or inhabited by natives whose community is not to be considered as a State.³ Natives may live on a territory under a tribal organisation which need not be regarded as a State; and even civilised individuals may live and have private property on a territory without forming themselves into a State proper exercising sovereignty over such territory.⁴ But the territory of any State, even though it is entirely outside the international community, is not a possible object of occupation; and it can only be acquired through cession⁵ or subjugation. On the other hand, a territory which once belonged to a State,

¹ See below, § 236.

² See above, § 209. For a decision of the Supreme Court of Norway affirming the proprietary right of a private individual in a part of Jan Mayen Island occupied by him at a time when it was *terra nullius* see *Jacobsen v. Norwegian Government*, *Annual Digest*, 1933-1934, Case No. 42. And see *United States v. Fullard-Leo*, decided by a United States Circuit Court of Appeals (1943) 133 F. (2d) 743.

³ For the Treaty between nine States recognising the sovereignty of

Norway over Spitsbergen signed on February 9, 1920, see Treaty Series (1924), No. 18, and *A.J.*, 18 (1924), Suppl., pp. 199-208; Heilborn in *Strupp, Wort.*, ii. pp. 569, 570; Piccioni in *R.G.*, 30 (1923), pp. 104-115. Russia protested against the Treaty (see *Bulletin de l'Institut Inter-médiaire International*, 9 (1923), p. 341).

⁴ As to the legal position of *terra nullius* see Giese in *Archiv des öffentlichen Rechts*, 29 (1938), pp. 310-360.

⁵ See above, § 214.

but has been afterwards abandoned, is a possible object of occupation by another State.¹

Since the open sea is free, no part of it can be the object of occupation, nor can rocks or banks in the open sea, although lighthouses may be built on them.² Likewise, apart from rights arising in the continental shelf,³ the bed of the sea cannot be an object of occupation,⁴ but the subsoil⁵ of the bed of the open sea may become the object of occupation through driving mines and piercing tunnels from the coast.⁶

¹ See below, §§ 228 and 247.

² See above, § 190a. As to territorial waters see Cansacchi, *L'occupazione dei mari costieri* (1936).

³ See below, § 287d.

⁴ See below, § 281.

⁵ See below, §§ 287c and 287d, and, as to the maritime belt, above, § 190b.

⁶ When, in 1909, Admiral Peary reached the North Pole and hoisted the flag of the United States, the question was discussed whether the North Pole could be the object of occupation. The question must, it is believed, be answered in the negative since there is no land at the North Pole. See Scott in *A.J.*, 3 (1909), pp. 928-941; Balch in *A.J.*, 4 (1910), pp. 265-275; and Clute in *Canadian Law Review*, 5 (1927), pp. 19-26. As regards the South Pole see *Law Magazine and Review*, 37 (1912), pp. 326-328. Higgins in Hall, § 30 (n.), considers both the North and South Polar regions to be incapable of acquisition by occupation because they are incapable of settlement. Lindley (p. 6) sees no reason why the North and South Polar regions should not be susceptible of acquisition by occupation; as to the Arctic and Antarctic regions generally see Lindley, pp. 4-6, and Fauchille, § 531 (40). See also Lakhtine in *A.J.*, 24 (1930), pp. 703-717, who regards it as a rule of positive law that they belong in principle to the Polar State within whose 'region of attraction' they are situated. States asserting sovereignty in Arctic and Antarctic regions by reference to the sector principle claim territories defined by the coast-line

and the meridians drawn from the extreme points of that line. In an Order in Council of February 14, 1933, Great Britain has asserted sovereignty over 'all the islands and territories other than Adèle Land situated south of the 60th degree of South Latitude and lying between the 160th degree of East Longitude and the 45th degree of East Longitude.' See also *Proceedings of the Imperial Conference, 1936: Summary of Proceedings*, p. 33. The so called Ross sector, created by the Order in Council of July 30, 1923, established a similar claim between longitude 160° W. and 150° W. See Reeves in *A.J.*, 28 (1934), pp. 117-119. But see Treaty Series, No. 25 (1931), Cmd. 3875, for an Exchange of Notes of August and November 1930, between Norway and Great Britain in which the former, while formally recognising Canadian sovereignty over the Sverdrup Islands, stated expressly that the recognition 'is in no way based on any sanction whatever of what is named "the sector principle."' The Soviet Union Decree of April 15, 1926, says that 'as being territory of the Soviet Union are declared all lands and islands discovered, as well as those which may be discovered in future, and which at the time of the publication of this decree have not been recognised by the Government of the Soviet Union as the territory of a third State': Smedal, *op. cit.* below, p. 58. By a Royal Proclamation of January 14, 1939, Norway declared to be under Norwegian sovereignty the part of the mainland coast of the Antarctic between the limits of the Falkland Islands Dependencies in the

§ 222. Theory and practice agree nowadays upon the rule Modes of Occupation.
that occupation is effected through taking possession of, and establishing an administration over, territory in the name of, and for, the acquiring State. Occupation thus effected is *real* occupation, and, in contradistinction to *fictitious* occupation, is named *effective* occupation. Possession and administration are the two essential facts that constitute an effective occupation.

(1) *Possession*.—The territory must really be taken into possession by the occupying State. For this purpose it is necessary that it should take the territory under its sway (*corpus*) with the intention of acquiring sovereignty over it (*animus*). This can only be done by a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty. It usually consists either of a proclamation or of the hoisting

west and the limits of the Australian Antarctic Dependency in the east. For the text of the Proclamation see *A.J.*, 34 (1910), Suppl., p. 83. In the same year Germany made a similar claim based largely on discoveries and mappings of a German aerial expedition. As to all these claims see Reeves in *A.J.*, 33 (1939), pp. 519-521. And see generally on the question of acquisition of sovereignty over Polar regions Smedal, *Acquisition of Sovereignty over Polar Areas* (1931); Smith, *Le statut juridique des terres polaires* (1934); Taracouzis, *Soviets in the Arctic* (1938); Hackworth, i. §§ 67-71 (a valuable survey); Hunter Miller in *Foreign Affairs*, 4 (1925), p. 56; Schoenborn in *Hague Recueil*, vol. 30 (1929) (v.), pp. 162-166; Charteris in *J.C.L.*, 3rd ser., 11 (1929), pp. 226-232 (as to Australian claims); Johnston in *Canadian Historical Review*, 14 (1933), pp. 24-41; Hyde in *Iowa Law Review*, 19 (1933-1934), pp. 286-294; Schmitz and Friede in *Z.G.F.*, 9 (1939), pp. 219-263; McKittrick in *Journal of Comparative Legislation*, 22 (3rd ser., 1940), pp. 89-97; Jessup in *A.J.*, 41 (1947), pp. 117-119.; Sibert, pp. 853-857; Dollot in *Angue Recueil*, 75 (1949) (ii.), pp. 121-191; Corbett, *Law and Society in*

International Relations (1951), pp. 121-119. On trans-polar aviation and jurisdiction over arctic airspace see Plüschke in *American Political Science Review*, 37 (1943), pp. 999-1013. In 1948 the United States approached a number of Governments, not including that of Soviet Russia, with a proposal for a discussion of the territorial problems of the Antarctic. There was a tentative suggestion that internationalisation might provide the best solution of these problems. In 1950 the Government of Soviet Russia announced that, while ready to take part in any exchange of views on the subject, it would not recognise any decisions on this question in which it had not participated. Great Britain has repeatedly offered to submit to a decision of the International Court of Justice certain aspects of the controversy with some Latin-American States concerning antarctic regions. For a comprehensive treatment of the subject see Waldo in *B.Y.*, 25 (1948), pp. 314-318 (with reference to Falkland Islands Dependencies). See also *Survey of International Affairs*, 1947-1948, pp. 492-499; Daniel in *Year Book of World Affairs*, 1949, pp. 241-272 and Christie, *The Antarctic Problem* (1951).

of a flag. But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag. On the other hand, it is immaterial whether or not some agreement is made with the natives by which they submit themselves to the sway of the occupying State. Any such agreement is usually neither understood nor appreciated by them, and even if the natives really do understand its meaning it has a moral value only.¹

(2) *Administration*.—After having, in the aforementioned way, taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If, within a reasonable time after the act of taking possession, the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty is exercised by any State over the territory.

Inchoate
Title of
Dis-
covery.

§ 223. In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation. Although even in the age of discoveries States did not maintain that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations, the taking of possession was frequently in the nature of a mere symbolic act.² Later on, a real *taking possession* was considered necessary. However, it was not until the eighteenth century that the writers on the Law of Nations demanded *effective* occupation,³ and not until the nineteenth century that the practice of the States accorded with this postulate.

¹ If an agreement with natives were legally important, the territory would be acquired by cession and not by occupation. But although it is nowadays quite usual to obtain a cession from a native chief, this is, nevertheless, not cession in the technical sense of the term in International Law; see above, § 214.

² See Vattel, i. § 208.

³ For an interesting and scholarly survey see Keller, Lassitzyn and Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800* (1938). See also Schoenborn in 'Gegenwartigprobleme,' *Leua Festschrift* (1953), pp. 239-287.

But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance. It is agreed that discovery gives to the State in whose service it was made an *inchoate* title; it 'acts as a temporary bar to occupation by another State'¹ for such a period as is reasonably sufficient for effectively occupying the discovered territory. If the period lapses without any attempt by the discovering State to turn its *inchoate* title into a *real* title of occupation, the *inchoate* title perishes, and any other State can then acquire the territory by means of an effective occupation.²

§ 224. No rule of the Law of Nations exists which makes notification of occupation to other States a necessary condition of its validity. As regards all future occupations on the African coast the parties to the General Act of the Berlin Congo Conference of 1885 stipulated³ that occupation should be notified to one another.⁴ But this Act has been abrogated so far as the signatories of the Convention of St. Germain of September 10, 1919, are concerned.⁵

Notification of Occupation to other States.

§ 225. Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to cover so much territory as is effectively occupied. In practice, however, the interested States have neither acted in the past, nor do they at present act, in conformity with any such rule; on the contrary, they have always

Extent of Occupation.

¹ Thus Hall, § 32, p. 127.

² See Lindley, pp. 51-53. See Award of April 4, 1928, in the Arbitration between Holland and the United States of America regarding sovereignty over the Island of Palmas, at pp. 27, 28 of the Award as published by the Permanent Court of Arbitration: *A.J.*, 22 (1928), pp. 807-912; Scott, *Hague Court Reports* (2nd ser., 1932), pp. 84-131; and see vol. ii. p. 41, n. 1. See also the *Clipperton Island* case between Mexico and France decided in January 1931 by an award of the King of Italy: *A.J.*, 26 (1932), p. 390; *Annual Digest*, 1931-1932, Case No. 60. And see comment thereon by Dickinson, *A.J.*, 27 (1933), pp. 130-133. See also the award in the *Guatemala-Honduras*

Boundary Arbitration, Annual Digest, 1933 1934, Case No. 46 (at pp. 118-121). And see Waldo in *B.Y.* 25 (1948), pp. 320-325, and Lauterpacht, *ibid.*, pp. 415-423.

³ Article 34. See Courcel, *L'influence de la Conférence de Berlin de 1885 sur le droit colonial international* (1936).

⁴ The duty of notification does not apply to other States or regions. See *Island of Palmas* award: *Annual Digest*, 1927-1928, Case No. 71, and the award in the *Clipperton Island* case of January 28, 1931: *A.J.*, 26 (1932), p. 394.

⁵ Treaty Series, No. 18 (1919), Cmd. 477; *L.N.T.S.*, 8, p. 27. See however, Article 10 of this Convention.

tried to attribute to their occupation a much wider area.¹ Thus it has been maintained that an effective occupation of the land at the mouth of a river is sufficient to bring under the sovereignty of the occupying State the whole territory through which such river and its tributaries run, up to the very crest of the watershed.² Again, it has been maintained that; when a coast-line has been effectively occupied, the extent of the occupation reaches up to the watershed of all such rivers as empty into the coast-line.³ And thirdly, it has been asserted that effective occupation of a territory makes the sovereignty of the possessor extend also over neighbouring territories as far as is necessary for the integrity, security, and defence of the land actually occupied.⁴ But all these and other exaggerated assertions have no true legal basis.⁵ In truth, no rule can be laid down beyond the general principle that occupation reaches as far as it is effective. How far it is effective is a question in each particular case. It is obvious that when the agent of a State takes possession of a territory and makes a settlement on a certain spot of it, he intends thereby to acquire a vast area by his occupation. But everything depends, not upon his intention, but upon how far round the settlement or settlements the responsible authority governing the territory in the name of the possessor succeeds by degrees in establishing its sovereignty. The payment of a tribute on the part of tribes settled far away, the fact that flying columns of

¹ As to the doctrine of 'hinterland' as the basis of a claim to occupy territory see Lindley, pp. 234, 235; Fauchille, § 531 (40).

² Claim of the United States in the Oregon Boundary Dispute (1827) with Great Britain. See Twiss, i. §§ 126, 127, and his *The Oregon Question Examined* (1846); Phillimore, i. § 250; Hall, § 33; Corbett, *Law and Society in International Relations* (1951), pp. 105-110.

³ Claim of the United States in their dispute with Spain concerning the boundary of Louisiana (1805), approved of by Twiss, i. § 125.

⁴ This is one aspect of the so-called 'right of contiguity,' approved of by Twiss, i. §§ 124 and 131. See also

Wright in *A.J.*, 12 (1918) pp. 519-521. For an express rejection of the doctrine of contiguity with respect to islands situated outside territorial waters see the award in the *Island of Palmas* case: *Annual Digest*, 1927-1928 Case No. 72. However, the practice of States does not confirm the view that contiguity, reasonably conceived, plays no part in determining the consequences of occupation. See Lauterpacht in *B.Y.*, 27 (1930), pp. 423-431.

⁵ See, however, favourable comment upon the watershed doctrine, mentioned above, by the Privy Council in the *Labrador Boundary Case* (1927) 43 T.L.R. at p. 204.

the military or the police sweep, when necessary, remote spots, the conclusion of treaties relating to the territory in question, and many other facts, can show how far round the settlements the possessor is really able to assert his established authority. Finally, in determining the degree of effectiveness of occupation necessary to confer sovereignty, regard must be had to the extent of competing claims of other States. Thus in the dispute between Denmark and Norway concerning the status of Eastern Greenland, decided by the Permanent Court of International Justice on April 5, 1933, the Court attached considerable importance to the fact that up to 1931 there had been no claim by any Power other than Denmark to sovereignty over Greenland.¹

§ 226. In the second half of the nineteenth century, the desire of States to acquire as colonies vast territories which they were not able to occupy effectively at once, led to agreements with the chiefs of natives inhabiting unoccupied territories by which these chiefs committed themselves to the 'protectorate' of States that are members of the international community. These so-called protectorates were certainly not protectorates in the technical sense of the term, which denotes that relationship between a strong State and a weak State where by a treaty the weak State has put itself under the protection of the strong and transferred to the latter the management of its more important international relations.²

§ 227. The uncertainty of the extent of an occupation and the tendency of every colonising State to extend its occupation constantly and gradually into the interior, or 'hinterland,'³ of an occupied territory, led several States with colonies in Africa to secure for themselves 'spheres of

¹ Series A/B, No 53, pp. 45, 46. This is one of the most important cases on the questions of occupation and discovery. For the literature see below, vol. II, p. 82, n. 6, to which add *Castberg in R.I.*, 3rd ser., 5 (1924), pp. 262-269. See also the Judgment of the International Court of Justice given in 1953 in the *Minquiers and*

Ecrhas case (*J.C.J. reports*, 1953, pp. 68-70) as an illustration of the kind of State activity held relevant for recognition of sovereignty claimed to be based on effective possession.

² See above, §§ 92, 93.

³ As to the 'hinterland' doctrine as the basis of a claim to occupy territory see above, § 225, p. 560, n. 1.

influence' by international treaties with other interested Powers. 'Sphere of influence' was therefore the description of territory exclusively reserved for future occupation by a Power which had effectively occupied adjoining territories.¹ In this way disputes could be avoided for the future, and the interested Powers could gradually extend their sovereignty over vast territories without coming into conflict with other Powers. Thus, to give some examples, Great Britain concluded treaties regarding spheres of influence with Portugal² in 1890, with Italy³ in 1891, with Germany⁴ in 1886 and 1890, and with France⁵ in 1898.⁶ But the establishment of a sphere of influence did not in itself vest territorial rights of a legal nature in the State exercising the influence.

Consequences
of Occu-
pation.

§ 228. As soon as a territory has been occupied by a State, it comes within the sphere of the Law of Nations, because it constitutes a portion of the territory of a subject of International Law. No other State can acquire it thereafter through occupation, unless the occupying State has either intentionally withdrawn from it or has been successfully driven away by the natives without attempting or being

¹ Lindley, p. 206, distinguishes three kinds of spheres of influence, of which the first is that described in this section; the second, a sphere of influence or interest enjoyed by two States by agreement between themselves in the territory of a third and weaker State—for instance, the agreement between Great Britain and Russia of August 31, 1907, as to Persia; and the third an interest enjoyed by one State in the territory of another, and usually weaker, State by agreement between them—for instance, as to non-alienation of territory. As to the Agreement of December 1925 between Great Britain and Italy concerning their interests in Abyssinia and the Abyssinian protest to the League of Nations see Toynbee, *Survey*, 1929, pp. 208-232; (1927) *Omd.* 2792; *Off. J.*, November 1928.

² See Martens, *N.R.G.*, 2nd ser., 18, p. 164.

³ See Martens, *N.R.G.*, 2nd ser., 18, p. 175.

⁴ See Martens, *N.R.G.*, 2nd ser., 12, p. 298, and 16, p. 694.

⁵ See Martens, *N.R.G.*, 2nd ser., 20, p. 116.

⁶ Protectorates and spheres of influence are exhaustively treated in Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), §§ 92-105; but Hall fails to distinguish between protectorates over Eastern States and protectorates over native tribes. See also Lindley, pp. 181-236; Kohler, § 33; Heilborn in *Strupp, Wort.*, pp. 550-552; Rutherford in *A.J.*, 20 (1926), pp. 300-325; Schoenborn in *Hague Recueil*, vol. 30 (1929) (v.), pp. 169-177; and, for a suggested distinction between a 'sphere of influence' and a 'sphere of interest,' Rutherford, *op. cit.*, p. 311, n. 64. The term 'sphere of action' is also used. As to agreements not to alienate territory see Lindley, pp. 225-227; See also Hold-Ferneck, ii, pp. 93-95; Langhaus-Ratzeburg in *Z.V.*, 14 (1928), pp. 356 et seq.

able to re-occupy it.¹ On the other hand, the Power which assumes sovereignty over the occupied territory is thereafter responsible for all events of international importance on the territory. It must, in particular, maintain a certain order among the native tribes so as to restrain them from acts of violence against neighbouring territories, and must punish them for such acts if committed.

XV

ACCRETION

Grotius, ii. c. 8, §§ 8-16—Hall, § 37—Lawrence, § 75—Phillimore, i. §§ 240, 241—Twiss, i. §§ 131 and 154—Moore, i. § 82—Hyde, i. § 105—Bluntschli, §§ 294, 295—Hackworth, i. § 60—Hefster, § 69—Fauchille, §§ 533-533 (2)—Despagnet, § 370—Pradier-Fodéré, ii. §§ 803-816—Rivier, i. pp. 179, 180—Nys, ii. pp. 4-10—Calvo, i. § 266—Fiore, ii. § 852, and *Code*, §§ 1073-1075—Martens, i. § 90—Lindley, p. 69—De Louter, i. pp. 343-345—Heimburger, *Der Erwerb der Gebietshoheit* (1888), p. 106.

§ 229. Accretion is the name for the increase of land through new formations. Such new formations may be only a modification of the existing State territory, as, for instance, where an island rises within a river, or a part of a river, which is totally within the territory of one and the same State; and in such case there is no increase of territory to correspond with the increase of land. On the other hand, many new formations occur which really do enlarge the territory of the State to which they accrue, as, for instance, where an island rises within the maritime belt. And it is a customary rule of the Law of Nations that enlargement of territory, if any, created through new formations, takes place *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty. Accretion must, therefore, be considered as a mode of acquiring territory.

§ 230. New formations through accretion may be artificial or natural. They are artificial if they are the outcome of human work. They are natural if they occur through

¹ See below, § 247.

the operation of nature. And within the circle of natural formations different kinds must again be distinguished—namely, alluvions, deltas, new-born islands, and abandoned river-beds.¹

Artificial
Formations.

§ 231. Artificial formations are embankments, breakwaters, dykes, and the like, built along the river or the coast-line of the sea. As such artificial new formations along the bank of a boundary river may more or less push the volume of water so far as to encroach upon the other bank of the river, and as no State is allowed to alter the natural condition of its own territory to the disadvantage² of the natural conditions of a neighbouring State territory, a State cannot build embankments, and the like, of such kind without a previous agreement with the neighbouring State. But every State may construct such artificial formations as far into the sea beyond the low-water mark as it likes, and thereby gain considerably in land and also in territory, since the maritime belt (which is at least three miles wide) would then be measured from the extended shore.

Alluvions. § 232. Alluvion is the name for an accession of land washed up on the seashore or on a river-bank by the waters. Such accession is as a rule produced by a slow and gradual process, but sometimes also through a sudden act of violence, the stream detaching a portion of the soil from one bank of a river, carrying it over to the other bank, and embedding it there so as to be immovable (*avulsio*). Through alluvions the territory of a State may be considerably enlarged.³ For if the alluvion takes place on the shore, the extent of the territorial maritime belt is now to be measured from the extended shore. And if the alluvion takes place on one bank of a boundary river, and the course of the river is thereby naturally so altered that the waters in consequence cover a part of the other bank, the boundary line, which runs through the middle or through the mid-channel,⁴

¹ As to accretion and avulsion in the case of rivers, and the effect on boundaries, see above, § 199

² See above, § 127.

³ See below, § 245.

⁴ See above, § 199 (1). And see *Louisiana v. Mississippi* (1931) 282 U.S. 458; *Hogus v. Stricker Land and Timber Co.* (1934) 60 F. (2d) 167; *Annual Digest*, 1933-1934, Case No. 49.

may thereby be extended into former territory of the other riparian State.

§ 233. Similar to alluvions are deltas. Delta is the name ^{Deltas.} for a tract of land at the mouth of a river, shaped like the Greek letter Δ , and owing its existence to a gradual deposit by the river of sand, stones, and earth on one particular place at its mouth. As the deltas are continually increasing, the accession of land they produce may be very considerable, and, according to the Law of Nations, is to be considered an accretion to the territory of the State to which the mouth of the river belongs, although the delta may be formed outside the territorial maritime belt.

§ 234. The natural processes which create alluvions on ^{New-born} the shore and banks, and deltas at the mouths of rivers, ^{islands.} together with other processes, may lead to the birth of new islands. If they rise on the high seas outside the territorial maritime belt, they belong to no State, and may be acquired through occupation on the part of any State. But if they rise in rivers, lakes, or within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land.¹ New islands in boundary rivers which rise within the boundary line of one of the riparian States accrue to the land of such State, and islands which rise upon the boundary line are divided by it into parts which accrue to the land of the riparian States concerned. If an island rises within the territorial maritime belt, it accrues to the land of the littoral State, and the extent of the maritime belt is now to be measured from the shore of the new-born island.²

An instructive example is the case of *The Anna*³ In 1805, during war between Great Britain and Spain, the British privateer *Minerva* captured the Spanish vessel *Anna* near⁴ the mouth of the river Mississippi. When the *Anna*

¹ See, for instance, Article 6 of the Treaty of Lausanne of 1923.

² See Gidel, iii. pp. 664-726.

³ See 6 C. Rob. 373, and below, vol. ii. § 362. See also *The Secretary of State for India v. Sri Raja Chellakani Rama Rao* (1916) 32 T.L.R. 652.

⁴ It is not clear from the judgment

whether the mud islands arose within the maritime belt nor does it seem to have been considered relevant by Lord Stowell. The point was that 'they are the natural appendages of the coast on which they border, and from which, indeed, they are formed'; see Lindley, pp. 7, 8.

was brought before the British Prize Court, the United States claimed her on the ground that she was captured within the American territorial maritime belt. Lord Stowell gave judgment in favour of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture was within three miles of some small mud islands composed of earth and trees which had drifted down into the sea.

Abandoned
River-
beds.

§ 235. It happens sometimes that a river suddenly abandons its bed entirely or dries up altogether. If it was a navigable boundary river, the boundary line continues to run along the middle of the old *thalweg* in the abandoned bed.¹ But often this cannot be ascertained, and in such cases² the boundary line is considered to run through the middle of the abandoned bed, although the territory of one riparian State may become thereby enlarged, and that of the other diminished.

XVI

SUBJUGATION

Vattel, iii. §§ 199-203—Hall, §§ 204, 205.—Lawrence § 77—Halleck, ii. pp. 501-534—Walker, § 11—Wheaton, § 165—Moore i. § 67—Hyde, i. § 106, ii. § 907—Bluntschli, §§ 287-289, 701, 702—Heffter, § 178—Fauchille, §§ 557 (10)-557 (12)—Hackworth, i. § 62—Rivier, i. pp. 181, 182, ii. pp. 436-441—Nys, ii. pp. 44-57—Calvo, v. §§ 3117, 3118—Fiore, ii. § 863, iii. § 1693, and *Code*, § 1043-1046—Martens, i. § 61—De Loutre, i. pp. 371-373—Lindley, pp. 160-165—Holtzendorff, *Eroberung und Eroberungsgerecht* (1871)—Heimbürger, *Der Erwerb der Gebietshoheit* (1888), pp. 121-132—Westlake in *L.Q.R.*, 17 (1901), p. 392, reprinted in Westlake, *Papers*, pp. 475-489—Phillips, *Termination of War and Treaties of Peace* (1916), pp. 9-51—Schätzle, *Die Annexion im Völkerrecht* (1921)—Fabbri, *Effetti giuridici delle annessioni territoriali* (1931)—McMahon, *Conquest and Modern International Law* (1940)—Bentivoglio, *Debellatio nel diritto internazionale* (1948)—Fischer Williams in *B.Y.*, 1926, pp. 24-42—Udina in *Rivista*, 22 (1930), pp. 301-341—Schätzle in *Archiv des Völkerrechts*, 2 (1949), pp. 1-28.

Concep-
tion of
Conquest
and of
Subjuga-
tion.

§ 236. Conquest is the taking possession of enemy territory through military force in time of war. Conquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory, although such territory comes

¹ See above, § 199.

² As in the case of non-navigable rivers.

through conquest for the time under the sway of the conqueror. Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory.¹ Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives a title and is a mode of acquiring territory.² It is, however, quite usual to speak of 'title by conquest,' and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.³

§ 237. Conquered enemy territory, although actually in the possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror.⁴ Annexation turns the conquest into subjugation. It is the very annexation which *uno actu* makes the vanquished State cease to exist, and brings the territory under

Subjugation in
contra-
distinction to
Occupation.

¹ See, however, *In re Southern Rhodesia* [1919] A.C. at pp. 239, 240, but more particularly as to the position between the annexing State and its own subjects, and also *Sobhuza II. v. Miller* [1926] A.C. 518. For a clear statement to the effect that unilateral annexation of part of territory without the consent of the State concerned is invalid and produces no legal results, see the interesting decision of the Belgian Court of Cassation of June 16, 1947, in *In re Bindels* (*Journal des Tribunaux*, 62 (1947), p. 511).

² See below, vol. II § 264.

³ See above, § 216. Annexation by a State of territory hitherto under its administration, or leased to it, or granted to it for its 'use, occupation, and control' (see above, § 171 (2)-(4)), is not subjugation, because the annexing State was already exercising sovereignty over the territory in question. Examples

of annexations of this kind are the annexation by Austria in 1909 of the Turkish provinces of Bosnia and Herzegovina, and of the Turkish island of Ada Kalé in the Danube in 1913 (these territories having been under her administration since 1878), and the annexation by Great Britain immediately after the outbreak of war with Turkey in 1914 of the island of Cyprus, which had been under British administration since 1878. Such annexations without the consent of the State which in law owns the territory are certainly unlawful in time of peace, and of doubtful legality in war. However this may be, they are not a regular mode of acquiring territory (Turkey by the Treaty of Lausanne of 1923, Article 20, recognised 'the annexation of Cyprus proclaimed by the British Government on the 5th November 1914.')

⁴ See below, vol. II, § 166.

the conqueror's sovereignty. Thus the subjugated territory has not for one moment been no State's land, but passes from the enemy to the conqueror not through cession but through annexation.¹

The
Status of
Germany
after the
Second
World
War.

§ 237a. The legal status of Germany subsequent to her defeat and unconditional surrender at the end of the Second World War illustrates the distinction between conquest and subjugation. After the unconditional surrender of the German forces and the abolition of what purported to be the German Government, Great Britain, the United States of America, Russia, and France, in a joint Declaration issued on June 5, 1945, assumed supreme authority with respect to Germany, including all the powers possessed by the German Government and 'any state, municipal, or local government or authority.'² It was expressly stated that the assumption of these powers did not effect the annexation of Germany and that her future boundaries and status would be determined by the four States issuing the Declaration. But for that disclaimer of the intention of annexation the assumption of full authority over Germany would have been indistinguishable from subjugation.³ As the result of the Declaration, as well as of the various measures taken to implement it,⁴ the international personality of Germany must be deemed to have been suspended until an independent German Government should be set up exercising with relative freedom the right to conclude treaties and to maintain

¹ Some cases of annexation by unilateral act, i.e. without cession, are discussed by Hurst in *B.Y.*, 1924, pp. 163-178.

² *Unconditional Surrender of Germany. Declaration and other Documents*: Cmd. 6648 (1945)

³ But see Kelsen in *A.J.*, 39 (1945), pp. 518-526, for the view that such disclaimer is of political rather than of legal significance, and that as the result of the assumption of sovereignty over Germany—the Declaration refers only to the assumption of authority—Germany ceased to exist as a sovereign State. In April 1946, in connection with a case on appeal arising out of the continued detention of a German national, the British Foreign

Office stated that Germany continued to exist as a State and that the war with her had not come to an end. *Rex v. Baltrull, ex parte Kuechenmeister*, [1946] 1 All England Reports, 635 (Divisional Court), Weekly Notes, 1946, p. 177 (Court of Appeal). For lucid comment see *B.Y.*, 23 (1947), p. 381. See also *Nelz v. Edel, Solicitors' Journal*, March 20, 1946, p. 187.

⁴ See, for instance, Law No. 1 of September 20, 1945, issued by the Control Council and repealing a series of Laws of a political and discriminatory nature upon which the National Socialist régime rested: *Official Gazette of the Control Council for Germany*, No. 1, October 29, 1945, p. 3.

diplomatic relations.¹ Prior to the restitution of German sovereignty the exercise of the internal and external prerogatives and rights of the German State was vested, with full effect in International Law, either jointly with the four Powers or with any one of them in respect of the part of German territory placed under its administration.² When, on May 26, 1952, the Convention on Relations between the Federal Republic of Germany and the United States, the United Kingdom and France laid down that 'the Federal Republic shall have full authority over its internal and external affairs,'³ it did so subject to exceptions⁴ which

¹ See e.g. Proclamation No. 2 of September 20, 1945, which contains certain additional requirements imposed upon Germany: *ibid.*, p. 8; *A.J.*, 40 (1946), Suppl., p. 21. Section III of the Proclamation lays down that the Allied Representatives will regulate all matters affecting Germany's relations with other countries -- such regulation to include directions concerning the abrogation, bringing into force, or revival of treaties to which Germany was a party. The same Section provides that in virtue and as from the date of the surrender of Germany her diplomatic, consular, commercial and other relations with foreign States have ceased to exist and that German diplomatic and consular representatives abroad are recalled. The control and disposal of the buildings, property, and archives of German diplomatic and other agencies abroad is to be prescribed by the Allied Representatives.

² It would appear that by virtue of the Declaration of June 5, 1945 (see above, p. 568, n. 2) authority over Germany was vested in three bodies; (a) in the British, United States, Russian and French Commanders-in-Chief, each with respect to his own zone of occupation; (b) in the Control Council, composed of the four Commanders-in-Chief, in matters affecting Germany as a whole; (c) in an Inter-Allied Governing Authority for the area of 'Greater Berlin' operating under the general direction of the Control Council and consisting of four Commandants each of whom serves in rotation as Chief Commandant see Nobleman in *A.J.*, 41 (1947), pp.

650-655, and, in particular, Jennings in *B.Y.*, 23 (1946), pp. 112-141. See also Gros in *R.G.*, 50 (1946), pp. 67-78; Mann in *International Law Quarterly*, 1 (1947), pp. 314-335 and in *Grotius Society*, 33 (1947), pp. 119-146; Friedmann, *The Allied Military Government of Germany* (1947); Fauser Hall in *Annuaire Suisse de droit international*, 3 (1946), pp. 9-63. As to the Government of Berlin see Monier in *R.G.*, 51 (1947), pp. 48-64. See also the decision of the Obergericht of the Canton of Zürich of December 1, 1945 printed in *Annuaire Suisse de droit international*, 3 (1946), pp. 204-210. For the text of the Occupation Statute of Germany of April 8, 1949, see *M.J.*, 43 (1949), Suppl. p. 172. And see the extensive literature in vol. ii., p. 604 and Delba in *R.G.*, 54 (1950), pp. 3-40. On the effect on the status of Germany of the formal termination by the President of the United States of the state of war on October 24, 1951, see Wright in *A.J.*, 46 (1952), pp. 299-308.

³ Article 1 of the Convention: Germany No. 6 (1952), Cmd. 8571. The Convention was accompanied by a Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany, a Finance Convention, and a Convention on the Settlement of Matters arising out of the occupation.

⁴ The most important of these exceptions was: (a) the power vested in the Allied States, whose forces remained in Germany, to declare a state of emergency in the whole or part of Germany; (b) the retention of full rights with regard to West

raised the question whether the Republic was a sovereign State so long as the régime established by the Convention should last.¹ Notwithstanding the far-reaching character of these exceptions that question must be answered in the affirmative. However, in 1954 the above-mentioned States agreed to a full restoration of German sovereignty.

Justifica-
tion of
Subjuga-
tion as a
Mode of
Acquisi-
tion.

§ 238. Prior to the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War (the effect of which is considered below, § 241a), States, as well as the vast majority of writers, recognised subjugation as a mode of acquiring territory. Its justification lay in the fact that war was a contention, not condemned by law, between States for the purpose of overpowering one another. States which went to war knew beforehand that they more or less risked their very existence, and that it might be necessary for the victor to annex the conquered enemy territory, either in the interest of national unity or of safety against further attacks, or for other reasons.

Subjuga-
tion of the
Whole or
of a Part
of Enemy
Territory.

§ 239. Subjugation is, as a rule, a mode of acquiring the entire enemy territory. But it is possible for a State to conquer and annex *a part* of enemy territory, either when the war ends by a treaty of peace in which the vanquished State, without ceding the conquered territory, submits silently² to the annexation, or by simple cessation of hostilities.³

It must, however, be emphasised that such a mode of acquiring a part of enemy territory is totally different from forcibly taking possession of a part thereof during the continuance of war. Such a conquest, although the conqueror may intend to keep the conquered territory and therefore to annex it, does not confer a title so long as the war has not terminated either through simple cessation of hostilities or by a treaty of peace. Therefore, the practice, which sometimes prevails, of annexing during a war a conquered part of enemy territory cannot be approved. For annexa-

Berlin; (c) the reservation of the supreme authority of the Allies with regard to 'Germany as a whole, including the unification of Germany and a peace settlement.'

¹ See Kuns in *A.J.*, 47 (1953), pp.

106-114, who answers the question in the negative. See also Schwarzenberger in *Current Legal Problems*, 6 (1953), pp. 296-314.

² See below, vol. ii. || 273.

³ See below, vol. ii. || 263.

tion of conquered enemy territory, whether of the whole or of part, confers a title only after a *firmly established* conquest, and so long as war continues conquest is not firmly established.¹ For this reason² the annexation of the Orange Free State in May 1900, and of the South African Republic in September 1900, by Great Britain during the Boer War, was premature. So also was the annexation of Tripoli and Cyrenaica by Italy during the Turco-Italian War in November 1911 and, again, the annexation of Ethiopia by Italy in 1936.³

§ 240. Although subjugation is an original mode of acquisition, since the sovereignty of the acquiring State is not derived from that of the State formerly owning the territory, the new owner-State is nevertheless the successor of the former owner-State as regards many points which have been discussed above (§ 82). It must be specially mentioned that, as far as the Law of Nations⁴ is concerned, the subjugating State does not acquire the private property of the inhabitants of the annexed territory. Being now their sovereign, it may indeed impose any burdens it pleases on its new subjects—it may even confiscate their private property, since a sovereign State can do what it likes with its subjects—but subjugation itself does not by International Law affect private property.

As regards the national status of the subjects of the subjugated State, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation become *ipso facto*⁵ by the subjugation⁶ subjects of the subjugating State. But

¹ See below, vol. ii. § 60.

² See below, vol. ii. § 167.

³ See below, vol. ii. §§ 167 and 273, and Landley, pp. 161-164. As to the purported annexation of Abyssinia by Italy on May 9, 1936, see Strupp in *R.G.*, 44 (1937), pp. 44-46. See also Sereni in *Rivista*, 15 (1936), pp. 404-433, and Z.S.R., 17 (1937), pp. 287-313; Nostitz-Wallwitz in *Z.o.V.*, 7 (1937), pp. 38-46; Rousseau in *R.G.*, 44 (1937), pp. 5-42, 162-198.

⁴ *United States v. Percheman* (1833) 7 Peters 51, and Sayre in *A.J.*, 12 (1918), pp. 475-497.

⁵ See above, § 219.

⁶ See *Campbell v. Hall* (1774) 1 Cowper 208, and *United States v. Repentigny* (1866) 5 Wallace 211. The case is similar to that of cession: see above, § 219; Keith, *The Theory of State Succession* (1907), pp. 45 and 48; Moore, iii. § 379; Edwards in *J.C.L.*, New Ser., 15 (1915), pp. 108-111. As to the meaning of the term 'established' in a treaty for the exchange of populations see Advisory Opinion of the Permanent Court (*Exchange of Greek and Turkish Populations*), Publications of the Court, Series B, No. 10. As to the meaning

Consequences of Subjugation.

the national status of such enemy subjects as are domiciled abroad and do not return, and further of such as leave the country before the annexation or immediately afterwards, is a matter of dispute.¹ Some writers maintain that these individuals do in spite of their absence become subjects of the subjugating State; others emphatically deny it. Whereas the practice of the 'United States of America seems to be in conformity with the latter opinion,² the practice of Prussia in 1866 was in accordance with the former.³ Probably a distinction must be made between those individuals who leave the country *before* and those who leave it *after* annexation. The former are not under the sway of the subjugating State at the time of annexation, and, since the personal supremacy of their home State terminates with its extinction through annexation, they would seem to be outside the sovereignty of the subjugating State. But those individuals who leave the country *after* annexation leave it at a time when they have become subjects of the new sovereign, and they therefore remain such subjects even after they have left the country,⁴ for there is no rule

of domicile see award of Kaeckenbeek noted by Garner in *A.J.*, 20 (1926), pp. 130-135. As to the meaning of the terms 'resident' and 'ordinarily resident' in a British Order in Council defining the national status of the inhabitants of Cyprus after the British annexation in 1914 see *Gout v. Cimidian* [1922] 1 A.C. 105.

¹ As to the treatment of such persons by the Treaty of Lausanne of 1923 see Bentwich in *B.Y.*, 1926, pp. 97-109.

² See Halleck, ii. p. 510.

³ Thus in the case of Count Platen-Hallermund, a Cabinet Minister of King George v. of Hanover, who left Hanover with his King before the annexation in 1866 and was in 1868 prosecuted for high treason before the Supreme Prussian Court at Berlin, this Court decided that the accused had become a Prussian subject through the annexation of Hanover. See Halleck, ii. p. 510, on the one hand, and, on the other, Rivier, ii. p. 436. Valuable opinions of Zachariæ and Neumann, who deny that Count Platen was a Prussian subject,

are printed in *Deutsche Strafrechts-Zeitung* (1868), pp. 304-320. See also Schoenborn in *Strupp, Wört.*, ii. p. 271, and Borchard in *A.J.*, 37 (1943), pp. 634-640; *Murray v. Parkes* [1942] 2 K.B. 123. And see above, § 219a, with regard to cession. See also Mervyn Jones, *British Nationality Law and Practice* (1947), pp. 39-56, for an exhaustive and lucid discussion of the subject. The British Nationality Act of 1948 provides that if in the future territory becomes part of the United Kingdom and Colonies an Order in Council may be made laying down who are to become citizens of the United Kingdom and Colonies by virtue of their connection with the incorporated territory.

⁴ Supposing their original home State is extinguished as the result of the war (as in the case of the Orange Free State and the South African Republic), do they become stateless? In the Draft Convention on Elimination of Statelessness prepared in 1954 by the International Law Commission it is laid down that in the absence of treaty provisions

of the Law of Nations in existence which obliges a subjugating State to grant the privilege of emigration¹ to the inhabitants of the conquered territory.

Different from the fact that enemy subjects become through annexation subjects of the subjugating State is the question what position they acquire within it. This question is one of Municipal and not of International Law. The subjugating State can, if it likes, allow them to emigrate and to renounce their newly acquired citizenship, and its Municipal Law can put them in any position it likes, and can in particular grant or refuse them the same rights as those which its citizens by birth enjoy.

§ 241. In International Law as it obtained prior to the Covenant of the League, the Charter of the United Nations, and the General Treaty for the Renunciation of War the legal position with regard to the veto of third Powers could be summarised as follows :

Veto of
Third
Powers.

Although subjugation is an original mode of acquiring territory, and no third Power has as a rule² a right of intervention, the conqueror has not in fact an unlimited possibility of annexing the territory of the vanquished State. When the balance of power is endangered, or when other vital interests are at stake, third Powers can and will intervene, and history records many instances of such interventions. But the validity of the title of the subjugating State does not depend upon recognition on the part of other States. Nor is a mere protest of a third State of any legal weight.

The position, it is believed, has now changed as the result of the developments in International Law mentioned above. Recognition on the part of third Powers was unnecessary so long as conquest resulted from war which

preventing statelessness in connection with changes of territory, States to which territory is transferred, or which otherwise acquire territory, shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or otherwise or unless they have or acquire another nationality. See also Jellinek, *Der*

automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge (1951); Sibert, pp. 543-547.

¹ See above, § 219a, as to this option in cases of cession.

² But this rule had exceptions, as in the case of a State whose independence and integrity have been guaranteed by one or more States.

International Law admitted as a legitimate means of changing international rights. This is no longer the case.¹

Renuncia-
tion of
War and
Title by
Conquest.

§ 241a. The recognition of title by conquest was, prior to the Covenant of the League, the Charter of the United Nations, and the General Treaty for the Renunciation of War, the necessary result of the admissibility of the right of war as an instrument both for enforcing the law and for changing existing rights. The right to terminate the existence of another member of the community is a legal anomaly which can be understood only by reference to other anomalies of the legal system in question. Under general International Law conquest is not the result of an illegal act; on the contrary, it is the consequence of the use of force permitted by International Law. The position has, it is submitted, undergone change as the result of the Covenant of the League, the Charter of the United Nations, and, in particular, of the General Treaty for the Renunciation of War. In so far as these instruments prohibit war, they probably render invalid conquest on the part of the State which has resorted to war contrary to its obligations.² An unlawful act cannot normally produce results beneficial to the law-breaker. As has been pointed out above,³ the so-called doctrine of non-recognition does not render such conquest illegal; it is an announcement of the intention, or the assumption of an obligation, not to validate by an act of recognition a claim to territorial title which originates in an illegal act and which is, accordingly, itself invalid.⁴

On the other hand, the title by conquest remains a valid title in those cases in which the conquering State is not bound by the Charter of the United Nations or by the General Treaty for the Renunciation of War or when,

¹ See below, vol. ii. § 52j. And see above, § 75c, as to non-recognition.

² See § 75i.

³ As to the pronouncements of the Permanent Court of International Justice pointing to the acceptance of the maxim *ex injuria jus non oritur* see above, p. 142, n. 1.

⁴ In the absence of a judicial or

other authoritative pronouncement on this question, the view expressed in the text must be regarded as representing merely the opinion of the Editor of this edition. For a different view, so far as the effect of the Covenant is concerned, see § 241a of the previous edition. See also Hyde in *A.J.*, 30 (1936), pp. 471-476; Garner, *ibid.*, pp. 679-686.

although so bound, the resort to war on its part is not, in the particular case, unlawful.

XVII

PRESCRIPTION

Grotius, ii. c. 4 Vattel, ii. §§ 140-151—Hall, § 36—Westlake, i. pp. 94-96 Lawrence, § 78—Phillimore, i. §§ 251-261—Twiss, i. § 129—Walker, § 13—Wheaton, § 164 Moore, i. § 88 Hyde, i. § 116—Bluntschli, § 290—Fauchille, §§ 557 (5)-557 (9)—Hackworth, i. § 442—Mérignhac, ii. pp. 415-418—Pradier-Fodéré, ii. §§ 820-829—Rivier, i. pp. 182-184—Nys, ii. pp. 38-44 Calvo, i. §§ 264-265 Fiore ii. §§ 850, 851, and Code, §§ 1079-1082—Martens, i. § 90—G. F. Martens, §§ 70, 71—Lindley, pp. 178-180—De Louter, i. pp. 341-343—Ralston, §§ 573-574a—Heimbürger, *Der Erwerb der Gebietshoheit* (1888), pp. 140-155—Bleiber, *Die Entdeckung im Völkerrecht* (1933), pp. 41-48—Verykios, *La prescription en droit international public* (1934), pp. 11-109—Corbett, *Law and Society in International Relations* (1951), pp. 90-100—Andinet in *R.G.*, 3 (1896), pp. 313-325—Ralston in *A.J.*, 4 (1910), pp. 133-144—Sibley in *J.C.L.* 3rd ser., 7 (1925), pp. 17-22—Cavaglieri in *Rivista*, 18 (1926), pp. 169-204—Sørensen in *Nordisk T.A.*, 3 (1932), pp. 145-160—Johnson in *B.Y.*, 27 (1950), pp. 332-354.

§ 242. Since the existence of a science of the Law of Nations, there has always been opposition to prescription as a mode of acquiring territory. Grotius rejected the usucaption of the Roman Law, yet adopted from the same law *immemorial* prescription² for the Law of Nations. But whereas a good many writers³ still defend that standpoint, others⁴ reject prescription altogether. Again, others⁵ go beyond Grotius and his followers, and do not require possession from time *immemorial*, but assert that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time.⁶

This opinion seems to be in accordance with practice.

¹ Prescription was originally placed on the agenda of the League Codification Committee, but the subject was not proceeded with.

² See Grotius, ii. c. 4, §§ 1, 7, 9.

³ See, for instance, Heffter, § 12; Martens, i. § 90; De Louter, i. p. 343.

⁴ G. F. Martens, § 71; Klüber, §§ 6 and 125; Holtzendorff, ii. p.

255; Ullmann, § 92; Liszt, § 30, iii (1).

⁵ Vattel ii. § 147; Wheaton, § 165; Phillimore, i. § 259; Hall, § 36; Bluntschli, § 290; Pradier-Fodéré, ii. § 825, and many others.

⁶ As to Extinctive Prescription barring the prosecution of claims by lapse of time see above, § 155c.

There is no doubt that, in international practice, a State is considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully and unlawfully, provided that the possessor has been in undisturbed possession for such a length of time as is necessary to create the general conviction that the present condition of things is in conformity with international order. Such prescription cannot be compared with the usucaption of Roman Law, because the latter required *bona fide* possession, whereas the Law of Nations recognises prescription both in cases where the State is in *bona fide* possession and in cases where it is not. The basis of prescription in International Law is nothing else than general recognition¹ of a fact, however unlawful in its origin, on the part of States. Prescription in International Law may therefore be defined as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order*. Thus, prescription in International Law has the same rational basis as prescription in Municipal Law namely, considerations of stability and order.²

Mode of
Effecting
Prescrip-
tion.

§ 243. From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of the individual case. As long as other States keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order.³

¹ See Heimburger, pp. 151-155.

² On the principle of *uti possidetis* adopted by the Spanish-American Republics see above, § 201. For an affirmation of the principle of prescription in its application to State members of the American Union and for a survey of previous decisions see *Arkansas v. Tennessee* (1940) 310 U.S.

563; *A.J.*, 35 (1940), p. 154, *Annual Digest*, 1938-1940, Case No. 43.

³ The question whether the consent of the dispossessed State, which for a long time has not been in effective possession, is invariably required to render lawful a change of sovereignty was discussed in the course of the dispute of Great Britain with Persia

But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed and thus in certain circumstances matters may gradually ripen into that condition which is in conformity with international order. The question at what time and in what circumstances such a condition of things arises, is not one of law but of fact. When, to give an example, a State which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among States that the present condition of things is in conformity with international order. Or, to give another example, when an incorrectly drawn boundary line, which wrongly allots to one of the States concerned a tract of territory, has for a long time been regarded as correct, the conviction will prevail that the present condition of things is in conformity with international order, even if afterwards the wronged State raises a protest and demands that the boundary line should be re-drawn.¹ These examples show why a certain number of years² cannot, once for all, be fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences at work besides

concerning the Bahrain Islands see Smith, n pp. 62-76, *Off. J.*, 1928, pp. 605 and 1360, *ibid.*, 1934, p. 969; Toynbee, *Survey*, 1934, pp. 221-224. As to the Persian protest after the British Treaty with Saudi Arabia of November 1935 (Cmd. 5168) see *Journal des Nations* of June 20, 1936, *Off. J.*, 1936, p. 928. See also Z o F., 6 (1936), pp. 599, 600. And see Khadduri in *A.J.*, 45 (1951), pp. 631-647.

¹ See *Maryland v. West Virginia* (1909) 217 U.S. 22. See also the interim injunction granted by the German Staatsgerichtshof on February 23, 1925, in the dispute between Lübeck and Mecklenburg regarding jurisdictional rights in the Bay of Lübeck, printed in Wenzel,

Die Hoheitsrechte in der Lübecker Bucht (1926), pp. 9-21, and reported in *Annual Digest*, 1925-1926, Case No. 85.

² See Vattel, n § 151, and Field, *Outlines of an International Code*, § 52. For the purposes of the Boundary Arbitration between Great Britain and Venezuela in 1899 (the United States of America acting on behalf of Venezuela) it was agreed by a Treaty between Great Britain and Venezuela of February 2, 1897, that 'Adverse holding or prescription during a period of fifty years shall make a legal title'. see Lindley, p. 153. As to the interpretation of that provision during the arbitration proceedings see Lauterpacht, *Analogy*, pp. 220-231.

the mere lapse of time¹ to create the conviction that in the interest of stability and order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ.²

XVIII

LOSS OF STATE TERRITORY

Grotius, II c. 9—Hall, § 34—Phillimore, I, §§ 284-295—Moore, I §§ 89, 90—Hyde, I, §§ 115, 117-119—Holtzendorff in *Holtzendorff*, II pp 274-276—Pradier Fodéré, II §§ 850-852—Fauchille, § 544—Rivier, I, § 13—Fiore, II, § 865—Martens, I, § 92—Gemma, pp. 202, 203—Lindley, pp. 48-53—Smith, II, pp. 45-76—Henrich, *Theorie des Staatsgebietes* (1922), pp. 125-132—Bleiber, *Die Entdeckung im Völkerrecht* (1933), pp. 24-40

Six Modes of losing State Territory. § 244. To the five modes of acquiring sovereignty over territory correspond five modes of losing it—namely, cession, dereliction,³ operations of nature, subjugation, prescription. But there is a sixth mode of losing territory namely, revolt. No special details are necessary with regard to loss of territory through subjugation, prescription and cession, except that it is of some importance to repeat here that the historical cases of pledging, leasing, and giving territory to another State to administer are in fact, although not in strict law, nothing else than cessions⁴ of territory. But the operations of nature, revolt, and dereliction must be specially discussed.

¹ Heffter's (§ 12) dictum, 'Hundert Jahre Unrecht ist noch kein Tag Recht,' is met by the fact that it is not the operation of time alone, but also a combination of other circumstances and influences, which creates the title by prescription.

² For three recent instances of the recognition of prescription see the *Chamizal* arbitration between the United States of America and Mexico (Award of June 16, 1911 in *A.J.*, 5 (1911), pp. 785-812), the *Grisbadarna* arbitration between Sweden and Norway (Permanent Court of Arbitration, Award of October 23, 1909:

Scott, *Hague Court Reports* (1916), pp. 121-133), and the *Island of Palmas* arbitration between the United States and Holland (Award of April 4, 1928; *Annual Digest*, 1927-1928, Cases Nos. 68, 75; *A.J.*, 12 (1928), pp. 907-912; Scott, *The Hague Court Reports* (2d ser., 1932), p. 84).

³ The forfeiture of an inchoate title described above (§ 223) is not the same as the dereliction of territory which has been definitely acquired, whether by occupation or otherwise.

⁴ See above, §§ 171 and 216.

§ 245. Operations of nature as a mode of losing territory correspond to accretion as a mode of acquiring it. Just as through accretion a State may be enlarged, so it may be diminished through the disappearance of land and other operations of nature. And the loss of territory through operations of nature takes place *ipso facto* by such operations. Thus, if an island near the shore disappears through volcanic action, the extent of the maritime territorial belt of the littoral State concerned is thereafter to be measured from the low-water mark of the shore of the continent, instead of from the shore of the former island. Thus, further, if through a piece of land being detached by the current of a river from one bank and carried over to the other bank, the river alters its course and now covers part of the land on the bank from which such piece became detached, the territory of one of the riparian States may be decreased through the boundary line being *ipso facto* transferred to the new middle or mid-channel of the river.¹

§ 246. Revolt followed by secession is a mode of losing territory to which there is no corresponding mode of acquisition.² The question at what time a loss of territory through revolt is consummated cannot be answered once and for all, since no hard and fast rule can be laid down regarding the time when a State which has broken off from another can be said to have established itself safely and permanently.³ It may well happen that, although such a seceding State has already been recognised by a third State, the mother country does not consider the territory to be lost, and succeeds in reconquering it.

§ 247. Dereliction as a mode of losing territory corresponds to occupation as a mode of acquiring it. Dereliction frees a territory from the sovereignty of the present owner-State. It is effected through the owner-State completely

¹ See above, § 232.

² Thus the Netherlands fell away from Spain in 1579, Belgium from the Netherlands in 1830, the United States of America from Great Britain in 1776, Brazil from Portugal in 1822, the former Spanish South American States from Spain in 1810,

Greece from Turkey in 1830, Cuba from Spain in 1898, and Panama from Colombia in 1903. There were a number of other instances in Europe during, and at the end of, the First World War.

³ See above, § 74.

abandoning territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it. Just as occupation¹ requires, first, the actual taking into possession (*corpus*) of territory, and, secondly, the intention (*animus*) of acquiring sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention of giving up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory. Thus, for instance, if a rising of natives forces a State to withdraw from a territory, such territory is not derelict as long as the former possessor is able, and makes efforts, to retake possession. It is only when a territory is really derelict that any State may acquire it through occupation.² History knows of several such cases.³ But very often, when such occupation of derelict territory occurs, the former owner protests, and tries to prevent the new occupier from acquiring it. The cases of the Island of Santa Lucia and of Delagoa Bay may be quoted as illustrations.

(a) In 1639 Santa Lucia, one of the Antilles Islands, was occupied by England, but in the following year the English settlers were massacred by the natives. No attempt was made by England to retake the island, and France, considering it no man's land, took possession of it in 1650. In 1664 an English force under Lord Willoughby attacked the French, drove them into the mountains, and held the island until 1667, when the English withdrew, and the French returned from the mountains. No further step was made by England to retake the island, but she nevertheless asserted for many years to come that she had not abandoned it *sine spe redeundi*, and that, therefore, France in 1650 had no right to consider it no man's land. Finally, however, she resigned her claims in the Peace Treaty of Paris of 1763.⁴

(b) In 1823 England occupied, in consequence of a so-called cession from native chiefs, a piece of territory at Delagoa Bay

¹ See above, § 222.

² See above, § 228.

³ For a discussion of the alleged abandonment by Great Britain of the Falkland Islands in 1774 see Goebel, *The Struggle for the Falkland Islands*

(1927), pp. 411-459, and Smith, *ib.* pp. 45-62. See also Judgment of the Permanent Court of International Justice in the *Eastern Greenland* case of April 5, 1933, Series A/B, No. 53, p. 47.

⁴ See Hall, § 34, and Moore, i. § 89.

which Portugal claimed as part of the territory owned by her at the Bay, maintaining that the chiefs concerned were rebels. The dispute was not settled until 1875, when the case was submitted to the arbitration of the President of France. The award was given in favour of Portugal, since the interruption of the Portuguese occupation in 1823 was not to be considered as abandonment of a territory over which Portugal had exercised sovereignty for nearly three hundred years.¹

¹ See Hall, § 34. The text of the award is printed in Moore, *Arbitrations*, v. p. 4984.

CHAPTER II

THE OPEN SEA

I

RISE OF THE FREEDOM OF THE OPEN SEA

Grotius, ii. c. 2, § 3—Pufendorf, iv. c. 5, § 5—Vattel, i. §§ 279 286—Hall, § 40—Westlake, i. pp 164 167—Phillimore, i. §§ 172 179—Walker, *Science*, pp 163-171—Wheaton, §§ 186, 187—Gidel i. pp 125 200—Fauchille, §§ 483 (8) 483 (9) 483 (15)—Pradier-Fodere ii. §§ 871 874—Nys ii. pp. 171 177—Merignhac, ii. pp 198 605—Calvo i. §§ 347 352—Fiore, ii. §§ 718-727—Martens, i. § 97—Perels, § 4—De Louter, i. pp 375 385—Cruchaga, § 432—Lindley, pp. 54 56—Higgins and Colombos, §§ 48 66—Azuni, *Droit maritime* (1796), i. c. 1. Article 3—Reddie, *Researches . . . in Maritime International Law*, i. (1844) pp 79 111—Cauchy, *Le droit maritime international considéré dans ses origines*, 2 vols (1862)—Nys, *Les origines du droit international* (1894), pp 379 387—Castel, *Du principe de la liberté des mers* (1900) pp 1 15—Fulton, *The Sovereignty of the Seas* (1911), pp 1 56—Stier Somlo, *Die Freiheit der Meere und das Völkerrecht* (1917), pp 34 59—Ibarra, *La libertad de los mares* (1919)—Piggott, *The Freedom of the Seas, historically treated*, Oxford (1919), and Foreign Office Peace Handbook, No 148 (1920)—Boroughs, *Sovereignty of the British Sea* (1851), edited by Wade (1920)—Potter, *The Freedom of the Seas in History, Law, and Politics* (1924)—Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927)—Dupuis in 46 *Clunet* (1919), pp 603 614—Wade in *B Y*, 1921-1922, pp. 99-108—Senior in *L.Q.R.*, 38 (1921), pp 323 336—Fenn in *A.J.*, 19 (1925), pp 716-727, and *ibid.* 20 (1926), pp 465 483.

Former
Claims to
Control
over the
Sea.

§ 248. In antiquity and the first half of the Middle Ages, navigation on the open sea was free to everybody. According to Ulpian,¹ the sea is open to everybody by nature, and, according to Celsus,² the sea, like the air, is common to all mankind. Since no Law of Nations in the modern sense of the term existed during antiquity and the greater part of the Middle Ages, no importance is to be attached

¹ L. 13, pr. D. viii. 4: Mare quod natura omnibus patet

² L. 3, D. xlii. 8: Maris communem usum omnibus hominibus ut aeris.

to the following passage in the Digest: 'The Emperor Antoninus said: "I am master of the earth, but the law is mistress of the sea."' ¹ Nor is it of importance that the Emperors of the old German Empire, who were considered to be the successors of the Roman Emperors, styled themselves, among other titles, 'King of the Ocean.' Real claims to sovereignty over parts of the open sea began, however, to be made in the second half of the Middle Ages. And there is no doubt whatever that, at the time when the modern Law of Nations gradually arose, it was the conviction of the States that they could extend their sovereignty over certain parts of the open sea. Thus the Republic of Venice was recognised as sovereign over the Adriatic Sea, and the Republic of Genoa as the sovereign of the Ligurian Sea. Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic south of Morocco, and Spain over the Pacific and the Gulf of Mexico, both basing their claims on two Papal Bulls promulgated by Alexander VI. in 1493, which divided the New World between those Powers. Sweden and Denmark claimed sovereignty over the Baltic, and Great Britain over the Narrow Seas,² the North Sea, and the Atlantic from the North Cape to Cape Finisterre.

These claims were more or less successfully asserted for several hundreds of years. They were favoured by a number of different circumstances, as for instance the maintenance of an effective protection against piracy; and numerous examples can be adduced which show that they were more or less recognised. Thus Frederick III., Emperor of Germany, had in 1478 to ask the permission of Venice for a transportation of corn from Apulia through the Adriatic Sea.³ Again, Great Britain, in the seventeenth century, compelled foreigners to take out an English licence for fishing in the North Sea; and when in 1636 the Dutch attempted to fish without such licence, they were attacked, and compelled to pay £30,000 as the price for the indulgence.⁴

¹ *Digest*, 14. 2 de lege Rhodia, 9.

² See above, § 194.

³ See Walker, *History*, i. p. 163.

⁴ This and the two following examples are quoted by Hall, § 40

Again, when Philip II. of Spain was in 1554 on his way to England to marry Queen Mary, the British admiral who met him in the 'British Seas,' fired on his ship for flying the Spanish flag. And the King of Denmark, when returning from a visit to James I. in 1606, was forced by a British captain, who met him off the mouth of the Thames, to strike the Danish flag.

Practical
Expres-
sion of
Claims to
Maritime
Sove-
reignty.

§ 249. Maritime sovereignty found expression in maritime ceremonials at least. A State which claimed sovereignty over a part of the open sea required foreign vessels navigating that part to honour its flag¹ as a symbol of recognition of its sovereignty.² But apart from maritime ceremonials, maritime sovereignty also found expression in the levying of tolls from foreign ships, in the interdiction of fisheries to foreigners, and in the control, or even the prohibition, of foreign navigation. Thus Portugal and Spain attempted, after the discovery of America, to keep foreign vessels altogether out of the seas over which they claimed sovereignty. The magnitude of this claim created opposition to the very existence of such rights. English, French, and Dutch explorers and traders navigated on the Indian Ocean and the Pacific, in spite of the Spanish and Portuguese interdictions. And when, in 1580, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air is common to all, and that no title to the ocean can belong to any nation, since neither nature nor regard for the public use permits any possession of the ocean.³

Grotius'
Attack on
Maritime
Sove-
reignty.

§ 250. Queen Elizabeth's attitude was the germ out of which grew gradually the present freedom of the open sea.

¹ See Fulton, *op. cit.*, pp 39 and 204-208.

² So late as 1805 the British Admiralty Regulations contained an order (quoted by Hall, § 40) to the effect that 'when any of His Majesty's ships shall meet with the ships of any foreign Power within His Majesty's seas (which extend to Cape Finisterre), it is expected that

the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto and not suffer any dishonour to be done to His Majesty.'

³ See Walker, *History*, i. p. 161.

Twenty-nine years after her answer to Mendoza, there appeared, in 1609, Grotius' short treatise,¹ *Mare liberum*. His intention was to show that the Dutch had a right of navigation and commerce with the Indies, in spite of the Portuguese interdictions. He contended that the sea cannot be State property, because it cannot really be taken into possession through occupation,² and that consequently the sea is by nature free from the sovereignty of any State.³ The attack of Grotius was met by several authors of different nations. Gentilis defended Spanish and English claims in his *Advocatio Hispanica*,⁴ which appeared, after his death, in 1613. Likewise, in 1613, William Welwood defended the English claims in his book, *De dominio maris*. John Selden wrote his *Mare clausum sive de Dominio Maris* in 1618, but it was not printed until 1635.⁵ Sir John Borroughs wrote in 1633 his book, *The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom*, but it was not published until 1651. In defence of the claims of the Republic of Venice, Paolo Sarpi published in 1676 his book, *Del Dominio del Mare Adriatico*. The most important of these works defending maritime sovereignty is that of Selden. King Charles I., by whose command Selden's *Mare clausum* was printed in 1635, was so much impressed by it that, through his ambassador in the Netherlands, he complained of the audacity of Grotius and requested that the author of the *Mare liberum* should be punished.⁶

The general opposition to the bold attack of Grotius on maritime sovereignty prevented his immediate victory. Too

¹ Its full title is: *Mare liberum seu de jure quod Batavis competit ad indicana commercia dissertatio*, and it is now proved that this short treatise is only chapter 12 of another work by Grotius, *De jure prædæ*, which was found in manuscript in 1864 and published in 1868. See above, § 53. An English translation of the *Mare liberum* by Magoffin was published in 1916. For some account of the *De justo imperio Insularum asiaticarum* by Scraphin de Freitas published in 1625, in reply

to Grotius' *Mare liberum*, see Knight in *Grotius Society*, 11 (1926), pp. 1-9.

² See below, § 259.

³ Grotius was by no means the first author to defend the freedom of the sea. See Nys, *op. cit.*, pp. 381 and 382.

⁴ See Abbott in *A.J.*, 10 (1916) pp. 737-748.

⁵ An English translation by Marchmont Nedham was published in 1652.

⁶ See Phillimore, i. § 182

firmly established were the claims then recognised to sovereignty over certain parts of the open sea for the novel principle of the freedom of the sea to supplant them. Progress was made regarding one point only—namely, freedom of *navigation* of the sea. England had never pushed her claims so far as to attempt the prohibition of free navigation on the so-called British Seas. And although Venice succeeded in keeping up her control of navigation on the Adriatic till the middle of the seventeenth century, it may be said that in the second half of that century navigation on all parts of the open sea was practically free for vessels of all nations. But with regard to other points, claims to maritime sovereignty continued to be kept up. Thus the Netherlands had by Article 4 of the Treaty of Westminster, 1674, to acknowledge that their vessels must salute the British flag within the 'British Seas' as a recognition of British maritime sovereignty.¹

Gradual
Recognition
of the
Freedom
of the
Open Sea

§ 251. In spite of opposition, the work of Grotius was not to be undone. All prominent writers of the eighteenth century took up again the case of the freedom of the open sea, making a distinction between the maritime belt, which is to be considered under the sway of the littoral States, and the high seas, which are under no State's sovereignty. The leading author was Bynkershoek, whose standard work, *De Dominio Maris*,² appeared in 1702. Vattel, G. F. de Martens, Azuni, and others followed his lead. And although Great Britain upheld her claim to the salute due to her flag within the 'British Seas' throughout the eighteenth and at the beginning of the nineteenth century, the principle of the freedom of the open sea became more and more vigorous with the growth of the navies of other States; and at the end of the first quarter of the nineteenth century it became universally recognised in theory and practice. Great Britain silently dropped her claim to the salute, and with it her claim to maritime sovereignty, and she became now a champion of the freedom of the open sea. When, in 1821, Russia, which then still owned Alaska in North

¹ See Hall, § 40, p. 184.

² Translated by Magoffin, with an

Introduction by J. B. Scott (Classics of International Law) (1923).

America, attempted to prohibit all foreign ships from approaching within one hundred miles of the shore of Alaska, Great Britain and the United States protested in the interest of the freedom of the open sea, and Russia dropped her claims in conventions concluded with the protesting Powers in 1824 and 1825. Moreover, when, after Russia had sold Alaska in 1867 to the United States, the latter made regulations regarding the killing of seals within the Behring Sea, claiming thereby jurisdiction and control over a part of the open sea, a conflict arose in 1886 with Great Britain, which was settled by arbitration ¹ in 1893 in favour of the freedom of the open sea.

II

CONCEPTION OF THE OPEN SEA

Field, § 53—Westlake, 1 p 164 Moore, II § 308—Rivier, 1 pp 234, 235
 Pradier-Fodere, II § 808 Verdross pp 215 220 Gidel, 1 pp 44 62,
 123 127 213 233 Higgins and Colombos §, 48 50 67 70—Higgins in
Hague Recueil, vol. 30 (1924) (5) pp 5 12 Kelsen, *ibid*, vol. 42 (1932)
 (4), pp 221-220

§ 252. The open sea, or the high seas,² is the coherent body of salt water all over the greater part of the globe, with the exception of the maritime belt and the territorial straits, gulfs, and bays, which are part of the sea but not parts of the open sea. Wherever there is a salt-water sea on the globe, it is part of the open sea, provided it is not isolated from, but coherent with, the general body of salt water extending over the globe, and provided that the salt-water approach to it is navigable and open to vessels of all nations. The enclosure of a sea by the land of one and the same State does not matter, provided a navigable connection of salt water, open to vessels of all nations, exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more littoral States. Whereas, therefore, the Aral Sea is Russian territory, the Sea of Marmora is part

Difference
between
the Open
Sea and
Territorial
Waters.

¹ See below, § 284.

² See Field, § 53

of the open sea, although surrounded by Turkish land and although the Bosphorus and the Dardanelles are Turkish territorial straits, because these are open to merchantmen of all nations.¹

Clear Instances of
Parts of
the Open
Sea.

§ 253. It is not necessary or possible to particularise every portion of the open sea. It is sufficient to give instances which clearly indicate its extent. To the open sea belong, of course, all the so-called oceans—namely, the Atlantic, Pacific, Indian, Arctic, and Antarctic. But the branches of the oceans, which go under special names, and further, the branches of these branches, which again go under special names, belong likewise to the open sea.²

It will be remembered that it is doubtful as regards many gulfs and bays whether they belong to the open sea or are territorial.³

III

THE FREEDOM OF THE OPEN SEA

Hall, § 75—Westlake, i. pp. 164-170 Lawrence, § 100 Moyni §§ 300, 310
--Hackworth, ii. § 198 --Wheaton, § 167 Bluntschli, §§ 304-308--Ver-
dross, pp. 215-220 Sibert, pp. 652-657 --Fauchille, §§ 483-483 (7). 483

¹ See above, § 197. As to the Sea of Azoff see Rivier, i. p. 235, and Martens, i. § 97; but Stoerk in *Holtendorff*, ii. p. 513, declared that the Sea of Azoff was part of the open sea. The character of the Inland Sea of Japan is doubtful. Its three entrances, which are less than three miles wide, are indeed in practice open to merchantmen of all nations, but it is not known whether this practice is based upon comity only, or upon a customary rule of International Law. Moreover, geographically considered, this sea is more like a vast bay. The claim of Japan to its territorial character would therefore, perhaps, not be disputed by other States (see *The Imperial Japanese Government v. Peninsular and Oriental Steam Navigation Co.* [1895] A.C. 644; Piggott, *Nationality*, p. 29, and Fauchille, § 504 (1)).

² Examples of these branches are: the North Sea, the English Channel, and the Irish Sea; the Baltic Sea, the Gulf of Bothnia, the Gulf of Finland, the Kara Sea (the assertion of some Russian writers that the Kara Sea is Russian territory is refuted by Martens, i. § 97, and Fauchille, § 497 (1)), and the White Sea; the Mediterranean and the Ligurian, Tyrrhenian, Adriatic, Ionian, Marmora, and Black Seas; the Gulf of Guinea; the Mozambique Channel; the Arabian Sea and the Red Sea; the Bay of Bengal, the China Sea, the Gulf of Siam, and the Gulf of Tonking; the Eastern Sea, the Yellow Sea, and the Sea of Okhotsk; the Bohring Sea; the Gulf of Mexico and the Caribbean Sea; Baffin's Bay. See Jessup, *op. cit.*, ch. viii., for information upon many of these seas and gulfs and bays.

³ See above, § 191.

(11)-483 (14), 483 (16), 483 (17), 602—Pradier-Fodéré, ii. §§ 874-881—Rivier, i. § 17 Nys, ii. pp. 178-205—Calvo, i. § 346—Piere, ii. §§ 724, 727, and Code, §§ 933-935 Martens, i. § 97 Perels, § 4—Testa, pp. 63-66—Crecuaga, pp. 433-435, 441—Keith's Wheaton, pp. 355-360—Guggenheim, pp. 408-419—Gidel, i. pp. 201-212 Higgins and Colombos, §§ 71-72—Ortolan, *Diplomatie de la mer* (1856), i. pp. 119-149 De Burgh, *Elements of Maritime International Law* (1869), pp. 1-24—Castel, *Du principe de la liberté des mers* (1900), pp. 37-80—Strupp, *Éléments*, § 9a—Hirst in *Grotius Society*, 4 (1919), pp. 26-34—Hostie in *R.I.*, 3rd ser., 8 (1927), pp. 33-57—Lachs in *Z.G.R.*, 15 (1935), pp. 94-119 Wehberg in *Friedenswarte*, 42 (1942), pp. 161-170.

§ 254. The term 'freedom of the open sea' indicates the rule of the Law of Nations that the open sea is not, and never can be, under the sovereignty of any State whatever.¹ Since, therefore, the open sea is not the territory of any State, no State has as a rule a right to exercise its legislation, administration, jurisdiction,² or police³ over parts of the open sea. Since, further, the open sea can never be under the sovereignty of any State, no State has a right to acquire parts of the open sea through occupation,⁴ for, as far as the acquisition of territory is concerned, the open sea is what Roman Law calls *res extra commercium*.⁵ But although the open sea is not the territory of any State, it is nevertheless an object of the Law of Nations. The

Meaning of the Term 'Freedom of the Open Sea.'

¹ As to the meaning of the term see Stier-Somlo, *Die Freiheit der Meere und das Volkerricht* (1917); Meurer, *Das Programm der Meeresfreiheit* (1918); Erzberger, *A League of Nations* (1918) (translated into English, 1919, pp. 210-222); Nippold, *Development of International Law after the War* (1917) (English translation, 1923, pp. 149-166); Crockett, *Freedom of the Seas* (1935); Hershey in *A.J.*, 13 (1919), pp. 207-225; Dupuis in *46 Clunet* (1919), pp. 603-614; Seymour, *The Intimate Papers of Colonel House* (1926), i. ch. xiii. and *passim*; House in *Contemporary Review*, April 1928, pp. 416-421. And see vol. ii., § 178.

² As regards jurisdiction in cases of collision and salvage on the open sea, see below, §§ 265 and 271.

³ See, however, above, §§ 190 (i), 190 (ii).

⁴ Following Grotius (ii. c. 3, § 13) and Bynkershoek (*De Dominio Maris*,

c. 3), some writers (for instance, Phillimore, i. § 203) maintain that any part of the open sea covered for the time by a vessel is by occupation to be considered as the temporary territory of the vessel's flag State. And some French writers go even beyond that and claim a certain zone round the vessel in question as temporary territory of the flag State. But this is a somewhat superfluous fiction. (See Stoerk in *Holtzendorff*, ii. p. 494, Rivier, i. p. 238; Perels, pp. 37-39.) As to Grotius see Crichton in *The Juridical Review*, 53 (1941), pp. 226-241.

⁵ But the subsoil of the bed of the open sea can, through the driving of mines and piercing of tunnels from the coast, as well as the result of the assertion of rights in the continental shelf, be acquired by a littoral State. See above, § 221, and below, §§ 287c and 287d.

mere fact that there is a rule exempting the open sea from the sovereignty of any State whatever¹ shows this. But there are other reasons. For if the Law of Nations were to content itself with the rule which excludes the open sea from possible State property, the consequence would be a condition of lawlessness and anarchy on the open sea. To obviate such lawlessness, customary International Law contains some rules which guarantee a certain legal order on the open sea, in spite of the fact that it is not the territory of any State; and important international conventions have been concluded with the same object.

Legal
Provisions
for the
Open Sea.

§ 255. Apart from the rules contained in the conventions regarding salvage, assistance, collisions and safety of life at sea, which are discussed below,² this legal order is created through the co-operation of the Law of Nations and the Municipal Laws of such States as possess a maritime flag. The following rules of the Law of Nations are universally recognised, namely: first, that every State which has a maritime flag must lay down rules according to which vessels can claim to sail under its flag, and must furnish such vessels with some official voucher authorising them to make use of its flag; secondly, that every State has a right to punish all such foreign vessels as sail under its flag without being authorised to do so; thirdly, that all vessels with their persons and goods are, whilst on the open sea, considered under the sway of the flag State; fourthly, that every State has a right to punish piracy on the open sea even if committed by foreigners, and that, with a view to the extinction of piracy, men-of-war of all nations can require all suspect vessels to show their flag.

These customary rules of International Law are, so to speak, supplemented by Municipal Laws of the maritime States comprising provisions, first, regarding the conditions to be fulfilled by vessels for the purpose of being authorised to sail under their flags; secondly, regarding the details of jurisdiction over persons and goods on board vessels

¹ The assertion of Stier-Somlo, *op. cit.*, p. 59, that this rule is not one of customary International Law

but only a rule of comity, is unfounded.

² See §§ 265, 271.

sailing under their flags; thirdly, concerning discipline on board ship and the relations between the master, the crew, and the passengers; fourthly, concerning punishment of ships sailing without authorisation under their flags.

§ 256. Although the open sea is free and is not the territory of any State, it may nevertheless, in its whole extent, become a theatre of war, since the region of war is not only the territories of the belligerents, but likewise the open sea, provided that one of the belligerents at least is a Power with a maritime flag¹. However, certain parts of the open sea can become neutralised and thereby be excluded from the region of war. Thus the Black Sea became neutralised in 1856 through Article 11 of the Peace Treaty of Paris.² Yet this neutralisation of the Black Sea was abolished³ in 1871 by Article 1 of the Treaty of London, and no other part of the open sea is at present neutralised.⁴

§ 257. The freedom of the open sea involves perfect freedom of navigation for vessels of all nations, whether men-of-war, other public vessels or merchantmen. It involves, further, absence of compulsory maritime ceremonials on the open sea. According to the Law of Nations no rights of salute whatever exist between vessels meeting on the open sea. All so-called maritime ceremonials on the open sea⁵ are a matter either of courtesy and usage, or of special conventions and Municipal Laws of those States under whose flags the vessels sail. In particular, no State has a right to require a salute from foreign merchantmen for its men-of-war⁶.

The freedom of the open sea involves likewise freedom of inoffensive passage⁷ through the maritime belt for merchant-

¹ Concerning the distinction between theatre and region of war see below, vol. ii. § 70.

² Which provided that 'La Mer Noire est neutralisée - ouverte à la marine marchande de toutes les nations, ses eaux et ses ports sont formellement et à perpétuité interdits au pavillon de guerre, soit des puissances riveraines, soit de toute autre puissance.'

³ See above, § 181.

⁴ Unless possibly parts of the open

sea are included in the neutralised zone of the Åland Islands see below, vol. ii. § 72 (8).

⁵ But not within the maritime belt or other territorial waters. See above, §§ 122 and 187.

⁶ That men of war can on the open sea ask suspicious foreign merchantmen to show their flags has nothing to do with ceremonials, but with the supervision of the open sea in the interest of its safety. See below, § 266. ⁷ See above, § 188.

Freedom
of the
Open Sea
and War.

Naviga-
tion and
Cere-
monials
on the
Open Sea

men of all nations, and also for men-of-war of all nations, in so far as the part of the maritime belt concerned forms a part of the highways for international traffic.

Claim of
States to
Maritime
Flag.

§ 258. Since no State can exercise protection over vessels that do not sail under its flag, and since every vessel must, in the interest of the order and safety of the open sea, sail under the flag of a State, the question was discussed before the First World War whether not only maritime States, but also States with no sea-coast, could claim a maritime flag. At that time no State without a seaboard actually had a maritime flag, and all vessels belonging to its subjects sailed under the flag of a maritime State. At the Barcelona Conference of 1921 a Declaration¹ was signed, which has been ratified or acceded to by a number of States (including Great Britain), whereby the signatory and acceding States 'recognise the flag flown by the vessels of any State having no sea-coast which are registered at some one specified place situated in its territory,' such place serving as the port of registry of the vessels²

States which have a maritime flag have as a rule a war

¹ Dated April 20, 1921. Treaty Series, No. 29 (1923), Cmd. 1921, L.N.T.S., 7, p. 74, A.J., 18 (1924), Suppl., pp. 167-168. This Declaration seems to apply both to public ships, including warships, and to private ships.

² The question was discussed, in particular, in Switzerland. In 1864, 1874, 1889, and 1891, Swiss merchants in foreign ports applied to the Swiss Bundesrath for permission for their vessels to sail under the Swiss flag, but the Swiss Government refused to have a maritime flag (see Huber, *Die rechtlichen Verhältnisse einer Schweizerischen Meereschiffahrt unter Schweizer Flagge* (1918), pp. 3-5), because it was aware of the difficulties arising from the fact that, as Switzerland has no seaports of her own, vessels sailing under her flag would in many respects have to depend upon the goodwill of the maritime States (see Calvo, i. § 427; Westlake, i. p. 169; and, in some detail, Huber, *op. cit.*, pp. 6-21; see also Varadil, *La libertà del mare o lo stato chiuso moderno* (1922); Guggenheim, pp. 410, 411; Spiropoulos in Z.V., 13

(1926), pp. 103-111, Møller, *ibid.*, pp. 265-273, Wehberg in *Friedenswarte*, 42 (1942), pp. 175-178). The freedom of the open sea involves a claim of any State to a maritime flag (see Huber, *op. cit.*, pp. 5-11, but see Westlake, i. p. 169). In Article 273 of the Treaty of Peace (1919) with Germany, the Parties agreed to recognise the flag flown by the vessels of an Allied or Associated Power having no sea coast, but registered at a place within its territory serving as a port of registry. For the facilities granted to Czechoslovakia in the ports of Hamburg and Stettin see Article 363 of the same Treaty, and in the port of Trieste see a treaty between that State and Italy of March 1921. L.N.T.S., 32, p. 241. And see Article 43 of the Statute of the Free Territory of Trieste set up in 1947 and Annex VIII to the Treaty of Peace with Italy of that year (Instrument for the Free Port of Trieste). See also Haas in *Hague Recueil*, vol. 21 (1928) (1), pp. 375-423; Váň, *Servituten of International Law* (1933), pp. 128-136. And see above, § 205.

flag different from their commercial flag; some States, however, have one and the same flag for both their navy and their mercantile marine. But it must be mentioned that a State can by an international convention be restricted to a mercantile flag only, such State being prevented from having a navy.¹ This was formerly the position of Montenegro¹ according to Article 29 of the Treaty of Berlin of 1878.

(Canada, Australia, New Zealand, and South Africa have a maritime flag which is a modification of the British flag.²

§ 259. Grotius and many writers who follow him³ adduce two facts as the reason for the freedom of the open sea. They maintain, first, that a part of the open sea could not be effectively occupied by a navy, and could not therefore be brought under the actual sway of any State; secondly, that nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible and, therefore, sufficient for all.⁴ The second argument will nowadays hardly be accepted by those who deny the validity of the Law of Nature. And the first argument is now without basis in face of the development of modern navies, since the number of public vessels which the different States possess at present would enable many a State to occupy effectively one part or another of the open sea. The real reason for the freedom of the open sea is represented in the motive which led to the attack against maritime sovereignty, and in the purpose for which such attack was made—namely, the freedom of communication, and especially commerce, between the States which are separated by the sea.⁵ The sea being an international highway which connects distant lands, it is the common conviction that it should not be under the sway of any State whatever. It is

Rationale
for the
Freedom
of the
Open Sea.

¹ See *R.G.*, 17 (1910), pp. 173-176

² See above, §§ 94a, 94b; Ewart in *A.J.*, 7 (1914), pp. 780-783; and Keith, *Responsible Government in the Dominions* (2nd ed., 1928), vol. II p. 1090, and *The Constitutional Law of the British Dominions* (1933), p. 124. The red ensign, defaced by an appro-

priate badge, may be flown by ships belonging to subjects of British colonies and trust territories.

³ See, for instance, Twiss, i. § 172, and Westlake, i. p. 160.

⁴ See Grotius, ii. c. 2, § 3.

⁵ See also Stier-Somlo, *op. cit.*, pp. 39-56.

in the interest of free intercourse¹ between the States that the principle of the freedom of the open sea has become universally recognised and will always be upheld.

IV

JURISDICTION ON THE OPEN SEA

Vattel, § ii. 80—Hall, § 45—Westlake, i. pp. 170-180—Lawrence, § 100—Wheaton, § 106—Moore, ii. §§ 309, 310—Hackworth, ii. §§ 199, 205-215—Hyde, i. §§ 227-230, 235-237—Bluntschli, §§ 317-352—Fauchille, §§ 483 (39)-483 (48) 597-606, 607-613—Merignhac, ii. pp. 536-553—Pradier-Fodéré, v. §§ 2376-2470—Rivier, i. § 18—Nys, ii. pp. 178-215—Calvo, i. §§ 385-473—Fiore, ii. §§ 730-742, and *Code*, §§ 1006-1032—Martens, ii. §§ 55, 56—Perejs, § 12—Testa, pp. 98-112—De Lunter, i. pp. 400-410—Cruchaga, §§ 466-479—Keith's Wheaton pp. 255-263—Smith, vol. ii., pp. 97-118—*The Law and Custom of the Sea* (2nd ed. 1950) (Cadel i. pp. 235-300, 357-436—Higgins and Colombos, §§ 243-350—Ortolan, *Diplomatie de la mer* (1856), i. 254-325—Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), §§ 106-109—Travers, §§ 238-279, 1657-1669—Alexandri, *Introduction à l'étude du droit de la mer* (1924)—Quadri, *Le navire privé nel diritto internazionale* (1939)—Clemenson in *B.Y.*, 1925, pp. 144-158—Franck in *L.Q.R.*, 42 (1926), pp. 25-36—Muller in *Z.V.*, 13 (1926), pp. 223-265, 353-397—Sibert in *R.G.*, 34 (1927), pp. 20-44—Higgins in *Hague Recueil*, vol. 30 (1929) (5), pp. 14-76—Diena, *ibid.*, vol. 51 (1935) (1), pp. 409-479—Strandgaard in *Nordisk T.A.*, 6 (1935), pp. 85-95—Colombos in *B.Y.*, 21 (1944), pp. 96-110.

The Flag
and
Jurisdiction
on
the Open
Sea.

§ 260. Jurisdiction on the open sea is in the main connected with the maritime flag under which vessels sail. This is the consequence of the fact, stated above,² that a certain legal order is created on the open sea through the co-operation of rules of the Law of Nations with rules of the Municipal Laws of such States as possess a maritime flag. But two points must be emphasised. The one is that this jurisdiction is not jurisdiction over the open sea as such, but only over vessels, persons, and goods on the open sea.³ The other is that jurisdiction on the open sea is mainly but not exclusively connected with the flag under which vessels sail, because men-of-war of all nations have, as will be seen,³ certain powers over merchantmen of all nations. The points which must therefore be here discussed singly are: the claim of

¹ See above, § 142.

² See above, § 255.

³ See below, § 266.

vessels to sail under a certain flag, ship's papers, the names of vessels, the connection of vessels with the territory of the flag State, the safety of traffic on the open sea, the powers of men-of-war over merchantmen of all nations, and, lastly, shipwreck.

§ 261. The Law of Nations does not contain any rules regarding the claim of vessels¹ to sail under a certain maritime flag, but imposes the duty upon every State^{Vessels to sail under a certain Flag.} having a maritime flag to provide by its own Municipal Laws the conditions to be fulfilled by those vessels which wish to sail under its flag. In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State. But a State is absolutely independent in framing the rules concerning the claim of vessels to its flag. It can in particular authorise such vessels to sail under its flag as are the property of foreign subjects; but such foreign vessels sailing under its flag fall thereby under its jurisdiction. The different States have made different rules concerning the sailing of vessels under their flags.² Some, like Great Britain,³ allow only such vessels to sail under their flags as are the exclusive property of their citizens or of corporations established on their territory. Others allow vessels which are the property of foreigners. Others again, like France,⁴ allow to sail under their flags vessels which are only in part the property of their citizens.⁵

But no State may allow a vessel to sail under its flag which already sails under the flag of another State. A vessel sailing under the flags of two different States, like a vessel not sailing under the flag of any State, does not

¹ As to what constitutes a vessel see the learned discussion by Gidel, i. pp. 64-71.

² See Calvo, i. §§ 393-423, where the respective Municipal Laws of most countries are given; and Müller, *op cit.*, pp. 363-382.

³ See § 1 of the Merchant Shipping Act, 1894, and §§ 51 and 80 of the Merchant Shipping Act, 1906, and Temperley, *Merchant Shipping Act*, 3rd ed. (1921) by Temperley and W. L. McNair, pp.

1-3 and 495, 496. See also Rienow, *The Test of the Nationality of a Merchant Vessel* (1937).

⁴ By a Law of the 9th June, 1845, which provides that at least one half of the property must belong to French citizens.

⁵ See *Annuaire*, 15 (1896), p. 201, for the 'Règles relatives à l'usage du pavillon national pour les navires de commerce' adopted by the Institute of International Law.

enjoy any protection whatever.¹ Nor is protection enjoyed by a vessel sailing under the flag of a State which has no maritime flag.² Vessels belonging to subjects of such a State must obtain authority to sail under the flag of another State if they wish to enjoy protection on the open sea.³ And any vessel, although the property of foreigners, which sails without authority under the flag of a State, may be captured by the men-of-war of such State, prosecuted, punished, and confiscated.³

Ship's
Papers.

§ 262. All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship's papers, which serve the purpose of identification on the open sea. But neither the number nor the kind of such papers is prescribed by International Law, and the Municipal Laws of the different States differ much on this subject.⁴ They do, however, agree upon the need for the following papers

(1) An official voucher authorising the vessel to sail under its flag, which consists of a *Certificate of Registry*, in case the flag State possesses, like Great Britain and Germany, for instance, a register of its mercantile marine; in other cases the voucher consists of a *Passport*, *Sea-letter*, *Sea-brief*, or of some other document serving the purpose of showing the vessel's nationality.

(2) *The Muster Roll*, which is a list of all the members of the crew, their nationality, and the like.

(3) *The Log Book*, which is a full record of the voyage, with all nautical details.

(4) *The Manifest of Cargo*, which is a list of the cargo of a vessel, with details concerning the number and the marking of each package, the names of the shippers and the consignees, and the like.

(5) *The Bills of Lading*, which are duplicates of the documents which the master of the vessel hands over to the shipper of the goods on shipment.

(6) If the vessel is chartered, the *Charter Party*, which is the contract between the owner of the ship, who lets it wholly or in part, and the charterer, who hires it.

¹ See *Naim Mokvan v. Attorney-General for Palestine* [1948] A.C. 351. See, however, Müller, *op. cit.*, at p. 259.

² But see above, § 258.

³ See the case of *The Steamship Maori King* [1899] A.C. 562, and §§

89 and 76 of the Merchant Shipping Act, 1894.

⁴ See Holland, *Manual of Naval Prize Law*, §§ 178-184, where the papers required by the different maritime States in 1888 are enumerated. See also Hackworth, *ibid.* §§ 210, 211.

§ 263. Every State must register the names of all ^{Names of} private vessels sailing under its flag, and it must make ^{Vessels.} them bear their names visibly so that every vessel may be identified from a distance. No vessel may be allowed to change her name without permission and fresh registration.¹

§ 264. It is a customary rule of the Law of Nations that ^{Territorial} men-of-war and other public vessels of any State are, ^{Quality of} whilst on the open sea as well as in foreign territorial waters, ^{Vessels on} in every point considered as though they were floating parts ^{the Open} of their home States.² Private vessels are considered as though they were floating portions of the flag State only in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction and protection of the flag State. Thus the birth of a child,³ a will or business contract made, or a crime⁴ committed on board ship, and the like, are considered as happening on the territory, and therefore under the territorial supremacy, of the flag⁵ State.⁶ But private vessels are not for all purposes considered as floating portions of the flag State; for in time of war belligerent

¹ As regards Great Britain see §§ 47 and 48 of the Merchant Shipping Act, 1894, and §§ 50 and 53 of the Merchant Shipping Act, 1906.

² See above, § 172u, and below, §§ 447-451a; and *Letters of Historicus* (1863), pp. 201-212 ('The Territoriality of the Merchant Vessel').

³ *Marshall v. Murgatroyd* (1870) L.R. 6 Q.B. 31; and the British Nationality and Status of Aliens Act, 1914, § 1 (1) c.

⁴ See Jordan in *R.I.*, 2nd ser., 10 (1908), pp. 341-362 and 481-500; *R. v. Lesley* (1860) Bell C.C. 220; Beckett in *B.Y.*, 1827, pp. 108-128; Sack in *New York University Law Quarterly Review*, 12 (1935), p. 628, and in *R.I.F.*, 1 (1936), pp. 129-148, 310-340; and see *The United States of America v. Santos Flores*, 289, U.S. 137; *A.J.*, 27 (1933), pp. 569-579 (an important case concerning crimes committed on a national vessel in foreign territorial waters), and the *Lotus* case, above, § 147a.

⁵ Since, however, individuals

abroad remain under the personal supremacy of their home State, nothing can prevent a State from legislating as regards such of its citizens as sail on the open sea on board a foreign vessel. With the development of aircraft the question has arisen as to the status of floating islands or seadromes. One view is that the sovereignty and responsibility for them should rest with the State to which the owners belong; the other view is that they must be internationalised. See Giannini, *Saggi di diritto aeronautico* (1932), who suggests an ultimate control in the League of Nations. Schäfer, *Die Fluginsel* (1932); Dahmen, *Die völkerrechtliche Stellung der Fluginseln* (1935); Pignochet, *La commission internationale de navigation aérienne* (1936), pp. 170-191; and Gidel, pp. 64-70.

⁶ On the other hand, in *R. v. Finlayson* (1941) 57 T.L.R. 270, it was held that a British ship on the high seas was not part of the United Kingdom within § 41 of the Army Act, 1881.

men-of-war can visit, search, and capture neutral private vessels on the open sea for breach of blockade, contraband, and the like, and in time of peace men-of-war of all nations have certain powers¹ over merchantmen of all nations.²

Safety of
Traffic on
the Open
Sea.

§ 265. The safety of navigation clearly involves common action on the part of the leading maritime States, for if, for instance, the vessels of one State followed one set of rules for the avoiding of collisions and the vessels of another State followed a different set of rules, the result would be chaos. This common action has been achieved mainly by the enactment by the different maritime States of similar or identical regulations, and only to a slight extent by the conclusion of international conventions. Thus until 1910 no rules of International Law existed for the purpose of preventing collisions, saving lives after collisions, and the like; but States possessing maritime flags had individually enacted laws concerning signalling, piloting, courses, collisions, and the like, which were applicable to vessels sailing under their flag on the open sea. Although every State could then legislate on these matters independently, there was a tendency during the second half of the nineteenth century to follow the lead given by Great Britain in the Merchant Shipping Amendment Act of 1862, with its 'Regulations for preventing Collisions at Sea,' and the Merchant Shipping Acts of 1873 and 1894. Moreover, the *Commercial Code of Signals for the Use of all Nations*, published by Great Britain in 1857, was adopted by all maritime States. In 1889 a conference of eighteen maritime States took place at Washington, which recommended a body of rules for preventing collisions at sea to be adopted by each State,³ and a revision of the *Code of Signals*. These regulations were revised in 1890 and 1900 in England, and,⁴ after some direct negotiations between the Governments, most mari-

* See below, § 266. The question of the territoriality of vessels is ably discussed by Hall, §§ 76-79. See also *Harvard Research* (1935), pp. 508-519, 539-542, and above, p. 597, n. 4.

² See also p. 329, n., above, on the doctrine of the territoriality of

merchant vessels in relation to confiscatory and requisition decrees affecting vessels on the high seas.

³ See Martens, *N.R.G.*, 2nd ser., 16, p. 416.

⁴ See Martens, *N.R.G.* 2nd ser., 22, p. 113.

time States made corresponding regulations.¹ In pursuance of a recommendation of the Washington Radiotelegraph Conference of 1927 a new edition of the *International Code of Signals*, to be effective from 1934, was prepared, and an international standing committee was established under the British Board of Trade charged with the task of keeping the Code up to date. In addition to that Code, attempts have been made to unify rules concerning buoyage, and on May 13, 1936, the Council of the League of Nations opened for signature an Agreement for a uniform system of maritime buoyage.² Finally, on October 23, 1930, there was concluded the Convention concerning Manned Lightships not on their Stations³ (i.e. lightships dragged or broken adrift from their moorings or proceeding towards their stations or towards a port). The Convention provides in particular that such lightships must hoist a special signal and must not show their characteristic lights.

As a result of the disaster to the liner *Titanic* in 1912, an international 'Convention for the Safety of Life at Sea' was signed in London on January 20, 1914, and the Merchant Shipping (Convention) Act, 1914,⁴ was passed to give effect to it. That Convention was replaced by a Convention bearing the same name and signed on May 31, 1929,⁵ which

¹ As to the British regulations now in force see Maraden, *Collisions at Sea* (8th ed., 1923, by Gibb), pp. 294, 295, 483-495, and Temperley, *Merchant Shipping Acts*, 3rd ed. (1921), p. 246. And see the various Orders in Council issued in 1932 and referred to below, n. 5.

² See Hudson, *Legislation*, vii. p. 308. The Agreement has been ratified by a number of countries, including Great Britain.

³ The Convention has now been ratified by over twenty-five States, including Great Britain. For the text see Treaty Series, No. 13 (1931), Cmd. 3791; *L.N.T.S.*, 112, p. 21; Hudson, *Legislation*, v. p. 801. For the Records of the Conference see C. 163. M. 58. 1931. VIII. On December 16, 1930, there was concluded a convention concerning the maintenance of certain lights in the Red Sea: Misc. No. 1 (1931), Cmd.

3755; Hudson, *Legislation*, v. p. 833. See also *ibid.*, vi. pp. 419 and 446, for Regional Arrangements concerning maritime radio beacons. As to the Cape Spartel Lighthouse see Gidel, i. pp. 379-386, and Stuart, *The International City of Tangier* (1931), pp. 39-49. And see Marchegiano in *A.J.*, 25 (1931), pp. 330-347, for an interesting opinion on the juristic character of the International Commission of Cape Spartel Lighthouse.

⁴ The Convention is printed as a schedule to the Act. See also Wheeler in *A.J.*, 8 (1914), pp. 758-768; Temperley, *Merchant Shipping Acts* (3rd ed., 1921), pp. 573-588.

⁵ Treaty Series, No. 34 (1932), Cmd. 41; Hudson, *Legislation*, iv. p. 2724. And see the Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 Geo. 5, c. 9), giving effect thereto, and a number of Orders in Council enumerated in

in turn was revised and considerably amplified by the International Convention for the Safety of Life at Sea signed on June 10, 1948.¹ The Convention contains detailed provisions relating to the construction of ships in the matter of their length, permeability, the length of compartments and the subdivisions of the ship, the construction and testing of watertight bulkheads, the openings in the shell plating below the margin line, watertight doors, pumping arrangements, electrical installations, fire protection, means of escape, life-saving appliances and lifeboats. A special chapter of the Convention is devoted to radiotelegraphy and radiotelephony and the technical requirements of the installations connected therewith as well as to radio equipment in lifeboats. Another chapter contains provisions relating to ensuring safety of navigation such as danger messages, meteorological services and ice patrol services. The Convention makes detailed provision concerning both the initial and periodic examinations of ships to ensure compliance with the requirements of the Convention as well as those relating to various kinds of certificates testifying to such compliance. These include separate safety certificates, safety equipment certificates, and safety radiotelegraphy and radiotelephony certificates. The certificates are normally issued by the Government of the country where the ship is registered. They may, at the request of that Government, be issued by the Government of any other Contracting Party. These certificates, upon the possession of which States make dependent the grant of various facilities and privileges to foreign vessels, constitute an important

Annual Survey of English Law, 1932, pp. 362, 363. See also the 'Simla Rules, 1931,' being an agreement concluded on June 11, 1931, between the Governments of Ceylon, Hong Kong, India, the Netherlands, the Netherlands East Indies and the Straits Settlements in order to replace certain provisions of the Convention of 1929 as being impracticable of enforcement with regard to ships carrying large numbers of unberthed Mohammedan pilgrims and similar categories of passengers: Hudson,

Legislation, v. p. 1003. See also Gidel, i. pp. 371-374.

¹ Treaty Series, No. 1 (1953), Cmd. 8720. The Convention has been ratified by the United Kingdom and is now in force. By the end of 1952 the Convention had been accepted by the following countries: United Kingdom, Canada, New Zealand, South Africa, India, Pakistan, Belgium, Denmark, France, Iceland, Israel, Italy, Japan, Netherlands, Philippine Republic, Portugal, United States and Yugoslavia.

means of ensuring compliance with the Convention. In addition, the Conference of 1948 prepared, but did not formally adopt, new International Regulations for Preventing Collisions at Sea to replace the existing Regulations on the subject.¹ On July 5, 1930, the Load Line Convention² was concluded with a view to promoting safety of life and property at sea by establishing rules with regard to the limits to which ships on international voyages may be loaded. It provided for the surveying and marking of ships proceeding to sea on an international voyage and the issue of International Load Line Certificates.

§ 265a. In 1910, at a conference held at Brussels, to Collisions at Sea. which all the maritime States of Europe,³ the United States of America, and most of the South American States sent representatives, two Conventions were signed on September 23, one 'for the unification of certain rules of law with respect to collisions between vessels,' and the other 'for

¹ These include provisions relating to the carrying by vessels and sea planes, of internationally recognised lights and shapes in order to make their presence known; internationally recognised steering and sailing rules, signals to be used in distress, and the obligation of masters to render assistance to vessels involved in a collision. Thus Article 11 of the Regulations provides that every master is bound, so far as he can do so without serious danger to his vessel to her crew and her passengers to render assistance to everybody, even though an enemy, found at sea in danger of being lost. One of the objects of the Inter-Governmental Maritime Consultative Organization to be established in pursuance of the Convention of March 6, 1948, on the subject (Cmd 7412) is to provide machinery for co-operation in matters relating to safety at sea (see below p. 1014).

² Treaty Series, No. 35 (1932), Cmd. 4199, *L.N.T.S.*, 135, p. 303, Hudson, *Legislation*, v. p. 634. The Convention has been ratified by more than forty States, including all the Great Powers. See Bruhn, *Some Considerations regarding International*

Load Line Regulations (1929), Elsner, *Das internationale Übereinkommen über den Freibord der Kauffahrtschiffe* (1933). And see Merchant Shipping (Safety and Load Line Conventions) Act 1932, referred to above, p. 399, n. 5. See also, as to both Conventions, Gutteridge in *J.C.L.*, 3rd ser., 16 (1934), pp. 246-251, and Kuhn in *I.J.*, 24 (1930), pp. 133-135. On the question of the measures against the pollution of the sea—the question which still awaits solution—see Gidel, *supra*, pp. 480-494. On the international regulation of shipping see Higgins and Colombo, §§ 327-350. See also Rivault, *Les conventions de Londres de 1929 et de 1930 sur la sécurité en mer* (1930), and Mance, *International Sea Transport* (1945). And see the Agreement of October 30, 1943, for the Establishment of a Provisional Maritime Consultative Council, adopted by the United Maritime Consultative Council (Treaty Series, No. 36 (1947), Cmd. 7137).

³ See *Cydon v Samos Navigation Company and Others*, in which the Mixed Tribunal of Port Said considered that Convention to be applicable even to non-signatory States: *Annual Digest*, 1925-1926, Case No. 1.

the unification of certain rules of law respecting assistance and salvage at sea.¹ To carry out these two Conventions the Maritime Conventions Act² was passed in 1911.

Although certain rules of law which are to be applied in actions relating to collisions at sea have been settled by the first of the Conventions just mentioned, the question as to what courts have jurisdiction in such actions is still unsettled.³ That the damaged innocent vessel can bring an action against the guilty ship in the courts of the latter's flag State is beyond doubt, since jurisdiction on the open sea follows the flag. If the rule that all vessels while on the open sea are considered under the sway of their flag State were not subject to exceptions, no other State could claim jurisdiction in cases of collision. But in fact maritime States⁴ do claim jurisdiction over vessels flying other flags, though their practice is not uniform. Thus, for instance, France⁵ claims jurisdiction if the damaged ship is French, although the guilty ship may be foreign, and also if both ships are foreign in case both consent, or certain special circumstances exist. Thus, further, Italy⁶ claims jurisdiction, even if both ships are foreign, in case an Italian port is the port nearest to the collision, or in case the damaged ship was forced by the collision to remain in an Italian port. Great Britain goes farthest, for the Admiralty Court claims jurisdiction provided the guilty ship is in a British port at the time the action for damages is brought, even if the collision took place between two foreign ships on the high seas.⁷ The position in the United States is

¹ Misc. No. 5 (1911), Cmd. 5558; Treaty Series (1913), No. 4; Martens, *N.R.G.*, 3rd ser., vii. p. 711; Marsden, *op. cit.*, pp. 547-550.

² As to the second of these Conventions see below, § 271.

³ See Phillimore, iv. § 815, Calvo, i. § 444; Pradier-Fodéré, v. §§ 2362-2374; Gidel, i. pp. 366-370; Bar, *Private International Law* (2nd ed., translated by Gillespie), pp. 720 and 928; Dicey, pp. 62, 264, 279-284; Foote, *Private International Jurisprudence* (5th ed., 1925), pp. 518, 528-531; Westlake, *Private Inter-*

national Law (7th ed., 1925), pp. 287-293; Marmen, *The Law of Collisions at Sea* (9th ed., 1934); Halsbury, *The Laws of England - Collisions*, xxvi. p. 359; Roscoe, *Admiralty Jurisdiction and Practice* (4th ed., 1920); Servat, *De la responsabilité en matière d'abordage maritime* (1935); Coffey in *California Law Review*, January 1925, pp. 83-112.

⁴ See above, § 146.

⁵ See Pradier-Fodéré, v. § 2363.

⁶ See Pradier-Fodéré, v. § 2364.

⁷ Or even in foreign territorial waters; see Roscoe, *op. cit.*, p. 112.

the same.¹ The court justifies this extended claim of jurisdiction² by maintaining that collision is a matter *communis juris*, and can therefore be adjudicated upon by the courts³ of all maritime States.⁴ With regard to the consequences, in the sphere of criminal law, of collisions on the high sea, a Convention was signed in Brussels on May 10, 1952,⁵ the effect of which, if generally adopted, will be to discard the principle acted upon by the Permanent Court of International Justice in the case of *The Lotus*.⁶ The Convention provides that in the event of a collision or any other incident of navigation involving the penal or disciplinary responsibility of the master or any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State whose flag the ship was flying, and that 'the authorities of no other State may arrest or detain the vessel even for the purpose of interrogation. This, it is laid down, does not prevent other States from withdrawing, or taking other appropriate action in respect of, certificates of competence or licences issued by them or from prosecuting their own nationals for offences committed while on board a ship flying the flag of another State.

§ 266. Although the freedom of the open sea, and the fact that vessels on the open sea remain under the jurisdiction of the flag State, exclude, as a rule, the exercise of the authority of any State over foreign vessels, certain exemptions exist in the interest of all maritime nations. They are

Powers of
Men-of-
war over
Merchant-
men of all
Nations

(1) *Blockade and Contraband*.—In time of war belligerents

¹ In *The Harfy et al.* the Court assumed jurisdiction in the matter of a collision between British and Portuguese vessels in a French harbour. *Annual Digest*, 1941-1942, Case No. 43. In *The Tollen* it was held that English courts had jurisdiction to adjudicate in an action *in rem* where the claim was against the owners of a ship which had done damage to any structure attaching to or forming part of the soil of foreign territory: [1947] L.J.R. 201; 62 T.L.R. 378. *Annual Digest*, 1946, Case No. 42.

² *The Johann Friederich* (1838)

1 W. Rob. 35. *The Chartered Mercantile Bank of India, London, and China v. The Netherlands India Steam Navigation Co.* (1883) 10 Q.B.D. 537.

³ The practice of the United States of America coincides with that of Great Britain, see the case of *The Belgenland* (1885) 114 U.S. 355, and Wharton i. § 20.

⁴ See *Annuaire*, 10 (1889), p. 152.

⁵ It was signed by Belgium, Brazil, Denmark, France, Germany, Greece, Italy, Monaco, Nicaragua, Spain, United Kingdom and Yugoslavia.

⁶ See above, § 147a.

may blockade not only enemy ports and territorial coast waters, but also parts of the open sea adjoining those ports and waters, and neutral merchantmen attempting to break such a blockade may be confiscated. And, further, in time of war belligerent men-of-war may visit, search, and eventually-seize neutral merchantmen for carriage of contraband, and the like.

(2) *Verification of Flag*.—It is a universally recognised customary rule of International Law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag.¹ But such vessels must be suspicious. Since a suspicious vessel may still be a pirate although she shows a flag, she may further be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag. It is, however, quite obvious that this power enjoyed by men-of-war must not be abused, and that the home State is responsible in damages in case a man-of-war stops and visits a foreign merchantman without sufficient ground for suspicion.² The right of every State to punish piracy on the open sea will be treated below, §§ 272-280.

(3) *So-called Right of Pursuit*.—It is a universally recognised customary rule that men-of-war of a littoral State can pursue into the open sea, seize, and bring back into a port for trial, any foreign merchantman that has violated the law whilst in the territorial waters of that State. But such pursuit into the open sea is permissible only if commenced while the merchantman is still within those territorial waters or has only just escaped thence, and the pursuit must stop as soon as the merchantman passes into the maritime belt of another State.³

¹ So-called 'Droit d'Enquête' or 'Vérification du Pavillon.' This power vested in men-of-war has given occasion to much dispute and discussion, but in fact nobody denies that in case of grave suspicion it does exist. See Twiss, i. § 193; Hall, § 81; Fiore, ii. §§ 732-736; Perels, § 17; Taylor, § 266; Fauchille § 438 (40).

² For a discussion of the right of approach and as to the payment of damages for a seizure, erroneous but in pursuance of the exercise of an honest discretion, see *The Marianna Flora* (1826) 11 Wheaton 1; Scott. Cases, p. 1009.

³ See Hall, § 80; Westlake, i. p. 177; Hackworth, ii. § 205; Higgins and Colombos, §§ 132-139; Jessup

(4) *Abuse of Flag*.¹—It is another universally recognised rule that men-of-war of every State may seize, and bring to a port of their own for punishment, any foreign vessel sailing under the flag of such State without authority.²

§ 267. A man-of-war which meets a suspicious merchant-man not showing her colours and wishes to verify them, hoists her own flag and fires a blank cartridge. This is a signal for the other vessel to hoist her flag in reply. If she takes no notice of the signal, the man-of-war fires a shot across her bows. If the suspected vessel, in spite of this warning, still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the

How Veri-
fication of
Flag is
effected.

Law of Territorial Waters (1927), pp. 106-110; Gidel, iii. pp. 339-360; *Annuaire*, 13 (1894), p. 330; Hughes in *A.J.*, 18 (1924), at pp. 231-232, cited by Dickinson in *H.L.R.*, 40 (1926), at p. 21; Sibert, *op. cit.*, p. 33; Massin, *La Poursuite en Droit Maritime* (1937); Glanville Williams in *B.Y.*, 20 (1939), pp. 83-98; and the authorities compiled by Dennis in *A.J.*, 23 (1929), p. 351, and Beck in *Canadian Bar Review*, 9 (1931), pp. 85, 176, 249, 311 (an exhaustive study). For the application of the doctrine of hot pursuit (*dum ferret opus*) in a different sphere see *The Anichab* [1919] P. 329, at p. 337; [1922] 1 A.C. 236; 3 B. and C.P.C. 611, 993. And for its application in land operations see Hershey in *A.J.*, 13 (1919), pp. 557-560. For a case of seizure of a British vessel in 'hot pursuit' which took place thirteen miles from land in pursuance of an offence committed seven and a half miles from land and within one hour's sailing distance, and was held to be lawful, see *The Vines* (1927) United States District Court of South Carolina, 20 F. (2d) 164, and comment in *Michigan Law Review*, 26 (1928), p. 551. See also *The Pescanha*: 45 F. (2d) 221; *Annual Digest*, 1929-1930, Case No. 86; *The Revolution*, 30 F. (2d) 534; *Annual Digest*, 1929-1930, Case No. 87; *The Katina* (decided by the Egyptian Mixed Court of Appeal): *ibid.*, Case No. 89; *R. v. Mason* [1935] 2 D.L.R. 161. Various aspects of the question of the limits of hot pursuit arose and were discussed in

connection with the *I'm Alone* incident in 1929 between Canada and the United States (see above, p. 347, n. 2, and below, p. 606, n. 1), but the Report of the Commissioners entrusted with the settlement of the dispute throws no light on the question. See Garner in *B.Y.*, 16 (1935), p. 173; Fitzmaurice, *ibid.*, 17 (1936), pp. 88, 95-100.

¹ In addition to the four reasons mentioned in the text which are based upon customary International Law, States sometimes grant to one another by treaty mutual rights of visit and search of private vessels by men-of-war. See, for instance, as to the slave trade, below, § 340a; as to control of fishing-vessels and bum-boats in the North Sea, §§ 282-283; as to the protection of cables, § 287. See also De Loutch, i. pp. 413-420.

² Except as a ruse, in time of war, to escape capture by a belligerent man-of-war. The Merchant Shipping Act, 1894, § 69 enacted: 'If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right.' On visit and search for other reasons see Hackworth, ii. § 190.

purpose of visiting her and thereby verifying her nationality.

How Visit
is effected.

§ 268. The intention to visit may be communicated to a merchantman either by hailing, or by the 'informing gun'—that is, by firing either one or two blank cartridges. If the vessel takes no notice of this communication, a shot may be fired across her bows as a signal to bring to, and, if this also has no effect, force may be resorted to.¹ After the vessel has been brought to, either an officer is sent on board for the purpose of inspecting her papers, or her master is ordered to bring his ship's papers for inspection on board the man-of-war. If the inspection proves the papers to be in order, a memorandum of the visit is made in the log-book, and the vessel is allowed to proceed on her course.

How
Search is
effected.

§ 269. Search is naturally a measure which must always be preceded by visit. It is because the visit has given no satisfaction that search is instituted. Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being obliged to render any assistance whatever, except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo. If the search proves everything to be in order, the searching party must carefully replace everything removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course.

How
Arrest is
effected.

§ 270. Arrest of a vessel takes place either after visit and search have shown her liable thereto, or after she has committed some act which is sufficient in itself to justify her seizure. Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel. This officer is responsible for the vessel, and for her cargo,

¹ On the limits of the use of force and the incidental right of sinking an escaping vessel see the somewhat inconclusive Joint Interim Report of June 30, 1933, of the Commissioners in the *M. Alone* case between the United

States and Canada: see *Annual Digest*, 1933-1934, Case No. 86 (at p. 205), Dennis in *A.J.*, 23 (1929), p. 359, and Hyde, *ibid.*, 29 (1935), p. 299.

which must be kept safe and intact. The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbour as is determined by the cause of the arrest.¹

§ 271. Goods and persons shipwrecked on the open sea do not thereby lose the protection of the flag State of the shipwrecked vessel.² Even before 1910 no State might recognise appropriation by its subjects of abandoned foreign vessels and other derelicts on the open sea. But every State could by its Municipal Law enact that those of its subjects who took possession of abandoned vessels and of shipwrecked goods need not restore them to their owners without salvage,³ whether the act of taking possession occurred on the open sea or within its territorial waters or on its shore.

The Brussels Convention of 1910 'for the unification of certain rules of law respecting assistance and salvage at sea,'⁴ recognises the right to salvage, and contains a uniform set of rules to be applied by municipal courts exercising jurisdiction in actions for salvage and claims arising out of assistance rendered to vessels in distress. Such modification in English law as was needed to give effect to its provisions was carried out by the Maritime Conventions Act of 1911.⁵

As regards vessels in distress,⁶ the same Brussels Convention contains, in Article 11, a provision that every master is bound, so far as he can do so without serious danger to

¹ But when a fishing vessel or a bumboat is arrested in the North Sea, she is always to be brought into a harbour of her flag State and handed over to the authorities there. See below, §§ 282 and 283.

² On the question of a derelict vessel see the *Costa Rica Packet* case, referred to above, § 162.

³ See Phillimore, iv. § 815. Dicey, pp. 870, 871; Higgins and Colombos, §§ 289-290, and Halsbury, *The Law of England - Wreck*, xxvi. p. 348. See also §§ 545 and 585 of the Merchant Shipping Act 1894.

⁴ See above, § 265.

⁵ See above, § 265.

⁶ Wireless signals of distress are discussed below in §§ 287a, 287b. It

has been held by the Exchequer Court in Canada that although, normally, a ship which has been compelled through stress of weather, duress or other unavoidable cause to put into a foreign port is exempt, on the grounds of comity, from liabilities and penalties which she would have incurred if she had entered the port voluntarily that principle does not apply to exemption from local laws, especially revenue laws. *Customs and Excise v. The King* [1935] Ex. C.R. 103. *Annual Digest*, 1933-1934, Case No. 87. See also, for a qualification of the notion of distress, *Re v. Flakout*, decided in 1934 by the Supreme Court of New Brunswick: *ibid.*, 1938-1940, Case No. 61.

his vessel, her passengers and crew, to render assistance to every person, even though an enemy, found at sea in danger of being lost. The owner of the vessel, however, incurs no liability through disobedience to this provision. The Convention does not apply to ships of war, nor to Government ships exclusively appropriated to the public service.¹ Most States, however, by their municipal regulations, order their men-of-war to render assistance to any vessel found in distress at sea.

V

PIRACY

Hall, §§ 81-82—Westlake, i. pp. 181-186—Lawrence, § 102—Philimore, i. §§ 356-361—Walker, § 21—Wheaton, §§ 122-124—Moore ii. §§ 311-315—Hackworth, ii. §§ 203, 204—Hyde, i. §§ 231-234—Bluntschli §§ 313-350—Heffter, § 104—Fauchille, §§ 483 (49) 483 (58)—Merignhac, ii. pp. 506-511—Pradier-Fodéré, v. §§ 2491-2515—Rivier, i. pp. 248-251—Calvo, i. §§ 485-512—Cruchaga, §§ 436-438—Fiore, i. §§ 494, 495, and *Code*, § 300-305—Perels, §§ 16, 17—Testa, pp. 90-97—Gidel, i. pp. 303-355—Higgins and Colombos, §§ 368-382—Holland, *Lectures*, pp. 162-165—Fenwick, pp. 324-327—*Harvard Research* (1932), pp. 743-1013 (a valuable study with an annex containing a collection of piracy laws of various countries)—*Harvard Research* (1935), pp. 563-592—Ortolan, *Diplomatie de la mer* (1856), i. pp. 231-253—Stiel, *Der Tatbestand der Piraterie* (1906)—Ormerod, *Piracy in the Ancient World* (1924)—Müller, *Die Piraterie im Völkerrecht* (1929)—Report by Matsuda and Wang Chung-hui for League Codification Committee in *A.J.*, 20 (1926), Special Suppl., pp. 222-229, and comment by Dickinson in *A.J.*, 20 (1926), pp. 750-752—Cybichowski in *Hague Recueil* 1926 (ii), pp. 349-358—Pella, *ibid.* (v), pp. 149-257—Gebert in *Z.I.*, 26 (1916), pp. 8-70—Dickinson in *H.L.R.*, 38 (1925), pp. 334-360—Fairman in *A.J.*, 29 (1935), pp. 508-512—Lewis in *J.C.L.*, 3rd ser., 10 (1937), pp. 77-89—Lauterpacht in *R.G.*, 46 (1939), pp. 513-540—Cowles in *California Law Review*, 33 (1945), pp. 177-218.

Conception
of
Piracy.

§ 272. Piracy, in its original and strict meaning,² is every unauthorised act of violence committed by a private vessel³ on the open sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered

¹ See Article 14.

² See below, §§ 273 and 273a (with regard to acts of unrecognised insurgents).

³ On the question whether it is possible for the maritime operations

of a State to be 'piratical' in more than a rhetorical sense see below, § 273a. On the Barbary corsairs in the seventeenth century see Clark in *Cambridge Historical Journal*, 8 (1944), pp. 22-35.

by this narrow definition, and yet they are treated in practice as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Again, if unauthorised acts of violence, such as murder of persons on board the attacked vessel, or destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical. Therefore several writers,¹ correctly, it is believed, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder. However, no unanimity exists among them concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.*²

Before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a '*hostis humani generis*.' According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character; and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called 'international crime'³; the pirate is considered the enemy of every State, and can be brought to justice anywhere.

§ 273. As a rule private vessels only can commit piracy. It is widely believed⁴ that a man-of-war or other public

Private
Ships as
Subjects
of Piracy

¹ Hall, § 81; Lawrence, § 102. Bluntschli, § 343; Liszt, § 36, iv; Calvo, § 485.

² The conception of piracy is discussed in *The Republic of Bolivia v The Indemnity Mutual Marine Assurance Co.* [1909] 1 K.B. 785.

³ See above, § 151.

⁴ See previous editions of this treatise. See also Genet in *A.J.*, 32 (1938), pp. 253-263, and in *R.I.F.*, 3 (1937), pp. 12-25, and 5 (1938), pp. 280-284, and authorities there cited. And see in *B.Y.*, 19 (1938), pp. 198-208. But see below, § 273a.

ship under the orders of a recognised government or belligerent, so long as she remains such, is not a pirate, and that if she commits unjustified acts of violence redress must be asked from her flag State, which has to punish the commander, and to pay damages where required. In any case if a man-of-war or other public ship of a State revolts, and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence then committed by her are indeed piratical acts. A *privateer* is not a pirate as long as her acts of violence are confined to enemy vessels, because such acts are authorised by the belligerent in whose services she is acting. And it matters not that the privateer was originally a neutral vessel.¹ But if a neutral vessel were to take letters of marque from both belligerents, she would be considered a pirate.

Doubtful is the case where a privateer, in a civil war, has received her letters of marque from the insurgents: and, further, the case where, during a civil war, men-of-war join the insurgents before they have been recognised as a belligerent Power. It is evident that the legitimate Government will treat such ships as pirates; but third States ought not to do so, so long as these vessels do not commit any act of violence against ships of such third States.² Thus, in 1873, when an insurrection broke out in Spain, Spanish men-of-war stationed at Carthagena fell into the hands of the insurgents and the Spanish Government proclaimed these vessels pirates, Great Britain, France, and

¹ See Hall, § 81. See also below, vol. ii. §§ 83 and 330

² In a Convention on the Duties and Rights of States in the Event of Civil Strife, adopted in February 1928 by the Sixth International American Conference, it is laid down that a declaration of piracy, emanating from a Government, against an insurgent vessel is not binding upon other States. But such other State, if injured by the activities of the vessel, may, if she is a man-of-war, capture her and send her to her home State for trial; in the case of merchant vessels the injured State may punish the

vessel according to its own laws. 4.J., 22 (1928), Suppl., p. 160. The same Convention provides that if the insurgent vessel arrives in the territory of a contracting party, the vessel must be handed over to the lawful authorities of the home State and that the members of the crew must be considered as political refugees. In 1920 the United States refused to treat as pirates the *Falke*, a vessel registered in Germany which was boarded by Venezuelan rebels and taken to Venezuela with a cargo of munitions on board. For a report of the incident see *RIC*, 38 (1931), pp. 341-344.

Germany instructed the commanders of their men-of-war in the Mediterranean not to interfere as long as these insurgent vessels¹ abstained from acts of violence against the lives and property of their subjects.² On the other hand, when in 1877 a revolutionary outbreak occurred at Callao in Peru, and the ironclad *Huascar*, which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal without payment from one of these, and forcibly took two Peruvian officials from on board another where they were passengers, she was justly considered a pirate and was attacked by the British Admiral de Horsey, who was in command of the British squadron in the Pacific.³

It must be emphasised that the motive and the purpose of such acts of violence do not alter their piratical character, since the intent to plunder (*animus furandi*) is not required. Thus, for instance, if a private neutral vessel

¹ See Calvo, i. §§ 497-501. Hall, § 82. Westlake, i. pp. 183-186. Keith's Wheaton, pp. 278-284.

² But in the American case of the *Ambrose Light* (25 Federal 408; see also Moore, ii. § 332, p. 1098) the Court did not agree with this. The *Ambrose Light* was a brigantine which, when sighted on April 24, 1885, by Commander Clark of the U.S. ship *Alliance* in the Caribbean Sea, was flying a strange flag showing a red cross on a white ground, but which afterwards hoisted the Colombian flag, when seized she was found to carry sixty armed soldiers, one cannon, and a considerable quantity of ammunition. She bore a commission from Colombian insurgents, and was designed to assist in the blockade of the port of Cartagena by the rebels. Commander Clark considered the vessel to be a pirate and sent her in for condemnation. The Court held that in the absence of any recognition of the Colombian insurgents as a belligerent Power the *Ambrose Light* had been lawfully seized as a pirate. The vessel was, however, nevertheless released because the American Secretary of State had recognised by implication a state of war between the insur-

gents and the legitimate Colombian Government. For a survey of the practice of the Supreme Court see Lenoir in *Journal of Criminal Law*, 25 (1934), p. 532. The Pan-American Convention of February 1928 (see above, p. 610, n. 2) provides in effect that vessels which have risen in arms against their Government must not be treated as pirates even if they have committed depredations upon vessels of the State concerned (Article 2).

³ See Pitt Cobbett, *Leading Cases on International Law*, i. (5th ed., 1931, by Grey), p. 299. However, it appears that no prosecution in England would take place in such cases. The Attorney-General, in answering in the House of Commons a question by Sir William Harcourt, said: 'In strictness they were pirates, and might have been treated as such, but it is one thing to assert that they had been guilty of acts of piracy, and another to advise that they shall be tried for their lives and hanged at Newgate': *Hansard*, 3rd ser., vol. 236, pp. 787 *et seq.* As regards the case of the Argentinian vessel *Portena* and the Spanish vessel *Monteruma*, afterwards called *Caspedes*, see Calvo, i. §§ 502 and 503.

without letters of marque during war, out of hatred of one of the belligerents were to attack and to sink vessels of such belligerent without plundering at all, she would nevertheless be considered a pirate.¹

The case must also be mentioned of a privateer or man-of-war which, after the conclusion of peace, or the termination of war by subjugation and the like, continues to commit hostile acts. If such vessel is not cognisant of the fact that the war has come to an end, she cannot be considered a pirate. Thus the Confederate cruiser *Shenandoah*, which in 1865, for some months after the end of the American Civil War, attacked American vessels, was not considered a pirate² by the British Government when her commander gave her up to the port authorities at Liverpool in November 1865, because he asserted that he had not known till August of the termination of the war, and that he had abstained from hostilities as soon as he had obtained this information

Public
Ships as
Subjects
of Piracy.

§ 273a. The case of the *Huascar*, discussed in the preceding section, shows that a vessel may be treated as piratical even if she is not a private vessel in the literal sense of the word, and even if her depredations are not effected with the intent to plunder for private gain. Vessels of unrecognised insurgents interfering with ships of third States may be treated as piratical; when such attacks show criminal ruthlessness resulting in loss of life, their crews may be subjected to the drastic penalties which International Law reserves for pirates *jure gentium*³

The same applies to vessels which, though acting under orders of a recognised Government, commit acts which are in gross breach of International Law and which show a criminal disregard of human life⁴. In the course of the

¹ In spite of Article 46, No. 1, of the unratified Declaration of London; see below, vol. II. § 410 (1)

² See Lawrence, § 102

³ For a survey of the practice of States in the matter see Lauterpacht in *R.G.*, 46 (1939), pp. 513-549. And see *The Ambrose Light* (1885) 25 Fed. 408; *The Three Friends* (1897) 166 U.S. 1. 63.

⁴ See e.g. the instructions of the United States Secretary of State to the Minister in Spain in 1823 laying down that 'acts of practical aggression and depredation may be committed by vessels having lawful commissions as privateers . . .': Manning, *Diplomatic Correspondence of the United States concerning the Independence of Latin-American Nations*, vol. I. (Parts

Spanish Civil War, Great Britain, Belgium, Egypt, France, Greece, Roumania, Turkey, and Soviet Russia concluded, on September 14, 1937, the Nyon Agreement which provided for collective measures 'against piratical acts by submarines' of unknown nationality. These were described as 'acts contrary to the most elementary dictates of humanity which should be justly treated as acts of piracy.'¹ The use of the term 'piracy' on that occasion, although it was subjected to some criticism,² cannot be regarded as improper. Article 3 of the unratified Treaty of Washington of 1922 provided for the punishment 'as if for an act of piracy' of persons directly responsible for sinking merchant vessels in a manner contrary to International Law.³ When, in September 1941, President Roosevelt issued orders to American naval forces to fire at sight upon German and Italian submarines and surface vessels, he described that measure as being one in defence against piratical attacks in violation of International Law.⁴ There is substance in the view that, by continuous usage,⁵ the notion of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it

i. n., 1925), p. 167. And see *ibid.*, p. 176. See also *The Magellan Pirates*, 1 Spink's Eccl. and Adm. Rep. 81, where Dr. Lushington said (*obiter*): 'Even an independent state may, in my opinion, be guilty of piratical acts. . . . I am well aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such a dictum as a universal proposition.'

¹ Cmd. 5568 (1937) The Treaty provided that any submarine attacking vessels not belonging to one of the parties to the Spanish Civil War, in a manner contrary to International Law, shall, if encountered in the vicinity of the attack, be counter-attacked and, if necessary, destroyed by the forces of the Parties to the Agreement.

² See e.g. Genet in *R.I.F.*, 3 (1937), pp. 12-25, and 5 (1938), pp. 280-284; Mirwart in *R.I.*, 3rd ser., 19 (1938), pp. 341-352; Anon. in *B.Y.*, 19 (1938), pp. 198-208. But see Padelford in *A.J.*, 32 (1938), pp. 271-279 and

Lauterpacht in *R.G.*, 46 (1939), pp. 513-549. See also Finch in *A.J.*, 31 (1937), pp. 659-665 and Schmitz in *Z.o.V.*, 8 (1938), pp. 641-671. And see de Montmorency in *L.Q.R.*, 35 (1919), pp. 133-142, and Pollack, *ibid.*, p. 211; Hyde, i. p. 231; Fauchille, § 483 (51).

³ Cmd. 1627; *A.J.*, 16 (1922), Suppl., p. 67.

⁴ See vol. ii. (6th revised ed.), § 292a, p. 505.

⁵ See, for instance, with regard to the Declaration that destruction of submarine cables shall be dealt with as an act of piracy, the Opinion of the British Law Officers of May 15, 1870, *United States*, No. 779. The use of the term 'piracy' in connection with slave traffic or acceptance of letters of marque in breach of treaties or of general international law is a frequent occurrence in diplomatic practice. On robbery and brigandage as an international crime analogous to piracy see Cowles in *California Law Review*, 33 (1945), pp. 188-216.

now covers generally ruthless acts of lawlessness on the high seas¹ by whomsoever committed.

**Mutinous
Crew and
Passen-
gers as
Subjects
of Piracy.**

§ 274. If the crew, or passengers, revolt on the open sea and convert the vessel and her goods to their own use, they commit piracy, whether the vessel is private or public.² But a simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy, at least not as far as International Law is concerned. If, for instance, the crew were to murder the master on account of his cruelty, and afterwards carried on the voyage, they would be murderers, but not pirates. They are pirates only if the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.

**Object of
Piracy.**

§ 275. The object of piracy is any public or private vessel, or the persons or the goods thereon, whilst on the open sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate, whether he does that only or whether he kills the crew and appropriates the ship or sinks her. On the other hand, the cargo need not be the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy: it is likewise piracy if he stops a vessel merely to kill a certain person on board, although he may afterwards free vessel, crew, and cargo.³

**How
Piracy is
effected.**

§ 276. Piracy is effected by any unauthorised act of violence, be it direct application of force or intimidation through menace. The crew or passengers who, for the purpose of converting a vessel and her goods to their own use, force the master through intimidation to steer another course, commit piracy just as much as those who murder the master and navigate the vessel themselves. And a ship which

¹ But see below, p. 615, n. 5.

² This statement is controversial; see Fauchille, § 483 (50), who cites authors and discusses incidents.

³ That a possible object of piracy is not only another vessel, but also the very ship to which the persons guilty of piracy belong, is an inference from the statements above in § 274.

forces another ship, by threatening to sink her if she should refuse, to deliver up her cargo or a person on board, commits piracy just as much as the ship which attacks another vessel, kills her crew, and thereby gets hold of her cargo or a person on board.

The act of violence need not be consummated¹: a mere attempt, such as attacking or even chasing a vessel for the purpose of attack, by itself constitutes piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence.²

§ 277. Piracy as an 'international crime' can be committed³ on the open sea only. Piracy in territorial coast waters has as little to do with International Law as other robberies within the territory of a State. Some writers⁴ maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the acts of violence in question are committed by descent from the open sea. They maintain, therefore, that if 'a body of pirates land on an island unappropriated by a civilised Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy' It is doubtful whether this is so. Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than on the open sea.⁵

¹ See the Reference under the Judicial Committee Act, 1833. *In re Piracy jure gentium*, in which the Judicial Committee held that actual robbery is not an essential element in the crime of piracy *jure gentium* and that, therefore, a frustrated attempt to commit a piratical robbery is piracy *jure gentium*: [1934] A.C. 586; *Annual Digest*, 1933-1934, Case No. 89; *A.J.*, 29 (1935), p. 140; Fairman, *ibid.*, pp. 508-512.

² See Stephen, *Digest of the Criminal Law*, Article 104. In the case of the *Ambrose Light*—see

above, § 273, p. 611, n. 2—the Court considered the vessel to be a pirate, although no attempt to commit a piratical act had been made by her.

³ On the conception of 'international crimes' other than piracy, see Dumas in *R.I.*, 3rd ser., 13 (1932), pp. 721-741.

⁴ Hall, § 81; Lawrence, § 102; Westlake, i. p. 181.

⁵ *Sed Quære*. See *People v. Lol-Lo and Sarau*, decided in 1922 by the Supreme Court of the Philippine Islands: *Annual Digest*, 1919-1922, Case No. 112.

Jurisdiction over Pirates, and their Punishment.

§ 278. A pirate and his vessel lose *ipso facto* by an act of piracy the protection of their flag State and their national character. Every maritime State has, by a customary rule of the Law of Nations, the right to punish pirates. And the vessels of all nations, whether men-of-war, other public vessels, or merchantmen,¹ can chase, attack, and seize the pirate on the open sea,² and bring him home for trial and punishment by the courts of their own country.³

This punishment may, by the Law of Nations, be capital. But it need not be, the Municipal Law of the different States being competent to order any less severe punishment. Nor does the Law of Nations make it a duty for every maritime State to punish all pirates.⁴

In former times it was said to be a customary rule of International Law that after seizure pirates could at once be hanged or drowned by the captor. But this cannot now be upheld, although some writers assert that it is still the law. It would seem that the captor may execute pirates on the spot only when he is not able to bring them safely into a port for trial; but Municipal Law may, of course, forbid such execution.

Pirata non mutat dominium.

§ 279. The question as to the property in the seized piratical vessels, and the goods thereon, has been the subject of much controversy. During the seventeenth century, the practice of several States conceded such vessel and goods to the captor as a premium. But during the eighteenth century, the rule *pirata non mutat dominium* became more and more recognised. Nowadays it is generally agreed that ship and goods must be restored to their owners and may

¹ A few writers (Gareis in *Holtendorff*, ii. p. 575; Liszt, § 36, iv.; Ullmann, § 104; Stael, *op. cit.*, p. 51) maintain, however, that only men-of-war have the power to seize the pirate. And see, for a compromise view, *Harvard Research* (1932), p. 846 where it is suggested that the seizure may be made only on behalf of a State and only by a person authorised to act on behalf of it.

² If a pirate is chased on the open sea and flies into the territorial

maritime belt, the pursuers may follow, attack, and arrest the pirate there; but they must give him up to the authorities of the littoral State.

³ As to the right of verifying the flags of suspicious merchantmen of all nations see above, § 266 (2).

⁴ See Stephen's *Digest of the Criminal Law*, Article 104; Perels, § 17, as to the German Criminal Code; and Stael, *op. cit.*, p. 15, n. 4, for the law of a number of States.

be conceded to the captor only when their real ownership cannot be ascertained.¹

§ 280. Piracy according to the Law of Nations, which has been defined above (§ 272), must not be confused with the conception of piracy according to the different Municipal Laws.² The several States may confine themselves to punishing as piracy fewer acts of violence than those which the Law of Nations defines as piracy. On the other hand, they may punish their own subjects as pirates for a much wider range of acts. Thus, for instance, according to the criminal law of England,³ every British subject is, *inter alia*, deemed to be a pirate who gives aid or comfort upon the sea to the King's enemies during a war, or who transports slaves on the high seas. However, since a State cannot enforce its Municipal Laws on the open sea against others than its own subjects,⁴ it cannot treat foreigners on the open sea as pirates, unless they are pirates according to the Law of Nations. Thus, when in 1858, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States rightly complained.⁵

VI

FISHERIES IN THE OPEN SEA

(Grotius, ii. c. 2, § 3—Vattel, i. § 282—Hall, § 27—Lawrence, §§ 86, 91—Phillimore, i. §§ 189-195—Wharton, iii. §§ 300-308—Wheaton, §§ 167-171—Moore, i. §§ 169-173—Hackworth, i. §§ 108-111—Hyde, i. § 143 (n. 2)—Bluntschli, § 307—Fauchille, §§ 183 (20)-483 (28)—Despagnet, §§ 411-413—Pradier-Fodéré, v. §§ 2440-2458—Rivier, i. pp. 243, 244—Nys, ii. pp. 205-209—Calvo, i. §§ 357-364—Fiore, ii. §§ 728, 729, and *Code* §§ 1000-

¹ In the first case, however, a certain percentage of the value is very often conceded to the captor as a premium and an equivalent for his expenses (so-called *droit de rescousse*) (see details in Pradier-Fodéré, v. §§ 2408-2409). Thus according to English law (see § 5 of the Piracy Act, 1850), a salvage of 12½ per cent. is to be paid to the crew of a British warship capturing the pirate. See generally Wortley in *B.Y.*, 24 (1947),

pp. 258-272.

² See Calvo, §§ 188-192; Lawrence, § 103; Pradier-Fodéré, v. §§ 2501, 2502.

³ See Stephen, *Digest of the Criminal Law*, Articles 104-117.

⁴ See, however, the *Lotus* case discussed above, § 147a.

⁵ See Wharton, iii. § 327, pp. 142, 143; Taylor, § 190; Moore, ii. § 310, pp. 941-946. See also § 340h.

1004—Martens, i. § 98—Perels, § 20—Gidel, i. pp. 437-463—Hall, *Foreign Powers and Jurisdiction* (1894), § 107—David, *La pêche maritime au point de vue international* (1897)—Fulton, *The Sovereignty of the Seas* (1911), pp. 57-534—Ræsted, *La chasse à la baleine à mer libre* (1928)—Bingham, *Report of the International Law of Pacific Coastal Fisheries* (1938)—Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942)—Tomasevitch, *International Agreements on Conservation of Marine Resources* (1943)—Leonard, *International Regulations of Fisheries* (1944)—Hurst in *B.Y.*, 1923-1924, pp. 34-43—Jessup in *Hague Recueil*, 20 (1929) (iv.), pp. 401-514, and in *A.J.*, 33 (1939), pp. 129-138—Selak in *A.J.*, 44 (1950), pp. 670-681.

Fisheries
in the
Open Sea
free to all
Nations.

§ 281. Whereas the fisheries in the territorial maritime belt can be reserved by the littoral State for its own subjects, it is an inference from the freedom of the open sea that the fisheries thereon are open¹ to vessels of all nations. Since,

¹ Denmark, by her fishing regulations of 1872, silently dropped her claim to an exclusive right of fisheries within twenty miles of the coast of Iceland. see Hall, § 40. Russia promulgated, in 1911, a statute forbidding the fisheries to foreign vessels within twelve miles of the shore of the White Sea, but the Powers protested against this encroachment upon the freedom of the open sea. The regulation of the fisheries off the coasts of Northern Russia formed an important part of the abortive 'Draft of Proposed General Treaty' 'between Great Britain and the Union of Soviet Socialist Republics in 1924: Russia, No. 1 (1924), Cmd. 2215. But in the Temporary Fisheries Agreement between Great Britain and Soviet Russia of May 22, 1930, the latter agreed that British fishing-boats may fish at a distance of from 3 to 12 geographical miles from the low-water mark; Treaty Series, No. 22 (1930), Cmd. 3583.

A case of a particular kind would seem to be the pearl fishery off Ceylon, which extends to a distance of twenty miles from the shore, and for which regulations exist which are enforced against foreign as well as British subjects. The claim on which these regulations are based is one 'to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction': see Hall,

Foreign Powers and Jurisdiction (1894), p. 243, n. 1. See also Westlake, i. p. 190, who cites Vattel, i. § 287. Westlake bases the British pearl fisheries off the coast of Ceylon and in the Persian Gulf upon occupation of the bed of the sea. This opinion of Westlake coincides with the contention of Great Britain during the Behring Sea Arbitration; see *Parl. Papers*, United States, No. 4 (1893), Behring Sea Arbitration Archives of His Majesty's Government, pp. 51, 50. Some hold the view that the bed of the open sea is not a possible object of occupation and that the explanation of the pearl fisheries off Ceylon and in the Persian Gulf being exclusively British is to be found in the fact that the freedom of the open sea was not a rule of International Law when these fisheries were taken into possession. See Oppenheim in *Z.V.*, ii. (1908) pp. 6-10; Westlake, i. p. 203; Lindley, pp. 64, 69; Vorwerk in *Strupp, Wort.*, i. pp. 190-191; Gidel, i. pp. 488-501, and Hatachek, p. 210, who has found an explanation in Islamic law. The submission that the bed of the sea is not capable of occupation is contested by Hurst, *op. cit.* As to Bahrain in the Persian Gulf see Persia's claim to ownership made in a protest addressed to Great Britain against Article 6 of the Treaty of Jeddah between Great Britain and the Hedjaz of May 20, 1927: the protest was circulated by the Secretary-General to the mem-

however, vessels remain whilst on the open sea under the jurisdiction of their flag State, every State possessing a maritime flag can legislate for the exercise of fisheries by its own vessels on the open sea; and it can by an international agreement renounce its fishing rights in certain parts of the open sea, and can accordingly forbid its vessels to fish there. So whenever it is deemed advisable to restrict and regulate the fisheries in some parts of the open sea, States can do this through treaties. Such treaties have been concluded, first, with regard to the fisheries in the North Sea and the suppression of the liquor trade among the fishing-vessels there; secondly, with regard to the seal fisheries in the North Pacific Ocean; thirdly, with regard to the fisheries around the Farøe Islands and Iceland.¹

§ 282. Fisheries in the North Sea are regulated by the Convention for the Regulation of the Police of the Fisheries in the North Sea outside Territorial Waters,² which was

Fisheries
in the
North
Sea.

bers of the League on December 28, 1927—see *Off. J.*, May 1926, pp. 605-607. And see above, § 243 (n.) For details as to the above-mentioned sedimentary fisheries as well as of those in Australia, Tunisia and Venezuela see the *Second Report on the High Seas* prepared by François for the International Law Commission in 1951 (A/CN.4.42).

For a criticism of some interesting legislative attempts in the United States to assume jurisdiction over fisheries in the high seas see Jessup in *A.J.*, 33 (1939), pp. 129-138. Thus in a statute passed in 1938 by the Senate of the United States it was recited that 'the shallow depths of the Behring Sea must be regarded as a slightly submerged margin of the American Continent'. In another bill, introduced in 1937, it was asserted that the salmon spawned and hatched in the waters of Alaska is the property of the United States, with the result that it is illegal to catch it in the waters adjacent to the United States. For a similar assertion put forward by the United States in the *Behring Sea Arbitration* see Lauterpacht, *Analogies*, § 99. In *Skirvold v. State of Florida* (1941) 61 S. Ct. 924, the Supreme Court of the United States upheld the validity of a statute

of the State of Florida in so far as it prohibited citizens of the United States from using diving apparatus in the taking of sponges within nine nautical miles off the coast of Florida. The Court did not pronounce upon the validity of the statute in so far as it affected persons other than citizens of the United States. See Borchard in *A.J.*, 35 (1941), pp. 515-519. See also Bingham, *Report on the International Law of Pacific Coastal Fisheries* (1938); Riessfeld, *Protection of Coastal Fisheries under International Law* (1942). Leonard, *International Regulation of Fisheries* (1944), pp. 145-151.

¹ The question of the Exploitation of the Products of the Sea was studied and reported upon by the League of Nations Codification Committee—see above, § 34, and Report of Suarez in *A.J.*, 20 (1926), Special Suppl., pp. 231-241, with list of treaties. See Jessup in *Hague Recueil*, vol. 29 (1929) (4), pp. 405-511; Gidel, p. 464-471.

² Martens, *N.R.G.*, 2nd ser., 9, p. 556. The matter is exhaustively treated by Rykera, *Le régime légal de la pêche maritime dans la mer du Nord* (1901). To carry out the obligations undertaken by her in the North

signed on May 6, 1882, by Great Britain, Belgium, Denmark, France, Germany,¹ and Holland. By its terms a mutual right of visit and search was conferred for the purpose of ensuring the observance of its provisions.

Bumboats
in the
North
Sea.

§ 283. For the purpose of prohibiting the sale of spirituous drinks to persons on board fishing-vessels in the North Sea and of licensing and regulating the bumboats which sell provisions to them, a Convention concerning the Abolition of the Liquor Traffic among the Fishermen in the North Sea² was signed on November 16, 1887, by Great Britain, Belgium, Denmark, France, Germany,³ and Holland. This Convention also confers a right of mutual visit and search.

Fisheries
in the
North
Pacific
Ocean.

§ 284. A dispute between Great Britain and the United States of America regarding the seizure by the latter State of British Columbian vessels engaged in seal fishing in the Behring Sea outside American territorial waters was settled by a tribunal of arbitrators in Paris in favour of Great Britain,⁴ and the parties were directed by the Tribunal to put in force certain regulations for the protection of the seal-fishing industry.⁵ These regulations proving ineffective,

See Fisheries Convention, Great Britain enacted The North Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22). See also the further Convention of February 1, 1889: Martens, *N.R.G.*, 2nd ser., 15, p. 568; and Tafel in *Z.I.*, 37 (1927), pp. 161-206, 267-276.

¹ See, however, as to Germany, Article 272 of the Treaty of Peace (1919). See also the Convention of December 31, 1932, for the preservation of plaice in the Skagerrak, Hudson, *Legislation*, vi. p. 277; of September 6, 1937, relating to preservation of plaice and dab in the Skagerrak, *ibid.*, vii. p. 827; the Convention of March 23, 1937, on the regulation of meshes of fishing nets and size limits of fish, *ibid.*, vi. p. 642; Misc. No. 5 (1937), Cmd. 5494; and the International Overfishing Convention of April 15, 1946: Misc. No. 7 (1946).

² See Martens, *N.R.G.*, 2nd ser., 14, p. 540, and 22, p. 562; Treaty Series, No. 13 (1894). The matter is treated by Guillaume in *R.I.*, 26

(1894), p. 488, and by Tafel in *Z.I.*, 37 (1927), pp. 222-249.

³ See, however, as to Germany, Article 272 of the Treaty of Peace (1919). See also the Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors signed at Helsingfors on August 19, 1925. It has been ratified by all the Baltic States: *L.N.T.S.*, 42, p. 73; Hudson, *Legislation*, iii. p. 1673; *Répertoire*, iii. pp. 693-695.

⁴ See Martens, *N.R.G.*, 2nd ser., 21, p. 439. The award is discussed by Barclay in *R.I.*, 25 (1893), p. 417, and Engelhardt in *R.I.*, 26 (1894), p. 386, and *B.G.*, 5 (1898), pp. 193 and 347. See also Tillier, *Les pêcheries de phoques de la Mer de Behring* (1906); Borch, *L'évolution de l'arbitrage international* (1908), pp. 70-91; and Leonard, *op. cit.*, pp. 55-78.

⁵ See the Behring Sea Award Act, 1894, and Seal Fisheries (North Pacific) Act, 1895.

a Convention respecting measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean¹ was signed on July 7, 1911, by Great Britain, the United States, Russia, and Japan. The Convention was to remain in force for fifteen years from December 15, 1911, and thereafter until terminated by twelve months' written notice. The Convention prohibited the killing, capturing or pursuing of fur seals at sea in wide areas of the North Pacific Ocean. In 1940 Japan gave notice to terminate the Convention on the ground that, as fur seals feed on fish, the increase, which resulted from the Convention, in the number of fur seals caused injury to Japanese fishing interests.² The British Parliament enacted the Seal Fisheries (North Pacific) Act, 1912, in order to carry out its provisions. On May 9, 1930, the United States and Canada concluded a Convention for the preservation of the halibut fishery of the Northern Pacific Ocean and the Behring Sea.³ The revised Convention of January 29, 1937,⁴ prohibited the nationals and inhabitants of the United States and of Canada to fish for halibut in the territorial waters and in the high seas off the western coast of the United States (including Alaska) and Canada between November 1 and February 15. Officials of either party were authorised to seize and detain persons and boats of the nationals of the contracting parties fishing in violation of the Convention and to hand them over for prosecution by the authorities of their State. Similar provisions were contained in the Treaty of May 26, 1930 (ratified on July 28, 1937) between these two countries for the protection of the sockeye salmon fisheries in the Fraser

¹ See Martens, *N.R.G.*, 3rd ser., 5, p. 720, and Treaty Series (1912), No. 2. Great Britain and the United States had already, on February 7, 1911, concluded a treaty concerning the same matter; see Martens, *N.R.G.*, 3rd ser., 5, p. 717, and Treaty Series (1911), No. 25. And see Ireland in *A.J.*, 36 (1942), pp. 400-406.

² See Leonard, *op. cit.*, p. 90. In Article 9 of the Peace Treaty of 1951 Japan agreed to enter into negotia-

tions with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

³ *A.J.*, 25 (1931), Suppl., p. 118.

⁴ *A.J.*, 32 (1928), Suppl., p. 71. For the Regulations issued in 1941 by the International Fisheries Commission in pursuance of the Convention see *ibid.*, 35 (1941), Suppl. p. 184.

River system.¹ In 1951 the United States, Canada, and Japan formulated, at a conference, a 'Proposed International Convention for the High Sea Fisheries of the North Pacific Ocean.' A novel feature of the proposed treaty were provisions for abstention of some of the parties from fishing in specified areas left open to fishing by the other parties. In addition, the Treaty contains provisions for conservation measures to apply to all parties if accepted by them on the recommendation of a Commission to be established in accordance with the Treaty.²

Fisheries
in the
North-
West
Atlantic.

§ 284a. The Convention of February 8, 1949, for the North-West Atlantic Fisheries provided machinery not only for investigation of the stock of fish in the area (subdivided into sub-areas for administrative purposes) covered by the Convention, but also for essential regulation in cases in which investigation shows such regulation to be desirable. However, such regulation is subject to the agreement of all States represented on the commission (panel) concerned with any given sub-area.³

Fisheries
around
the Farøe
Islands
and
Iceland.

§ 285. For the purpose of regulating the fisheries outside territorial waters around the Farøe Islands and Iceland, Great Britain and Denmark signed on June 24, 1901, the Convention of London,⁴ whose stipulations are for the most part literally the same as those of the North Sea Fisheries

¹ *A.J.*, 32 (1938), Suppl., p. 65. See, as to these treaties and other treaties for the protection of the North Pacific Fisheries, Ireland in *A.J.*, 36 (1942), pp. 406-424. And see generally on the Alaskan salmon fisheries Leonard, *op. cit.*, pp. 121-136. In 1940 Canada and the United States concluded the Great Lakes Fishery Agreement: U.S. Executive Agreements Series, No. 182, Leonard, *op. cit.*, pp. 115-120. See also Homer and Barnes, *North Pacific Fisheries* (1939). For examples of concurrent national regulation giving effect to these treaties, see the Canadian Act of 1930 respecting the Convention relating to sockeye salmon fisheries, and the United States Act of 1947; the Canadian Northern Pacific Halibut Fishery Act of 1937; and the Regula-

tions of the International Fisheries Commission concerning Halibut Fisheries approved by the President of the United States in 1949 (*Laws and Regulations on the Régime of the High Seas*, U.N. Publication, 1951, vol. 1., pp. 200-222).

² See Allen in *A.J.*, 46 (1952), pp. 319-323, and Belak, *ibid.*, pp. 323-330.

³ For the text see *A.J.*, 45 (1951) Suppl. p. 40; Treaty Series No. 62 (1950), Cmd. 8071. The Convention was signed by France, Italy, Norway, Portugal, Spain, Canada, Denmark, Iceland, the United Kingdom and the United States. By 1951 it had been ratified by the five last-mentioned States.

⁴ See Martens, *N.F.G.*, 2nd ser., 33 (1906), p. 268; Treaty Series No. 5 (1903), Cmd. 5494.

Convention, concluded at The Hague in 1882.¹ An additional article of the Convention of London stipulates that any other State whose subjects fish around the Farøe Islands and Iceland may accede to it.²

§ 285a. On September 24, 1931, a widely signed convention was concluded for the Regulation of Whaling.³ Regulation of Whaling. It laid down that licences are required for vessels engaged in whaling, and that the contracting parties are bound to supply relevant information to the International Bureau for Whaling Statistics at Oslo. A further agreement for the regulation of whaling was signed on June 8, 1937,⁴ and supplemented by Protocols signed in London on June 24, 1938,⁵ and February 7, 1944.⁶ The Convention for the Regulation of Whaling of December 2, 1946,⁷ consolidates

¹ See above, § 282. And see Gidel, pp. 422-432.

² In 1943 an International Fisheries Conference met in London at the invitation of the British Government and adopted a Draft Convention (Misc. No. 5 (1943), Cmd. 6496) relating to the policing of fisheries and measures for the protection of immature fish. The Conference was attended by representatives of Belgium, Canada, Denmark, Eire, France, Iceland, the Netherlands, Newfoundland, Norway, Poland, Portugal, Spain, Sweden, and the United Kingdom. The Draft Convention was intended to replace by a single Convention the Anglo-French Convention of 1839 on the Oyster and Other Fishery on the Coasts of Great Britain and France (*British and Foreign State Papers*, 27, p. 983; Leonard, *op. cit.*, pp. 34-42), the North Sea Fisheries Convention (see above, § 282), the Farøe Islands and Iceland Convention of 1901 (see above, § 285), and the Agreement of 1937 for the regulation of meshes of fishing nets (see above, p. 620, n. 1). See also Final Act and Convention of the International Overfishing Conference, 1945. Cmd. 6791.

³ *A.J.*, 30 (1936), Suppl., p. 167. Treaty Series, No. 33 (1934), Cmd. 4751. The Convention was ratified by Great Britain in October 1934. It entered into force in January 1935. See Whaling Industry (Regulation)

Act, 1934 (24 and 25 Geo. 5, c. 49), and the Whaling Industry (Ship) Regulations, 1934 (S.R. & O., No. 961). And see Raestad in *R.I. (Paris)*, 2 (1928), pp. 595-642; Jessup in *Hague Recueil*, 29 (1929) (iv.), pp. 161-503; Wolgast in *Z.V.*, 21 (1937), pp. 151-172, and 23 (1939), pp. 1-22; Vallance in *A.J.*, 31 (1937), pp. 112-119; Leonard in *A.J.*, 35 (1941), pp. 90-113.

⁴ Cmd. 5487 (1937), *A.J.*, 34 (1940), Suppl., p. 108. Hudson, *Legislation*, vii p. 754. It entered into force on May 7, 1938, after having been ratified by Great Britain, the United States, Germany, Eire, New Zealand, and Norway; Canada and Mexico acceded.

⁵ *A.J.*, 34 (1940), Suppl., p. 115; Hudson, *Legislation*, vii p. 762. The Convention of 1937 is of wider scope than that of 1931 and applies also to grey whales.

⁶ This Protocol was intended to regulate whaling for the first season in which whaling operations were resumed after the cessation of hostilities. It provides that the number of baleen whales caught . . . shall not exceed 10,000 blue whale units: *Parl. Papers*, Misc. No. 1 (1944), Cmd. 6510.

⁷ The Convention entered into force in 1948 after ratifications had been deposited on behalf of Australia, the Netherlands, Norway, South Africa, Soviet Russia, United Kingdom and United States. For the text see

previous agreements on the subject. It prohibits the taking or killing of grey whales or right whales as well as calves or suckling whales or female whales which are accompanied by calves or suckling whales. It also forbids to use a factory ship or whale catcher attached thereto for the purpose of taking or treating baleen or humpback whales in the areas specified in the Convention. It provides for the establishment of an International Whaling Commission entrusted with the task of conducting studies and collecting and disseminating information as well as of amending the provisions of the Convention with regard to determining the categories of protected species, open and closed fishing areas, methods and intensity of whaling, type and specification of permitted gear and apparatus, and the like. However, these amendments are not binding upon those Contracting Parties which object to them.

Inter-
national
Regula-
tion of
Fisheries.

§ 285b. Notwithstanding the increase in the number of treaties, both multilateral and bilateral,¹ regulating fisheries on the high seas, it is probable that only the conferment of an overriding power of regulation upon some international authority may be able to cope successfully with what is both a problem of considerable economic importance and an actual and potential cause of international friction. Although commissions and other bodies have been set up for that purpose in various treaties, the recommendations of such bodies are not, as a rule, binding upon the parties unless voluntarily accepted by them.² Moreover, such regulations are not binding upon States which are not parties to the treaties in question and which accordingly may be in the position to frustrate the purpose of the regime thus set up. Also, apart from the still uncertain emanations of the doctrine of abuse of rights,³ there appears to be nothing to prevent a State from wasteful or predatory conduct, through the activities of its nationals, on the high seas in the neigh-

Treaty Series No. 5 (1949). Cmd 7604; A.J., 43 (1949), Suppl. p. 174

¹ For an instance of the latter see the Agreement of April 13, 1949, between Italy and Yugoslavia (*Laws and Regulations on the Régime of the High Seas*, U.N. Publication, 1951,

vol. I., p. 241). And see above, §§ 284, 284a.

² See § 284 as to the North-West Atlantic Fisheries Convention and § 285a as to the Convention for the Regulation of Whaling.

³ See above, § 155aa.

bourhood of the coasts of other States. For those reasons the proposals, recounted above,¹ for an obligatory international regulation of fisheries on a general or regional² basis, far from being confined to coastal fisheries, appear to be of general application³

VII

TELEGRAPH CABLES IN THE OPEN SEA

Hyde i § 211—L'auchoille §§ 483 (29) 483 (34) Pradier Fodere v § 2548 — Merignhac, ii p 532 Hackworth ii §§ 349 352 Vis ii pp 210 211—Rivier i pp 214 386 Fricte ii § 822 and *Code* §§ 1139 1142 Lauterbach *Die Beschädigung unterseeischer Telegraphenkabel* (1889) Landin *Zur Lehre vom völkerrechtlichen Schutz der submarinen Telegraphenkabel* (1894) Jouhannaud *Les cables sous-marins* (1904) Renault in *R.I.* 12 (1886) p 251, 15 (1883) p 17 *id.* i pp 415 421—Higgins and Colombo §§ 327 326 *Annuaire* 33 (1927) i pp 171 190 and (1927) iii pp 296 209 and Resolution of the Institute of International Law in 4 *J.* 21 (1927) pp 728 729 and *ibid.* 22 (1928) Special Suppl. p 338 See also the literature quoted below at commencement of § 214

§ 286 It is a consequence of the freedom of the open sea that no State can prevent another from laying telegraph and telephone cables in any part of the open sea, whereas no State need allow this within its territorial maritime belt. As in course of time numerous submarine cables were laid, the question as to their protection arose. Already in 1869 the United States proposed an international convention for this purpose but the matter was dropped in consequence of the outbreak of the Franco Prussian war. The Institute of International Law took up the matter in 1879⁴ and recommended an international agreement. In 1882 France issued invitations to an international con-

Telegraph
Cables in
the Open
Sea per
mitted

¹ See above §§ 155*aa* (p 346 n 5), 294 285*a*

² See e.g. the Agreement for the Establishment of a General Fisheries Council for the Mediterranean of September 24, 1949 signed by France, Greece, Italy, the Lebanon, Turkey, the United Kingdom and Yugoslavia. Treaty Series No 15 (1952) Cmd 8508. There exists also an Indo-Pacific Fisheries Council and a Latin American Fisheries Council. There

are also bilateral arrangements. On January 25 1940 the United States and Mexico signed a Convention for the Establishment of an International Commission for the Scientific Investigation of Tuna. 1 *J.* 45 (1951) Suppl. p 51 and see below, p 997 (Appendix)

³ For the literature on the subject see above § 281

⁴ See *Annuaire*, in 351 394

ference at Paris for the purpose of regulating the protection of submarine cables. This conference met in October 1882, and again in October 1883, and produced the International Convention for the Protection of Submarine Telegraph Cables which was signed at Paris on March 14, 1884,¹ by Great Britain and twenty-five other States.

Inter-
national
Protec-
tion of
Sub-
marine
Telegraph
Cables

§ 287. Its principal provisions are as follows :

(1) Intentional or culpably negligent breaking or damaging of a cable in the open sea is to be punished by all the signatory Powers,² except in the case of such damage having been caused in the effort of self-preservation (Article 2).

(2) Ships within sight of buoys indicating cables which are being laid, or which are damaged, must keep at least a quarter of a nautical mile distant (Article 6).

(3) For dealing with infractions of the interdictions and injunctions of the treaty the courts of the flag State of the infringing vessel are exclusively competent (Article 8).

(4) Men-of-war of all signatory Powers have a right to stop and verify the nationality of merchantmen of all nations which are suspected of having infringed the regulations of the treaty (Article 10).

(5) All stipulations are made for the time of peace only, and in no wise restrict the action of belligerents during time of war.³

VIII

WIRELESS COMMUNICATION ON THE OPEN SEA

Higgins in Hall, § 42b—Hyde, i. §§ 192, 193—Fauchille, §§ 531 (22)-531 (35)—Despagne, 433 *quater*—Gidel, i pp 515 519 Mehl, *Die drahtlose Telegraphie*, etc. (1908) Schnech, *Drahtlose Telegraphie und Völkerrecht* (1908) — Landsberg *Die drahtlose Telegraphie* (1909) Kansen *Die drahtlose Telegraphie im Völkerrecht* (1910) — Thurn, *Die Funkentelegraphie im Recht* (1913)—Devaux, *La Télégraphie sans fil* (1914) Loxwengard, *Die internationale Radiotelegraphie im internationalen Recht* (1915) Rolland in *R.G.*, 13 (1906), pp 55 92 Fauchille in *Annuaire* 21 (1906) pp 76 87 Meurer and Bordin in *R.G.* 16 (1909), pp. 76 and 261 Haglstone *Law of*

¹ See Martens, *N.R.G.*, 2nd ser., 11, p. 481, and Tafel in *Z.I.*, 37 (1927), pp. 210-222. For a suggestion of an international system of telegraph cables, see Catellani in *Rivista*, 2nd ser., 7 (1918), pp. 161, 162. The Convention of 1884 was revived as regards Germany by Article 282 of

the Treaty of Peace of 1919.

² See the Submarine Telegraph Act, 1886.

³ See below, vol. II § 214; and see too awards of a British-American Claims Commission upon incidents occurring in the Spanish-American War: *A.J.*, 18 (1924), pp. 835-846.

the Air (1911), pp. 97-102—Higgins and Colombos, §§ 320-324. —Stewart in *A.J.*, 22 (1925), pp. 28-49.

§§ 287a and 287b. As the result of international conferences in Berlin in 1906 and London in 1912 three important International Radiotelegraphic Conventions² were signed and ratified by a large number of States, including Great Britain. The Convention of 1912 provides for the reciprocal exchange of radiotelegrams between ship stations and between 'coast stations' and 'ship stations' controlled by the contracting parties and the linking up of the coast stations with the general inland telegraphic systems, without distinction based upon the radiotelegraphic system adopted. Absolute priority is given to distress calls.³ The Convention of 1948 for the Safety of Life at Sea includes a comprehensive chapter on radiotelegraphy and radiotelephony.⁴ The administrative work is undertaken by the International Telegraph Office at Berne. In 1927, at a conference at Washington, a new International Radiotelegraph Convention with a set of Annexed Supplementary Regulations was concluded by the representatives of seventy-five Governments.⁵ It defines 'radio communication' as 'the transmission by radio of writing signs, signals, pictures, and sounds of all kinds by means of Hertzian waves,' and applies to all radio stations open to the international service of public correspondence, and thus greatly extends the scope of the earlier conventions.⁶

¹ As to communication over land see above, §§ 174 and 197f.

² Martens, *N.R.G.*, 3rd ser., 3, p. 147; *ibid.*, p. 158; and, for the Convention of 1912, Martens, *N.R.G.*, 3rd ser., 11, p. 270, and Treaty Series, No. 10 (1913). And see Article 264 of the Treaty of Peace with Germany (1919), and Article 236 of the Austrian Treaty (1919).

³ For instance, it was possible before 1906 for the following case (see Hazeltine, *op. cit.*, p. 101), to which the delegate of the United States drew the attention of the Berlin Conference, to occur in relation to a ship belonging to a State which had not signed the Additional Convention. The American steamer *Lebanon* had received orders to search the Atlantic for a wrecked vessel which offered great danger to navigation. The *Lebanon* came within communicating reach of the liner *Vaderland*, and inquired by wireless telegraphy whether the *Vaderland* had seen the wreck. The *Vaderland* refused to reply to this question, on the ground that she was not permitted to enter into communication with a ship provided with a wireless apparatus other than the Marconi.

⁴ See above, § 265.

⁵ See above, § 265.

⁶ *L.N.T.S.*, vol. 84, p. 97; Hudson, *Legislation*, iii, p. 2197; *A.J.*, 23 (1929), Suppl., p. 40. And see above, § 197f.

⁷ See Stewart in *A.J.*, 22 (1928), pp. 28-49.

IX

THE SURFACE OF THE BED OF THE OPEN SEA

Westlake, i. pp. 190, 191—Lindley, pp. 68, 69—Fauchille, §§ 483 (6), 483 (7), 483 (35)—Verdross, pp. 220-221—Smith, ii. pp. 118-123—Gidel, i. pp. 498-500, 507 *et seq.*—Hurst in *B.Y.*, 1923-1924, pp. 34-43 *International Law Assoc. Report*, 45 (1952), pp. 143-178. See also some of the literature cited above, § 281, and below, § 287d

The Sur-
face of
the Bed
of the
Open Sea.

§ 287bb. As natural resources become more and more exhausted and as scientific invention and engineering skill advance, it may be expected that mankind will devote increasing attention to the exploitation of the surface¹ of and the subsoil beneath the bed of the open sea. The subsoil is considered in the following paragraph. The question whether the former is capable of occupation is at present controversial. There has been a tendency in the past to assume that the surface of the bed upon which the open sea rests must be likened in legal condition to the waters of the open sea themselves. But when regard is had to the arguments which brought about the abandonment of the former claims to occupy the waters of the open sea, namely, the argument in the words of Grotius that *occupatio non procedit nisi in re terminata* (a theoretical reason), and the argument that the freedom of the waters of the open sea is essential to the freedom of intercourse between States (the main practical reason), it must be conceded that these reasons do not apply to the surface of the sea-bed or to its subsoil. In fact there exist numerous cases in which States habitually exploit through the activity of their nationals the resources of the surface of the sea-bed.² Although it is traditional to base some of these cases on the ground of prescription, it is not inconsistent with principle, and is more in accord with practice, to recognise that, as a matter of law, a State may acquire, for sedentary fisheries and for other purposes, sovereignty and property in the surface of the sea-bed, provided that in so doing it in

¹ Among the commodities at present obtained from the surface of the sea-bed may be mentioned oysters

and other shell-fish, pearls, sponges, coral, amber, chalk.

² See Hurst, *op. cit.*

no way interferes with freedom of navigation and with the breeding of free-swimming fish.¹ This is a case in which the requirement of effectiveness of occupation must be interpreted by reference to the reason of the thing and to the judicial and arbitral pronouncements in which such effectiveness is treated as a matter of degree determined by the nature of the area in question.² In so far as the right of the State to the continental shelf appurtenant to its territory has come to be recognised by International Law, such right extends both to the subsoil of the sea and to its bed.³

X

THE SUBSOIL BENEATH THE BED OF THE OPEN SEA

See most of the literature cited above, § 278bb—Lindley, pp. 69-71—Gidel, i. pp. 507-514—Sybert, pp. 671-673—*International Law Association Report* (Report by Feith), 43 (1948), pp. 168-206; 44 (1950), pp. 87-138—Lauterpacht in *B.Y.*, 27 (1950) pp. 394-403—Waklock in *Grotius Society*, 36 (1950), pp. 117-121.

§ 287c. The subsoil beneath the bed of the open sea requires special consideration, on account of coal or other mines, tunnels, and the like, as well as in relation to the rights in the continental shelf.⁴ If the subsoil beneath the bed of the open sea stood in the same relation to the open sea as the subsoil beneath the territory of a State stands to that territory,⁵ all rules concerning the open sea would necessarily have to be applied to the subsoil beneath its bed, and no part of this subsoil could ever come under the territorial supremacy of any State. However, it would not be rational to regard the subsoil beneath the bed of the open sea as an inseparable appurtenance of the open sea, in the same way as the subsoil beneath the territorial land and water is an appurtenance of such territory. The rationale of the open

Rules concerning the Subsoil beneath the Bed of the Open Sea

¹ See to the same effect Westlake, Fauchille, Hurst, *op. cit.*, and Verdross, p. 221; but see Lindley, *op. cit.* As to the Ceylon pearl fishery see above, p. 618, n. 1. For an instance of a regulation of oyster fisheries in the open sea without any assertion of sovereignty, see the Declaration signed by Great Britain and France on September 29, 1923: Treaty

Series, No. 31 (1923), Cmd. 1996; *L.N.T.S.*, 21, p. 138. See also Smith, n. pp. 142-164.

² See above, § 225.

³ See below, § 287d.

⁴ See below, § 287d.

⁵ See above, §§ 173, 175. As to the subsoil of territorial waters see Gidel, *ibid.* pp. 326-332.

sea being free and for ever excluded from occupation on the part of any State is that it is an international highway which connects distant lands and thereby secures freedom of communication, and especially of commerce, between States separated by the sea.¹ There is no reason whatever for extending this freedom of the open sea to the subsoil beneath its bed. On the contrary, there are practical reasons—having regard to the construction of mines, tunnels, and the like—which, apart from the wider issue involved in the now recognised claim to the continental shelf, compel recognition of the fact that this subsoil can be acquired through occupation. The following five rules, which are not exhaustive, commend themselves with regard to this more limited aspect of the question.²

(1) The subsoil beneath the bed of the open sea is no man's land, and it can be acquired on the part of a littoral State through occupation, starting from the subsoil beneath the bed of the territorial maritime belt.

(2) This occupation takes place *ipso facto* by a tunnel or a mine being driven from the shore through the subsoil of the maritime belt into the subsoil of the open sea.

(3) This occupation of the subsoil of the open sea can be extended up to the boundary line of the subsoil of the territorial maritime belt of another State, for no State has an exclusive claim to occupy such part of the subsoil of the open sea as is adjacent to the subsoil of its territorial maritime belt.

(4) An occupation of the subsoil beneath the bed of the open sea for a purpose which would endanger the freedom of the open sea is inadmissible.

(5) It is likewise inadmissible to make such arrangements in a part of the subsoil beneath the open sea which has previously been occupied for a legitimate purpose as would indirectly endanger the freedom of the open sea.

If these five rules are correct, there is nothing to prevent coal and other mines which are being exploited on the shore of a littoral State from being extended into the subsoil beneath the open sea up to the boundary line of the subsoil beneath the territorial maritime belt of another State. Further, a tunnel which might be built between two parts of

See above, § 259.

² As to the continental shelf see below, § 287d.

the same State separated by the open sea—for instance, between Northern Ireland and Scotland—would fall entirely under the territorial supremacy of the State concerned. On the other hand, for a tunnel between two different States separated by the open sea—as, for instance, the proposed Gibraltar tunnel between the Spanish coast and either Tangier or Ceuta—special arrangements would have to be made by treaty with regard to the territorial supremacy over that part of the tunnel which runs under the bed of the open sea.¹

§ 287d. Following upon the Proclamation of the President of the United States of September 28, 1945, a number of States have asserted rights to the so-called continental shelf. In that Proclamation² the Government of the United States declared the natural resources of the subsoil and sea-bed of the continental shelf described 'as an extension of the land-mass of the coastal nation and thus naturally appur-

The
Conti-
nental
Shelf.

¹ *The Proposed Channel Tunnel.*

It is of interest to give some details concerning the project of a Channel Tunnel between Dover and Calais (see Oppenheim in Z.V., 2 (1908), pp. 1-16; Robin in R.G., 15 (1908), pp. 50-77; Hatschek, p. 210; Verdross, p. 221; Fauchille, §§ 483 (35) 483 (38); Lindley, p. 70; Gairn, *La question du tunnel sous la Manche* (1933)). Already some years before the Franco-Prussian War the possibility of such a tunnel was discussed, but it was not until 1874 that the first preliminary steps were taken. The subsoil of the Channel was geologically explored, plans were worked out, and a shaft of more than a mile long was tentatively bored from the English shore. In 1876 an international commission, appointed by the British and French Governments and comprising three French and three British members, made a report on the construction and working of the proposed tunnel (see *Parl. Papers*, C. 1876, Report of the Commissioners for the Channel Tunnel and Railway, 1876). The report enclosed a memorandum, recommended by the commissioners as a basis for a treaty between Great Britain and France concerning the tunnel. In spite of this elaborate preparation the project

could not be realised, since public opinion in Great Britain was for political reasons opposed to it. And although repeated attempts were made both before and after the First World War to revive popular interest in the project, no progress has been made (see Fell, *The Position of the Channel Tunnel Question in May 1914* (1914), and *The Channel Tunnel, its Position in October 1921* (1921)). The rapid development of aviation is radically changing the problem. For an expression of British official opinion see the Statement of the Prime Minister (Mr. J. Ramsay MacDonald) in the House of Commons on July 7, 1921; Hansard, Commons, 1924, vol. 175, columns 1782-1786. And see for the Statement of Policy of the British Government of June 4, 1930, regarding the Channel Tunnel, (1930), Cmd. 3591; *British and Foreign State Papers*, 134, p. 1.

² For the text see A.J., 40 (1946), Suppl. p. 47, and *Laws and Regulations on the Régime of the High Seas* (published in 1951 by the United Nations), vol. i., p. 38. In the latter volume there will be found, on pp. 3-44 and 299-305, the relevant proclamations of most other States.

tenant to it'—beneath the high seas but contiguous to the coasts of the United States to be subject to its jurisdiction and control. Similar proclamations were subsequently issued under the responsibility of the United Kingdom by certain States under its protection¹ and by a large number of other States,² including Argentina, Chile and Peru. While in most cases the relevant proclamations expressly disclaimed the intention to affect the status of the high seas and the superincumbent air space, the three last-mentioned States, as well as some other Latin American States,³ combined the assertion of rights to the continental shelf with wide, though somewhat indefinite, claims to the sea above it. These claims, which must be regarded as having no foundation in International Law, have met with protests on the part of the principal maritime Powers.⁴

The reasons which have inspired the conception of the freedom of the sea and which assisted in its development are not, it is asserted, in conflict with the recognition of the rights of the coastal State to exclusive exploitation of the

¹ Namely, various Arab Sheikdoms in the Persian Gulf, including Bahrain, Kuwait, Abu Dhabi and Qatar—all issued in 1949. Previously, in a Treaty of February 26, 1942, with Venezuela relating to the submarine areas of the Gulf of Persia (Treaty Series, No. 10 (1942), Cmd 6400) the two countries agreed to recognise rights of sovereignty or control which may be acquired by either of them in the submarine areas of the Gulf of Persia as delineated by the Treaty. Proclamations of the continental shelf or instruments of a like nature were also issued by British authorities in the Bahamas (1945), Trinidad (1945), Jamaica (1948) and British Honduras (1949).

² These include, in addition to those mentioned in the text: Mexico (1945), Panama (1946), Costa Rica (1948), Iceland (1948), Guatemala (1949), the Philippines (1949), Saudi Arabia (1949), Honduras (1950), Brazil (1950), Pakistan (1950), El Salvador (1950), Yugoslavia (1950), Israel (1953), Australia (1953). Some of the proclamations and enactments are limited to fisheries, as was the Portuguese

Law of 1910 in which the equivalent of the expression 'continental shelf' is used throughout (*Laus and Regulations on the Regime of the High Seas*, vol. i. (1951), p. 19).

³ Thus the Constitution of El Salvador of 1950 lays down that the territory of the Republic 'includes the adjacent seas to a distance of two hundred nautical miles from low-water mark and comprises the corresponding aerial space, subsoil and continental shelf.'

⁴ The protests of the United States and of the United Kingdom, respectively, against the proclamations or enactments of Peru, Chile, Honduras, Yugoslavia, Ecuador, Costa Rica, El Salvador, Saudi Arabia, Argentina and Iceland will be found in *Laus and Regulations on the Regime of the High Seas*, vol. i. (1951) and *International Court of Justice, Anglo-Norwegian Fisheries case, Pleadings, Oral Arguments, Documents*, vol. 2, pp. 743, 747, 750, and vol. 4, pp. 574, 583, 589, 592, 596 and 601. Some of these protests had reference to the limit of territorial waters fixed in connection with the continental shelf.

natural resources of the sea-bed and the subsoil of the continental shelf. The direct proximity of the coastal State ; the fact that the continental shelf constitutes a natural prolongation of its territory and that the mineral deposits of the shelf and of the mainland may form a common pool ; the special interest of the coastal State in the exploitation of the resources of the continental shelf ; the circumstance that it is, geographically, in the best position to do so ; and its legitimate reluctance to permit other States to establish themselves, for that purpose, in the direct proximity of its coast — all these factors, it is said, substantiate the reasonableness of the claim of the coastal State to these areas. Whatever may be the deductions made by writers from the notion of the freedom of the sea in relation to its sea-bed and subsoil, such deductions cannot, according to some, prevail in relation to the possibilities, revealed by modern science and developments, of exploiting the resources of the bed of the sea and its subsoil. It is, on that view, consonant with the nature of things that the conception of effectiveness as a condition of possession or acquisition of title should in this case be applied only in a general and substantially figurative manner — as, indeed, it has been applied in the past to some situations relating to title to territory.¹

While the geographical notion of the continental shelf — conceived as the submarine areas contiguous to the coast up to a point where the sea is more than two hundred metres deep — may give rise to difficulties,² and although it introduces a measure of actual inequality as between various States,³ it has now become widely accepted and is believed

¹ See above, § 225.

² Thus, for instance, in some areas — as in the Persian Gulf — there exists no continental shelf proper inasmuch as the sea does not reach a depth of two hundred metres (six hundred feet).

³ In some countries the continental shelf ends abruptly near the coast. In its Report (see below, p. 635) the International Law Commission pointed out that although the depth of two hundred metres as a limit of

the continental shelf must be regarded as the general rule, it is a rule which is subject to equitable modifications in special regions in which submerged areas, of a depth less than two hundred metres, situated in considerable proximity to the coast are separated by a narrow channel, deeper than two hundred metres, from the part of the continental shelf adjacent to the coast. In such cases, it was stated, the shallow areas must be regarded as contiguous to that part of the shelf.

to express accurately the notion of coastal submarine areas as constituting the natural seaward extension of the territory of the State.

It probably matters little whether the rights of the coastal State in the continental shelf are described as exclusive rights of exploitation and exploration of the natural resources¹ of the sea-bed and its subsoil, or exclusive jurisdiction for the purpose of exploration and exploitation of such resources, or rights of sovereignty, or sovereign rights either generally or as limited to such exploration and exploitation.² Neither, it has been maintained, is there any compelling legal reason for limiting such rights to the subsoil of the continental shelf as distinguished from the bed of the sea so long as the assertion of such rights is not used as a device for encroaching upon freedom of navigation and

¹ Although the proclamations of the continental shelf had their origin in the desire to secure the exploitation of a mineral source of wealth, namely petroleum, it has been asserted, the general reasons underlying the recognition of the right of States to the sea-bed and subsoil of the continental shelf do not require any limitation of such rights to mineral resources. On that view, such rights extend to natural resources in the wider sense—provided their exploitation does not interfere with the rights of other States in respect of swimming fish even if their regular habitat or breeding periods occur on the bed of the sea. To that extent the recognition of the rights of the coastal State over the bed of the sea may render to a large extent obsolete, in respect of States validly claiming rights over the continental shelf, the conception of sedentary fisheries as an exceptional extension of the rights of the State (above, § 281). For sedentary fisheries are normally located on the bed of the sea—although it is conceivable that shallow sea areas permitting the exploitation of sedentary fisheries may be situated outside the continental shelf. There is agreement that with respect to sedentary fisheries the assertion of the right over the sea-bed within the continental shelf ought not to result in a deprivation of acquired

rights of foreign nationals.

² In this connection reference may be made to two cases decided by the Supreme Court of the United States in the matter of the respective rights of the United States and its member-States with regard to the ownership of the resources of the subsoil of territorial waters and of waters outside them. As to the first see *U.S. v. California* (above, p. 502, n. 3). As to the second see *U.S. v. Texas* (1950) 339 U.S. 707, where it was held, by a bare majority of the Court, that considerations of national defence and of the conduct of foreign affairs require that the title to and jurisdiction over the resources of the subsoil outside the territorial waters be deemed to be vested in the United States. For a discussion of what has been described as the 'tidelands controversy' see a series of articles in *Baylor Law Review*, 3 (1951), p. 115-335. See also Bartley, *The Tidelands controversy* (1953), Hardwick, Illig and Patterson in *Texas Law Review* 26 (1948), p. 394, and comment in *Yale Law Review*, 56 (1947), p. 350, and in *Michigan Law Review*, 50 (1951), p. 111. For the possible impact, on this question, of the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries case* see *I.C.J.Q.*, 1 (1952), pp. 213-216.

fishing on the high seas or for interfering with legitimate scientific investigations. In 1953 the International Law Commission, after prolonged study, adopted Draft Articles on the continental shelf designed mainly to safeguard the traditional principle of the freedom of the sea in relation to legitimate requirements of exploration and exploitation of the natural resources of the continental shelf.¹ To that extent these Articles provide an instructive example of a combination of the functions of codification and development of International Law.²

¹ After laying down that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources and that such rights do not affect the legal status of the superincumbent sea or of the air-space above it, the Draft provides, in Article 6, as follows:

'1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production.

2 Subject to the provisions of paragraph 1 and 5 of this article the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources and to establish safety zones at a reasonable distance around such installations and to take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained.

5. Neither the installations themselves, nor the said safety zones round

them may be established, in narrow channels or on recognised sea lanes essential to international navigation.'

² The following is a selection from the extensive literature on the subject: *Memorandum of the Secretary General of the United Nations on the High Seas* (Doc. A/CN.4/32) (prepared by Gidel), Mouton, *The Continental Shelf* (1952) (a comprehensive monograph); Azcarraga, *La plataforma submarina y el derecho internacional* (1952), Borchard in *A.J.*, 40 (1946), pp. 53-70, Vallat in *B.Y.*, 23 (1946), pp. 333-338, Young in *A.J.*, 42 (1948), pp. 840-857, 45 (1951), pp. 225-239 and 46 (1952), pp. 123-128; *International Law Association Report*, 43 (1948) pp. 168-206, and 44 (1950), pp. 87-138, Hurst in *Grotius Society*, 34 (1948) pp. 153-169, Waldo, *ibid.*, 36 (1950), pp. 115-148, Lauterpacht in *B.Y.*, 27 (1950), pp. 376-433; Biscottini in *Studi e Comunicazioni* 3 (1950), pp. 119-158; Johnson in *I.L.Q.* 4 (1951), pp. 445-453; Green in *Current Legal Problems*, 4 (1951), pp. 54-60, Delgado in *Revista Peruana*, 12 (1952), pp. 159-241; Bingham in *Southern California Law Review*, 1952; *Report of the International Law Commission*, 1953. See also the detailed and scholarly award given in 1951 by Lord Asquith in the *Abu Dhabi* arbitration: *I.L.Q.*, 1 (1952), p. 247. And see Annino, *The Continental Shelf and Public International Law* (1953).

CHAPTER III

INDIVIDUALS

I

POSITION OF INDIVIDUALS IN INTERNATIONAL LAW

Hyde, i. § 342—Heffter, § 38—Verdross, § 35 Fauchille, §§ 397, 397 (1)—Pradier Fodéré, i. §§ 43-49—Fiore, i. §§ 684-712—Anzilotti, pp. 65-68, 73-75—Martens, i. §§ 85, 86—De Louter, i. pp. 259-264—Cruchaga, §§ 338-345—Sibert, pp. 427-435—Balladore Palieri, pp. 167-190, 277-279, 457-473, and the same, *La natura giuridica internazionale della potestà dello Stato sugli individui* (1932)—Jellinek, *System der subjectiven öffentlichen Rechte* (1892), pp. 310-314—Heilborn, *System*, pp. 58-138—Kaufmann, *Die Rechtskraft des internationalen Rechts* (1899)—Bunovino, *Diritto e personalità giuridica internazionale* (1910)—Borchard, §§ 7-10—Meier, *Der Staatsangehörige und seine Rechte* (1927)—Σπιτοπουλος *L'individu et le droit international* (1928)—Segal, *L'individu en droit international positif* (1932)—Fenékides, *L'individu dans l'ordre juridique international* (1933)—Jessup, *A Modern Law of Nations* (1948), pp. 68-93—Spertutti, *L'individuo nel diritto internazionale* (1950)—Kohler in *Z.I.*, ii. (1908) pp. 209-230—Diena in *R.G.*, 16 (1909), pp. 57-76—Cavaglieri in *Rivista*, 17 (1925), pp. 18-32, 109-187—Hamburger in *Z.I.*, 36 (1926), pp. 117-196—Akzin in *R.I. (Paris)*, 4 (1929), pp. 451-489—Bourquin in *Hague Recueil*, 35 (1931) (i.), pp. 33-47—Hostie, *ibid.*, 40 (1932) (ii)—Herz in *Théorie du droit*, 10 (1936), pp. 100-111—Dumas in *Hague Recueil*, 59 (1937) (i.), pp. 7-93—Lauterpacht in *Grotius Society*, 29 (1943), pp. 1-33—Idelson, *ibid.*, 30 (1944), pp. 51-66—Mander in *A.J.*, 46 (1952), pp. 128-449—Weguer in 'Gegenwartsprobleme,' *Laun Festschrift* (1953), pp. 341-365. And see the literature referred to above § 13a, and below, §§ 340k and 340l, on the international protection of the rights of man.

Importance of Individuals to the Law of Nations.

§ 288. The individuals belonging to a State can, and do, come in various ways in contact with foreign States in time of peace as well as of war. Moreover, apart from being nationals of their States, individuals are the ultimate objects of International Law—as they are, indeed, of all law. These are the reasons why the individual is often the object of international regulation and protection.

Individuals as Subjects of the Law of Nations.

§ 289. Since the Law of Nations is primarily a law between States, States are, to that extent, the only¹ subjects of the Law of Nations. How is it, then, that, although individuals are not normally subjects of the Law of Nations, they have

¹ See above, §§ 13 and 63.

certain rights and duties in conformity with, or according to, International Law? Have not monarchs and other Heads of States, diplomatic envoys, and even private citizens, certain rights according to the Law of Nations whilst on foreign territory? The answer to these questions is that, as a rule, what the Law of Nations really does concerning individuals is to impose upon all States the duty to grant certain privileges to such foreign Heads of States and diplomatic envoys, and certain rights to such foreign citizens, as are on their territory. And, as corresponding to this duty, every State has by the Law of Nations a right to demand that its Head, its diplomatic envoys, and its citizens be granted certain rights by foreign States when on their territory. Foreign States granting these rights to foreign individuals do this by their Municipal Laws, and these rights are, to that extent, not international rights but rights derived from Municipal Laws. International Law is indeed the background of these rights, in so far as the duty to grant them is imposed upon the several States by International Law. It is therefore quite correct to say that individuals have these rights in conformity with, or according to, International Law, provided it is remembered that, as a rule, these rights would not be enforceable before national courts had the several States not created them by their Municipal Law.

The same applies as regards special rights of individuals in foreign countries according to treaties between two or more States. Although such treaties generally speak of rights which individuals shall have as derived from the treaties themselves, this is, as a rule, not the normal position under the municipal law of States. In fact, such treaties do not normally create these rights, but they impose the duty upon the contracting States of calling these rights into existence by their Municipal Laws.¹ Again, where States

¹ Jellinek, *System der subjectiven öffentlichen Rechts* (1892), pp. 310-314; Heilborn, *System*, pp. 58-138, and Anzilotti, pp. 50-59, stress this aspect of the matter. But see Diena in *R.G.*, 16 (1909), pp. 57-76; Rehm

and Adler in *Z.V.*, 1 (1907), pp. 53, 614; Liszt, § 7 (i.); Kohler in *Z.V.*, 2 (1908), pp. 209-230. See also the writers enumerated above, § 13a.

stipulate by international treaties certain benefits for individuals other than their own subjects, these individuals do not, as a rule, acquire any international rights under these treaties,¹ but the State whose subjects they are has an obligation towards the other States of granting such favours by its Municipal Law. But although this is the normal and most convenient procedure, States may, and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights *stricto sensu*, i.e. rights which they acquire without the intervention of municipal legislation² and which they can enforce in their own name before international tribunals.³ Moreover, the quality of indi-

¹ As laying down the principle that in concluding treaties the Crown does not act as trustee of the subject and that therefore the latter has no legal right to any compensation provided for in a treaty see *The Civilian War Rights Association v. The King* [1932] A.C. 14; 46 T.L.R. 581; 47 T.L.R. 102; *Administrator of German Property v. Knoop* [1933] Ch. 439, *Gschwind v. Swiss Confederation* (decided by the Swiss Federal Court in 1932). *Annual Digest*, 1931-1932, Case No. 120; *Receiver in Bankruptcy of the N.I. 'Zeischip Nest' v. The State of the Netherlands* (decided by the Hague Court of Appeal on January 14, 1937). *ibid.*, 1935-1937, Case No. 117. And see *B.Y.*, 13 (1932), pp. 163, 164.

² The Advisory Opinion of the Permanent Court in the matter of the *Jurisdiction of Danzig Courts* (see above, § 13a) is a striking illustration of that possibility.

³ In *Steiner and Gross v. Polish State* the Upper Silesian Arbitral Tribunal held, in March 1928, that, under the terms of the relevant convention, it had jurisdiction to entertain a claim by a Polish national against the Polish State—notwithstanding the Polish contention that under International Law an individual cannot invoke an international authority against his own State: *Annual Digest*, 1927-1928, Case No. 188. Moreover, in the same case the Tribunal held that a national of a third State, which was not a party to the Treaty in question, could exercise

rights enforceable before the Tribunal: *ibid.*, (Case No. 287). The Mixed Arbitral Tribunals are probably also another instance of direct access of individuals to international tribunals. See Bludhorn in *Hague Recueil*, vol. 51 (1932) (iii.), pp. 144-146. But the question is controversial. Thus Anzilotti, p. 136, considers the jurisdiction of the Mixed Arbitral Tribunals to be the result of parallel municipal legislation; see also Kaufmann cited below, who, without denying the theoretical significance of the innovation, explains it by reference to the exceptional character of the Peace Treaties and stresses the circumstance that before these Tribunals Governments remained in part *domini litis*. And see generally on the access of individuals to international tribunals: Fleury, *Un nouveau progrès de la justice internationale. L'accès de particuliers aux Tribunaux internationaux* (1932); Schulé, *Le droit d'accès des particuliers aux juridictions internationales* (1934). *Annuaire*, 33 (1927) (ii.), pp. 601-626; Rundstein in *R.I.*, 3rd ser., 10 (1929), pp. 431-463, 763-783; Borchard in *A.J.*, 24 (1930), pp. 359-365; Ténikides in *R.I.*, 3rd ser., 13 (1932), pp. 89-111; Baumgarten, *ibid.*, pp. 742-799; Séfériadès in *Hague Recueil*, vol. 51 (1935) (i.), pp. 6-140; Kaufmann, *ibid.*, 54 (1935) (iv.), pp. 420-427; Idelson in *Grotius Society*, 30 (1944), pp. 50-66. As to the access of individuals to international authorities by way of petition see Richard, *Le droit de pétition* (1932); Feinberg in *Hague*

viduals as subjects of International Law is apparent from the fact that, in various spheres, they are, as such, bound by duties which International Law imposes directly upon them.¹ The various developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law.² In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law.³

§ 290. But what is the normal position of individuals in International Law, if they are not regularly subjects thereof? ^{Individuals as Objects} The answer can only be that, generally speaking, they are ^{of the} objects of the Law of Nations. They appear as such from ^{Law of Nations.} many different points of view. When, for instance, the recognised territorial supremacy of every State is seen to comprise certain powers over foreign subjects within its boundaries with the exercise of which their home State has no right to interfere, these individuals appear again as objects of the Law of Nations.⁴ The same applies to those rights of aliens which the territorial State is bound to respect and which the home State is entitled to protect. However, the fact that individuals are normally the object of International Law does not mean that they are not, in certain cases, the direct subjects thereof.⁵

Recueil, vol. 40 (1932) (n.), pp. 529-640.

¹ See above, §§ 153a

² See above, § 13a, and below, § 292

³ See also above, p. 379, n. 3. On the status of international associations and especially on the Belgian Law of October 25, 1919, granting to them a special status see Normandin in *Répertoire*, ii, pp. 104-132. And see Bastid and others in *Annuaire*, 43 (1) (1950), pp. 547-630, and 43 (2), pp. 335-369. The Institute of International Law adopted in 1950 a Resolution containing the project of a Convention for the granting of international status to private international associations. The Convention provides in particular for the treatment, in various respects, of

such associations in a manner not less favourable than other non-profit-making associations within the territory of the Contracting Parties.

⁴ Any State may seize and punish foreign pirates on the open sea, and belligerents may seize and punish neutral blockade-runners and carriers of contraband on the open sea without their home State having a right to interfere. See, however, Westlake, *Papers*, p. 2, who maintains that in these cases individuals appear as subjects of International Law. But see Lorimer, ii, p. 131, and Holland, *Jurisprudence*, p. 341. See also above, § 13a.

⁵ See above, §§ 13a and 289, and below §§ 340l-340q.

Nationality the Link between Individuals and the Law of Nations.

§ 291. To the extent to which individuals are not subjects but objects of the Law of Nations, nationality is the link between them and International Law. It is through the medium of their nationality that individuals can normally enjoy benefits from the existence of the Law of Nations. This is a fact which has consequences over the whole area of International Law.¹ Such individuals as do not possess any nationality enjoy, in general, no protection whatever, and if they are aggrieved by a State they have no means of redress, since there is no State which is competent to take up their case. As far as the Law of Nations is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty² and in particular the general obligation, enshrined in the Charter of the United Nations, to respect human rights and fundamental freedoms—no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals.³ On the other hand, if individuals who possess nationality are wronged abroad, it is, as a rule, their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right.⁴ It is for this reason that the question of nationality is very important for the Law of Nations.

International Law and the Rights of Mankind

§ 292. Writers have occasionally expressed the view that International Law guarantees to individuals, both at home and abroad and whether nationals of a State or stateless, certain fundamental rights usually referred to as rights of mankind.⁵ Such rights have been said to comprise the right of life, liberty, freedom of religion and conscience, and the like. It is doubtful whether that view is expressive of

¹ See below, § 291.

² See below, §§ 310a and 313, from where it will be seen that stateless persons may become the object of protective international regulation. In such cases any signatory State is entitled to invoke the provisions of the Treaty on behalf of the stateless person regardless of the rule as to the nationality of claims (see above, § 1556).

³ See below, § 312.

⁴ That is, no international right. As to the general duty of an injured foreigner to exhaust the local municipal remedies before invoking the protection of his home State see above, § 162a, Ralston, §§ 129-133, and Borchard, §§ 381-383. And see above, § 1556, as to the rule as to nationality of claims and its limitations.

⁵ Bluntschli, §§ 360-363, 370; Martens, I, § 80; Fiere, I, §§ 684-712, and Code, pp. 619-674; Fouchille, § 397.

the actual practice of States. For it is generally recognised that, apart from obligations undertaken by treaty, a State is entitled to treat both its own nationals and stateless persons at discretion and that the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself.

At the same time it cannot be said that the doctrine of the 'rights of mankind' is altogether divorced from practice. In the first instance, it is clear that the State is bound to respect certain fundamental rights of aliens resident within its territory¹—although it is often said that the rights in question are not international rights of the aliens, but of their home State. Secondly, the principle and the practice of humanitarian intervention in defence of human rights ruthlessly trampled upon by the State have been frequently asserted and occasionally acted upon.² Thirdly, the various treaties—such as those concluded at the Berlin Conference in 1878³ or on the termination of the First World War⁴—for the protection of religious and linguistic minorities signified the tendency to extend recognition, by means of international supervision and enforcement, to the elementary rights of at least some sections of the population of the State. Finally, an imposing array of treaties of a humanitarian character, such as those for the abolition of slavery of slave trade, and of forced labour,⁵ for the protection of stateless persons and refugees,⁶ for safeguarding health and preventing abuses injurious to it,⁷ for securing humane conditions of work,⁸ and the like, have testified to the intimate connection between the interests of the individual and International Law. And although none of these developments have had the legal effect of incorporating the fundamental rights of man as part of the positive law of nations, they are not without significance for this aspect of International Law. It is probable that the Charter of the United Nations, with

¹ The somewhat paradoxical result of the existing position is that individuals, when residing as aliens in a foreign State, enjoy a measure of protection which International Law denies to the nationals of a State within its territory.

² See above, § 137.

³ See § 330b.

⁴ See below, §§ 340b-340c.

⁵ See below, §§ 340a-340i.

⁶ See below, § 313.

⁷ See Appendix, pp. 982-984.

⁸ See below, § 340f.

its repeated recognition of 'human rights and fundamental freedoms,'¹ has inaugurated a new and decisive departure with regard to this abiding problem of law and government. In some instances—as, for example, in the European Convention on Human Rights—that development has assumed the complexion of explicit rules legally binding upon States.²

II

NATIONALITY

Vattel, i, §§ 220-226 - Hall, §§ 66, 87—Westlake, i, pp. 220, 238-240—Moore, iii, §§ 372-376 - Hyde, i, § 342—Bluntschli, §§ 361-380 - Fauchille, §§ 410-416, 423-440—Pradier-Fodéré, iii, § 1645 - Rivier, i, p. 303 - Nys, ii, pp. 256-262—Calvo, ii, §§ 530-540—Fiore, i, §§ 641-658, 684-712, and *Code*, §§ 643-616—Martens, i, §§ 85-87—De Loutch i, pp. 264-265 - Suarez, §§ 142-144—Scelle, ii, pp. 136-152—Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), § 14—Zeballos, *La nationalité au point de vue de la législation comparée*, etc., 5 vols. (1914-1919)—Borchard, §§ 4, 5, 198-227—Bourbousson, *Traité général de la nationalité* (1931)—Quadri, *La sudditanza nel diritto internazionale* (1936)—Mervyn Jones, *British Nationality Law and Practice* (1947)—Jessup, *A Modern Law of Nations* (1948), pp. 68-78—Isay in *Hague Recueil*, 1924, iv, pp. 429-471—Report for League Codification Committee by Rundstein, de Magalhães, and Schucking in *A.J.*, 20 (1926), Special Suppl., pp. 21-61, and comment by Hyde in *A.J.* 20 (1926), pp. 726-735—Gargas in *Z.V.*, 5 (1911), pp. 278-316, 478-509—McNair in *L.Q.R.*, 35 (1919), pp. 213-225—Bles in *R.L.*, 3rd ser., 2 (1921), pp. 513-531—Lloyd Jacob in *Grotius Society*, 10 (1925), pp. 89-114—Mournoy in *A.S. Proceedings*, 1926, pp. 59-66—Maurv in *Répertoire*, ix, pp. 238-319—Rauchberg in *Z.o.R.*, 8 (1929), pp. 405-500—Rundstein in *Z.V.*, 16 (1931-1932), pp. 28-45—Kelsen in *Hague Recueil*, vol. 42 (1932) (iv.), pp. 242-248—Balladore Pallieri in *Rivista*, 28 (1936), pp. 34-54—*Rechtsverfolgung im internationalen Verkehr*, vol. vii, *Das Recht der Staatsangehörigkeit der europäischen Staaten* (1940)—Hanna in *Columbia Law Review*, 45 (1945), pp. 301-344—Koessler in *Yale Law Journal*, 56 (1947), pp. 58-76.

Concep-
tion of
Nation-
ality.

§ 293. Nationality of an individual³ is his quality of

¹ See below, §§ 340k and 340l.

² See below, § 340o.

³ The nationality of corporations is mainly a matter of Private International Law, and considerations of public policy have a decisive influence upon the attitude of every State with regard to it. See Isay, *Die Staatsangehörigkeit der juristischen Personen* (1907); Young, *Foreign Companies*

and other Corporations (1912); Borchard, §§ 23, 227-282 (exhaustive literature on the problem is to be found in Borchard's Appendix). During the First World War the problem became of particular importance, as is apparent from the following monographs: Pillet, *Des personnes morales en droit international privé* (1914); Schuster, *The Nationality and*

being a subject of a certain State,¹ and therefore its citizen. It is not for International Law but for Municipal Law to determine who is, and who is not, to be considered a subject.² But, as stated in Article I of the Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws (see above, § 35), while it is for each State to determine under its own law who are its nationals, such law must be recognised by other States only 'in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard

Domicile of Trading Corporations, in *Grotius Society*, 2 (1917), pp. 57-85; Mamelok, *Die Staatsangehörigkeit der juristischen Personen* (1918); Grossmann, *Wirtschaftspolitische Betrachtungen über die Staatsangehörigkeit der juristischen Personen* (1918); Ruegger, *Die Staatsangehörigkeit der juristischen Personen* (1918); Martin-Achard, *La nationalité des sociétés anonymes* (1918); Peppy, *La nationalité des sociétés* (1920); Cuq, *La nationalité des sociétés* (1921); Gam, *La nationalité des sociétés avant et depuis la guerre* (1924); Marburg, *Staatsangehörigkeit und juristischer Charakter juristischer Personen* (1927); Capotorti, *La nazionalità della Società* (1953); Norris in *J.C.L.*, 3rd ser., 3 (1921), pp. 273-276; McNair in *B.Y.* 1923-1924, pp. 44-59; Neumeyer in *Z.V.*, 12 (1922-1923), pp. 261-275 and in *Hague Recueil*, 1924 iii. pp. 5-62; Jemolo in *Rivista*, 3rd ser., 3, 1. (1921-1922), pp. 81-109; Feilchenfeld in *J.C.L.*, 3rd ser., 8 (1926), pp. 81-108, 260-274; Sereni, *La cittadinanza degli enti morali nel diritto internazionale* (1934), and in *Rivista*, 26 (1934), pp. 171-196, 321-349; Streit in *R.I.*, 3rd ser., 9 (1928), pp. 494-521, and in *Annuaire*, 34 (1928), pp. 187-222; Asset and Streit, *ibid.*, 35 (1) (1929), pp. 648-712; Norem in *A.J.*, 24 (1930), pp. 310-338; Travers in *Hague Recueil*, vol. 33 (1930) (iii.), pp. 5-109; Rundstein in *Z.V.*, 16 (1931-1932), pp. 14-71; Röhlund in *Hague Recueil*, vol. 45 (1933) (iii.), pp. 391-467; Vaughan Williams and Chruschaki in *Law Quarterly Review*, 49 (1933), pp. 334-349; Farnsworth, *The Residence and Domicile of Corporations* (1939). See

also two Reports by Rundstein, Guerrero, and Schucking for the League Codification Committee on Recognition of Legal Personality of Foreign Commercial Corporations and Nationality of Commercial Corporations and their Diplomatic Protection in *A.J.*, 22 (1928), Special Suppl., pp. 157-214; Mazeaud in *55 Clunet* (1928), pp. 30-66; and see below, vol. II, § 584, and Award in *Standard Oil Company's Arbitration* in *B.Y.*, 1927, pp. 156-178, and *A.J.*, 22 (1928), pp. 404-421.

¹ As to the nationality of the inhabitants of the former mandated areas see above, § 94e, and as to protected States see Advisory Opinion of the Permanent Court on the *Nationality Decrees Issued in Tunis and Morocco (French Zone)*. Series B, No. 4, and also the relevant Acts and Documents; Ruzé in *I.L.*, 3rd ser., 4 (1923), pp. 597-627, and Winkler, *La nationalité dans les protectorats de Tunisie et du Maroc* (1926). As to the meaning of *ressortissant* as used in the Treaty of St. Germain and the Peace Treaties (1919) see *Kahane v. Paris and the Austrian State*, decided on March 19, 1929, by the Austro-Rumanian Mixed Arbitral Tribunal. *Annual Digest*, 1929-1930, Case No. 131. See also Ralston, *The Law and Procedure of International Tribunals* (Suppl., 1936), pp. 61-64. As to nationality in France and her dependent areas see Maury in *Répertoire*, 9, pp. 326-489, and Audinet, *ibid.*, pp. 490-505. And see *ibid.*, pp. 506-805, for a survey of the nationality laws of various countries.

² See the same Advisory Opinion, Series B, No. 4, at p. 24.

to nationality.' ¹ In general, it matters not, as far as the Law of Nations is concerned, ² that Municipal Laws may distinguish between different kinds of subjects -for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens. Thus the now abolished German Law of September 15, 1935, established a distinction between German citizenship, limited to persons of 'German or cognate blood,' who alone enjoyed full political rights, and German nationality. ³ In some Latin-American countries the expression 'citizenship' denotes the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose citizenship, without being divested of nationality as understood in International Law. ⁴ In the United States of America, while the expressions 'citizenship' and nationality are often used interchangeably, the term 'citizen' is, as a rule, employed

¹ See for comment thereon Rundstein in Z.V., 16 (1931-1932), pp. 26-45. Thus it is clear that a State is not entitled to impose its nationality upon aliens residing for a brief period in its territory or upon persons resident abroad. See e.g. the statement of the United States in connection with the Hague Codification Conference of 1930: 'The scope of municipal law governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and other States' (*Bases of Discussion*, vol. 1., *Nationality*, 1929 p. 16). It is not open to a State which has deprived a person of his nationality to re-impose its nationality upon that person against his will, especially if he resides abroad. It does not matter whether such re-imposition of nationality is attempted by way of cancellation of the original deprivation of nationality or by other means. See Lauterpacht in *Jerush Yearbook of International Law*, 1948, pp. 164-185. On the right to refuse recognition to fraudulent naturalisation see Makarov in *Hague Recueil*, 74 (1949) (i.), pp. 331-334.

² Unless the State concerned has restricted its liberty of action with regard to these questions by treaty with another State (see below,

§§ 320b-340d). See also two Advisory Opinions of the Permanent Court, Series B, No. 4 (*Nationality Decrees in Tunis and Morocco*) and No. 7 (*Acquisition of Polish Nationality*), and the ensuing arbitration between Germany and Poland noted by Garner in 4 J., 20 (1926), pp. 130-135.

³ *Reichsgesetzblatt*, 1935, p. 1146. As to 'non citizen nationals' in the United States see McGovney in *Legal Essays* (1935, edited by Radin and Kidd), pp. 323-374.

⁴ See for instance, Articles 42 and 45 of the Constitution of Bolivia of 1945; Articles 15 and 16 of the Constitution of Ecuador of 1946 which provides for loss of nationality in some cases and loss or suspension of citizenship in other cases; Articles 34 and 36 of the Mexican Nationality Law of 1934, which provide for loss of citizenship (as distinguished from loss of nationality) for such causes as accepting or using titles of nobility which do not imply allegiance to a foreign country, for voluntarily serving a foreign Government or accepting foreign decorations without permission of Congress, and for rendering assistance to an alien or to another government against the nation in any diplomatic claim or before an international court; and the like.

to designate persons endowed with full political and personal rights within the United States, while some persons—such as those belonging to territories and possessions which are not among the States forming the Union—are described as ‘nationals.’ They owe allegiance to the United States and are United States nationals in the contemplation of International Law, they do not possess full rights of citizenship in the United States.¹ It is their nationality in the wider sense, not their citizenship, which is internationally relevant. In the British Commonwealth of Nations it is the citizenship of the individual States of the Commonwealth which is primarily of importance for International Law, while the quality of a ‘British subject’ or ‘Commonwealth citizen’ is probably relevant only as a matter of the Municipal Law of the countries concerned.²

‘Nationality,’ in the sense of citizenship of a certain State, must not be confused with ‘nationality’ as meaning membership of a certain nation in the sense of race. Thus, according to International Law, Englishmen and Scotsmen are, despite their different nationality as regards race, all of British nationality as regards their citizenship. Thus further, although all Polish individuals are of Polish nationality *qua* race, for many generations there were no Poles *qua* citizenship.

§ 294. Nationality is the principal link between individuals and the benefits of the Law of Nations.³ This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home State, especially on account of one particular right and one particular duty of every State towards all other States. The right is that of protection over its citizens abroad which every State holds, and occasionally vigorously exercises, as against other States; it will be discussed in detail below.⁴

Function
of Nationality.

¹ See § 204 of the Nationality Act of 1940, where some persons are described as ‘nationals but not [as] citizens.’ See also Hyde, *iii.*, § 342. The Nationality and Immigration Act of 1952 substantially reduced the numbers of nationals who were not

citizens, but, in § 308, retained that status for certain limited categories of persons born ‘in an outlying possession of the United States.’

² See below, § 298a.

³ See above, § 291.

⁴ See below, § 319.

The duty is that of receiving on its territory such of its citizens as are not allowed to remain ¹ on the territory of other States. Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The home State of expelled persons is bound to receive them on the home territory.²

No-called
Protégés
and *de*
facto Sub-
jects.

§ 295. Although nationality alone is the regular means through which individuals can derive benefit from the Law of Nations, there are four exceptional cases³ in which individuals may come under the international protection of a State of which they are not subjects :

(1) A State may undertake by an international agreement the diplomatic protection of another State's citizens abroad, and in this case the protected foreign subjects are named *protégés* of the protecting State. Such agreement may either be intended to be permanent, as when a small State, such as Liechtenstein, has no diplomatic representative in a certain foreign country where many of its subjects reside ; or to be temporary, for instance, upon a rupture of diplomatic relations, or upon the outbreak of war, when

¹ See below, § 326.

² See below, § 326. See also § 302 (2).

³ See Borchard, §§ 203-206, 249-252. So also the existence of a protectorate, including a British colonial protectorate, does not give the subjects of the protected State the nationality of the protecting State : see, e.g., *R. v. Graham Campbell* [1921] 2 K.B. at p. 475. On the question who are British protected persons see *M. Jones in B.Y.*, 22 (1945), pp. 122-129, who defines them as being British nationals who habitually, and not by reason only of their status as British subjects, receive British protection. (The term 'British nationals' in its wider sense seems to include British subjects, British protected persons, and juridical persons incorporated under the laws of a British territory.) The main classes of British protected persons derive that status from their connection with a British protected State (see above, § 94),

a British protectorate (see above § 94), or a British trust territory (see above, § 94e). The British Protectorates, Protected States, and Protected Persons Order in Council, 1919, lays down that a person born in a scheduled protectorate, protected State (see above, § 94) or United Kingdom trust territory is a British protected person. British protected persons are, for the purposes of International Law, in the same category as citizens of the United Kingdom and Colonies in the sense—but only in that sense—that the United Kingdom is entitled to afford them protection abroad. In the municipal sphere they are distinguished from aliens inasmuch as they are eligible for naturalisation on terms more favourable than those applicable to aliens; they are not subject to the disabilities imposed upon aliens by the Aliens Restriction Acts, 1914 and 1919; they are not, in general, aliens for the purposes of nationality law.

a belligerent usually hands over to a neutral State the protection of its subjects in an enemy State.¹

(2) A State may afford diplomatic protection to the subjects of a protected State or any other area under its protection or jurisdiction which does not form part of its territory.²

(3) States have on occasions afforded diplomatic protection within the boundaries of certain Oriental countries to certain natives, usually connected with or employed by the legations and consulates of the protecting State. Such protected natives are likewise called *protégés*, but they are also called 'de facto subjects' of the protecting State. Their position is quite anomalous; it is based on custom and treaties, and no special rules of the Law of Nations itself are in existence concerning them.³

(4) As previously in the case of mandated territories, so now inhabitants of a trust area are under the diplomatic protection of the administering authority when abroad.⁴

§ 296. As emigration involves the voluntary removal of an individual from his home State with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, it is obvious that emigrants may well retain their nationality. Emigration is in fact entirely a matter of internal legislation of the different States.⁵ Every State can fix for itself the conditions under

Nationality and Emigration.

¹ See Janner, *La puissance protectrice en droit international* (1948).

² See above, § 92.

³ For illustrations of the status of *protégés* see *Spanish Zone of Morocco Claims case, Annual Digest*, 1923-1924, Case No. 128; and the *Najera (of the Lebanon) case*, decided on October 19, 1928, by the French-Mexican Claims Commission, *Annual Digest*, 1927-1928, Case No. 208. See also *National Bank of Egypt v. Austro-Hungarian Bank: ibid.*, 1923-1924, Case No. 10.

⁴ See above, § 94c.

⁵ See the 'Vœux relatifs à la matière de l'émigration' in *Annuaire*, 16 (1897), p. 276. See also Gargas in *Z.V.*, 5 (1911), pp. 278-310, 478-509; Schätzol, *Internationale Arbeiterwanderungen* (1919); Saavedra

Lamas, *Traité international de type social* (1924), pp. 93-445; as to the immigration of workers into France, see Palewski in *R.G.*, 34 (1927), pp. 58-84. See also the valuable survey in three volumes published by the International Labour Office and entitled *Migration Laws and Treaties* (1928); and see Thibert in *Répertoire*, vii, pp. 543-580. For the International Agreement of June 14, 1929, concerning the preparation of a transit card for emigrants, concluded in order to simplify transit formalities for emigrant crossing the territories of the contracting parties, see *Treaty Series*, No. 27 (1929), Cmd. 3402. On the 'dictation test' in Australia see *Charteris in Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp. 174-

which emigrants lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return to their former home, provided the emigrants have retained their former nationality. The Law of Nations does not, as yet, grant a right of emigration to every individual, although it is frequently maintained¹ that it is a 'natural' right of every individual to emigrate from his own State. It is a moral right which could fittingly find a place in any international recognition of the Rights of Man.²

The
Right of
Expatriation.

§ 296a. The right of expatriation, as distinguished from that of emigration, is the right of a person who has emigrated and who has acquired or is in a position to acquire a new nationality, to renounce effectively the nationality of the State of his origin. Such right of expatriation, although it, too, has been asserted as a natural right of man,³ has not yet become part of the general practice. The United States has insisted on it, uniformly and uncompromisingly, since 1868.⁴ Great Britain recognised it in 1870 after having abandoned the common law doctrine of inalienability of allegiance.⁵ But many States still make expatriation

181. See below, §§ 314-316, as to the reception of aliens, and Fauchille, §§ 410-446, as to emigration.

¹ Especially by American writers. On the American standpoint concerning emigration see Borchard, §§ 315-331, and in *A.J.*, 25 (1931), pp. 312-316; Hackworth, iii. § 242; Sibert, pp. 527-534. See also Morrow in *A.J.*, 26 (1932), pp. 552-564, and Fields, *ibid.*, pp. 671-699; I-Mien Tsang, *The Question of Expatriation in America Prior to 1907* (1907). As to expatriation in Great Britain see Fraser in *Grotius Society*, 16 (1930), pp. 73-89.

² In accordance with Article 56 of the Treaty of Peace with Bulgaria (1919), and the decision of the Principal Allied and Associated Powers, Greece and Bulgaria signed, on November 27, 1919, a convention providing that the subjects of each party belonging to racial, religious, or linguistic minorities 'might freely emigrate to the territory of the other: Misc. No. 3 (1920), Cmd.

589. See also the Advisory Opinion of the Permanent Court on the *Exchange of Greek and Turkish Populations*, Series B, No. 10.

³ 'It [the right of expatriation] is a principle of the rights of man and of the liberty of the human race': Mr. Hunter Miller (Delegate of the United States), *Acts of the Conference for the Codification of International Law*, Meetings of the Committee, vol. ii. Nationality, p. 80. See also *ibid.*, p. 60 (Mr. Flournoy).

⁴ The Joint Resolution of the Congress of the United States of that year began as follows: 'Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness . . . (15 Stat. 223). This, it will be noted, was an assertion of principle not uninfluenced by the requirements of a country of immigration.

⁵ Thus Coke laid down in his edition of Littleton's *Tenures* published in 1629: *Nemo patriam, in qua natus*

dependent upon compliance with various conditions such as the fulfilment of the duties of military service.¹ The full acknowledgment of the right of expatriation, the denial of which is offensive alike to individual freedom and to the dignity of the State insisting on the retention of a grudging allegiance, is probably a proper subject-matter for a general international enactment. It would do away with a frequent cause of international friction arising from the determination of the State of origin to treat as its nationals persons naturalised in a foreign country.² No important interest of States militates against the full recognition of the right of expatriation in time of peace. The provisions of the Hague Convention of 1930 on certain questions relating to the Conflict of Nationality Laws touch only upon the fringe of the problem and, by contrast, tend to emphasise the shortcomings of the existing position.³

III

MODES OF ACQUIRING AND LOSING NATIONALITY

Vattel, i. §§ 212-219—Hall, §§ 67-72—Westlake, i. pp. 220-227—Lawrence, §§ 94, 95—Moore, in. §§ 372-373 Hackworth, in. §§ 221, 222, 243-253—Taylor, §§ 176-183—Fauchille, §§ 417-432—Despagnet, §§ 318-327—Pradier

est, exuere, neo legiantiae debitum ejurare possit. See also Blackstone, *Commentaries*, Book i. ch. x. Following upon the recommendations of the Royal Commission in 1868, the Naturalisation Act, 1870, and the British Nationality and Status of Aliens Act, 1914 (§ 13), fully admit the right of expatriation. However, a person about to be naturalised in Great Britain is often expected to produce a certificate of release from his nationality of origin. See Fraser in *Grotius Society*, 16 (1931), p. 85.

¹ For a survey of the practice of States see *League of Nations, Conference for the Codification of International Law, Bases of Discussion*, i. (Nationality), pp. 36-44. See also, for a valuable account, Hackworth, iii. § 242; Hall, § 71.

² For many instances see Moore, iii. §§ 431-469. And see *ibid.*, ii. §§ 317-320, on the British claim to impress seamen naturalised in the United

States and on the origins of the War of 1812.

³ Article 6 of the Convention lays down that, without prejudice to the faculty of States to accord wider rights of renunciation of nationality, a person possessing two nationalities acquired without any voluntary act on his part may renounce one of them with the authorisation of the State whose nationality he desires to surrender. This, somewhat nominal, undertaking is rendered more substantial by the provision that the authorisation may not be refused in the case of a person who has his habitual and principal residence abroad, 'if the conditions laid down in the law of the State whose nationality he desires to surrender are satisfied.' Article 7 of the Convention deals with expatriation permits with the view to avoiding statelessness if, after the expatriation permit has been granted, the intended new nationality does not materialise.

Fodéré, iii. §§ 1646-1691—Rivier, i. pp. 303-306—Calvo, ii. §§ 541-654, vi. §§ 92-117—Martens, ii. §§ 44-48—Fiore, *Code*, §§ 665-674—De Louter, i. pp. 265-268—Cruchaga, §§ 346-371—Keith's *Wheaton*, pp. 296-306—Baty, pp. 351-364—Harvard Draft Convention (and Comment), *A.J.*, 23 (1929), April, Special Number, pp. 24-38—Foote, *Private International Law* (5th ed., 1925), pp. 1-76—Dicey, pp. 150-198—Westlake, *Private International Law* (7th ed., 1925), pp. 365-378—Cockburn, *Nationality* (1869)—Sieber, *Das Staatsbürgerecht im internationalen Verkehr*, 2 vols. (1907)—Lehr, *La nationalité dans les principaux états du globe* (1909), and in *R.I.*, 2nd ser., 10 (1908), pp. 285, 401, and 625—Van Pittius, *Nationality within the British Commonwealth of Nations* (1930)—Lessing, *Das Recht der Staatsangehörigkeit und die Aberkennung der Staatsangehörigkeit* (1937)—Mervyn Jones, *British Nationality Law and Practice* (1947)—Makarov, *Allgemeine Lehre des Staatsangehörigkeitsrechts* (1947) the same in *Hague Recueil*, 74 (1949) (i.), pp. 273-374—Borchard, §§ 263-273 and 315-336—Garner in *A.J.*, 19 (1925), pp. 547-553—Holdsworth in *Revue d'histoire du droit*, vol. iii. (1921), pp. 175-214—Leibholz in *Z.o.V.*, i. (1929), pp. 99-103—Scott in *A.J.*, 24 (1930), pp. 58-64—Philippe in *Nordisk T.A.*, 2 (1931), pp. 85-94—*A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* Edited by Flournoy and Hudson (1929). See also Parry, *British Nationality* (1951), Mervyn Jones in *B.Y.*, 26 (1948), pp. 158-179; as to the United States see for the text of the relevant parts of the Immigration and Nationality Act, 1952 see *A.J.*, 47 (1953), Suppl. p. 20. See also *H.L.R.*, 66 (1953), pp. 647-735; as to Russia: Moder, *Staatsangehörigkeitsrecht der U.S.S.R.* (1950), Makarov in *Ostrecht*, 2 (1926), pp. 3-34 and Sandifer in *A.J.*, 29 (1935), pp. 261-278; Maasfeller, *Deutsches Staatsangehörigkeitsrecht von 1870 bis zur Gegenwart* (1953); Baumann, *Das Staatsangehörigkeitsrecht der Niederlande* (1953); (as to the French Law of 1945) Plaisant in *R.G.*, 50 (1946), pp. 48-66. And see the Reports of the Committee on Nationality presented to the Imperial Conference of 1926, Cmd. 2760: Appendix VII. and of 1937: Summary of Proceedings, Cmd. 5482 (1937).

Five Modes of Acquisition of Nationality.

§ 297. Although it is at present for Municipal Law to determine who is, and who is not, a subject of a State,¹ it is nevertheless of legal and practical interest to ascertain how nationality can be acquired according to the Municipal Law of the different States. There are five possible modes of acquiring nationality, and, although no State is obliged to recognise all five, nevertheless all States in practice do so. They are birth, naturalisation, redintegration, subjugation, and cession.²

¹ Except in the cases mentioned in § 293 above.

² The British Nationality Act, 1948, recognises the following modes of acquiring citizenship of the United

Kingdom and Colonies: (1) birth (see § 298); (2) descent (see § 298); (3) registration (see § 298a); (4) naturalisation (see § 299); (5) incorporation of territory into the United Kingdom.

§ 298. The first and chief mode of acquiring nationality is by birth; indeed, the acquisition of nationality by another mode is exceptional, since the vast majority of mankind acquires nationality by birth, and does not change it afterwards. But no uniform rules exist according to the Municipal Law of the different States concerning this matter.¹ Some States, such as Germany, have adopted the rule that parentage alone is the decisive factor,² so that a child born of their subjects became *ipso facto* by birth their subject likewise, be the child born at home or abroad. According to this rule, illegitimate children acquire the nationality of their mother. Other States, such as Argentina, have adopted the rule that the territory on which birth occurs is exclusively the decisive factor.³ According to this rule, every child born on the territory of such a State, whether the parents be citizens or aliens, becomes a subject of such State, whereas a child born abroad is foreign although the parents may be subjects. Again, other States, such as Great Britain⁴ and the United States, have adopted a

¹ For a comparative study of the laws of various countries see Sandifer in *A.J.*, 29 (1935), pp. 248-261.

² *Jus sanguinis*. The French Decree of October 19, 1945, recognises to a large extent the *jus soli* as an additional means of acquiring nationality: see Plaisant in *R.G.*, 50 (1946), pp. 48-66.

³ *Jus soli*.

⁴ The Common Law of England concerning nationality has several times been altered by statute. The British Nationality Act 1948 (11 & 12 Geo. 6, c. 56), regulates as follows the acquisition of citizenship by birth and descent: (a) *Acquisition of citizenship by birth*: Every person born within the United Kingdom and colonies is a citizen of the United Kingdom and Colonies by birth except when: (1) his father possesses such immunity from writ and legal process as is accorded to an envoy of a foreign sovereign power accredited to the Crown, and is not a citizen of the United Kingdom and Colonies (the expression Colonies includes also the Isle of Man and the Channel Islands which, although part of Her Majesty's

Dominions, are not part of the United Kingdom or colonies (§ 33)); (2) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy. (It was held in *Wong Man On v. Commonwealth of Australia* [1952] *Argus* L.R. 513 that a person born in German New Guinea during the period of British military occupation was not a person 'born within His Majesty's dominions and allegiance'.) (b) *Acquisition of citizenship by descent*: A person is a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at the time of the birth. However, if his father is a citizen of the United Kingdom and Colonies by descent only, such person is not a citizen of the United Kingdom and Colonies by descent unless: (1) that person or his father was born in a protectorate, protected state, mandated territory or trust territory, or any place in a foreign country where by treaty, capitulation, grant, usage, and the like, the United Kingdom exercised at the time of his birth jurisdiction over British subjects; (2) he was

mixed principle, since, according to their Municipal Law, not only children of their subjects born at home or abroad become their subjects, but also such children of alien parents as are born on their territory.

Citizen-
ship
within the
British
Common-
wealth of
Nations.

§ 298a. Within the British Commonwealth of Nations the achievement of the full international independence of the States of the Commonwealth has brought significant developments of some novelty. Following upon the Canadian Citizenship Act of 1946,¹ the British Nationality Act of 1948 provided, in the first instance, for citizenship of the United Kingdom and Colonies which can be acquired in the ways provided for by the Act.² Secondly, the Act creates the status of 'British subject' or 'Commonwealth citizen.' This is the status of persons who are citizens either of the United Kingdom (and Colonies) or of any of the

born in a foreign country (other than that referred to above under (1)) and the birth was registered at a United Kingdom consulate within one year of its occurrence or, with the permission of the Secretary of State later; (3) the father was at the time of birth in Crown service under the Government of the United Kingdom, (4) he is born in one of the Commonwealth countries enumerated below (p. 653, n. 1) and did not become a citizen of the country concerned at birth. These provisions mark a far reaching extension of acquisition of nationality by descent as compared with previous enactments. (c) *Persons born aboard ships and aircraft.* A person born aboard a registered ship or aircraft is to be deemed born in the place in which the ship or aircraft was registered. A person born in an unregistered ship or aircraft belonging to the Government of a country is to be deemed to have been born in that country. There is no provision as to the rare case of unregistered private ships or aircraft. Such persons if born within or over the territory (including territorial waters) of the United Kingdom or Colonies are United Kingdom citizens by birth. If born on or over the high seas or in a foreign port they may still be United Kingdom citizens by descent. See Hall, *Foreign Powers and Jurisdiction* (1894),

§ 14; Edwards and Sargent in *J.C.L.*, New Ser. 14 (1914), pp. 314-336; McNair, *Legal Effects of War* (2nd ed., 1914) pp. 12-17; Parry, *British Nationality* (1951), Mervyn Jones in *B.Y.*, 25 (1948) pp. 158-170.

As to the Law of the United States with regard to birth on board a ship see Hackworth, *supra*, p. 10. The law of the United States differs also from English law in the important detail that a person born on a United States vessel of alien parents does not acquire the nationality of the United States. *Lam Mou v. Nagle* (1928) 24 F. (2d) 316; Hackworth, *supra*, p. 11.

The United States Nationality Act of 1952 provides, in Section 301: 'The following shall be nationals and citizens of the United States at birth: (a) A person born in the United States and subject to the jurisdiction thereof. . . . ' The weight of opinion seems to be that a person born on Ellis Island, while his parents await decision as to admission to the United States, acquires citizenship of the United States: Hackworth, *supra*, p. 10. See also Levy in *A.J.*, 39 (1945), pp. 13-19, on acquisition of nationality in the Emergency Refugee Shelter established by the United States at Fort Ontario during the Second World War.

¹ 11 & 12 Geo. 6, c. 56.

² See above p. 650, n. 2.

countries of the Commonwealth enumerated in the Act in pursuance of the legislation enacted by those countries.¹ The result of that legislation is that a person can become a 'British subject' (or 'Commonwealth citizen') only as the result of being a citizen of a country of the Commonwealth in accordance with the legislation of that country. The international implications of the status of 'British subject' (or 'Commonwealth citizen') are not clear. Probably such status has no consequences in the sphere of International Law except with regard to such units and territories of the Commonwealth, such as Southern Rhodesia, which have no independent international status of their own. This means, for instance, that, in the absence of special arrangements recognised by other States, the United Kingdom is not normally entitled, having regard to the rule as to nationality of claims,² to afford diplomatic protection to citizens of Canada, Australia, or any other independent country of the Commonwealth. On the other hand, citizenship of the Commonwealth has, by virtue of the legislation enacted by the countries concerned, definite effects in the municipal sphere. Thus, according to the legislation of the United Kingdom, Commonwealth citizens are not aliens; they are entitled to enter the United Kingdom and to vote; and they are entitled, as a matter of right,³ to become citizens of the United Kingdom by registration, provided that they are

¹ These are, Canada (1946), Australia (1948), New Zealand (1948), South Africa (1949), Newfoundland (now part of Canada), India (1949), Pakistan (1951), Ceylon (1948), Southern Rhodesia (1949). The dates in brackets indicate the year in which these countries enacted nationality legislation which, generally speaking, amounts to recognition of Commonwealth citizenship. These enactments are reproduced in Mansergh, *Documents and Speeches on British Commonwealth Affairs, 1931-1952* (1953), vol. ii., pp. 930-1012. Unlike citizens of Commonwealth countries, citizens of Eire are not British subjects by virtue of their Eire citizenship. However, Eire citizens are not aliens under the law of the United Kingdom

(§32(1) of the Nationality Act of 1948). British subjects, who are not also Eire citizens, are aliens under the law of Eire. However, under her Aliens Act of 1935, Eire exempts citizens of the Commonwealth from most of the restrictions to which aliens are subject.

² See above, § 155b. However, there is nothing to prevent one country of the Commonwealth from granting ordinary diplomatic protection to the citizens of another Commonwealth country at the request of the latter.

³ This is not necessarily so in other Commonwealth countries. See e.g. § 8 of the South African Citizenship Act, 1949, which gives discretion in this matter to the Minister concerned.

either ordinarily resident in the United Kingdom¹ or are 'in the Crown Service under His Majesty's Government in the United Kingdom.' Similar, though not always so far-reaching, privileges are granted to citizens of the Commonwealth in some other countries of the Commonwealth. It is probable that the conception of common allegiance to the Crown is no longer the basis of Commonwealth citizenship—certainly not in relation to those countries, such as India or Pakistan, which are Republics. In so far as it exists, allegiance to the Crown is not so much the source of Commonwealth citizenship as a consequence thereof.²

Acquisition of Nationality through Naturalisation.

§ 299. The most important mode of acquiring nationality besides birth is that of naturalisation in the wider sense of the term. Through naturalisation, an alien by birth acquires the nationality of the naturalising State. According to the Municipal Law of the different States naturalisation may take place through six different acts—namely, (1) marriage,³

¹ Subject to the condition that he must reside in the United Kingdom throughout a period of twelve months immediately preceding the application or, in special circumstances for a shorter period at the discretion of the Secretary of State.

² See Mervyn Jones in *BY*, 25 (1948) p. 179. It would appear, as the result of the legislation enacted in 1948, that within the British Commonwealth of Nations a person may possess—either consecutively or possibly, simultaneously—five kinds of status. Thus in the case of an inhabitant of the State of Johore (a British Protected State) he is (or may be) (1) a subject of the native ruler, (2) a national of the Federation of Malay, (3) a British national (in so far as, being a British protected person, he is entitled to British protection abroad), (4) a citizen of the United Kingdom in case he becomes a naturalised citizen of the United Kingdom (a status which does not necessarily imply the abandonment of the previous kinds of status); and, as a citizen of the United Kingdom, (5) a British subject.

³ The Hague Convention of 1930 on Certain Questions Relating to the

Conflict of Nationality Laws (see above, § 36) regulates in Articles 8-11 some aspects of the nationality of married women. It provides in Article 8 that if by her law the wife loses her nationality on marriage with a foreigner, this result shall be conditional on her acquiring the nationality of the husband. A similar provision is made, in Article 9, in case of loss of nationality of the wife in consequence of a change of nationality by her husband. Article 10 lays down that naturalisation of the husband during marriage shall not involve a change of nationality of the wife except with her consent. The Conference also recommended to States the study of the possibility of introducing into their law the principle of equality of the sexes, in particular from the point of view of leaving the nationality of the wife unaffected by marriage or change of nationality of her husband, except with her consent. These provisions and recommendations were not regarded by various women's organisations as giving due recognition to the principle of equality of the sexes. But the Thirteenth Assembly of the League recommended in 1932 the members

of the League to sign the Convention or to introduce the necessary legislative changes in case they had signed it already. See Hudson in *A.J.*, 27 (1933), pp. 117-122, for a survey of the history of this question before the League. In 1937 this Convention entered into force. See above, p. 62, n. 3. Great Britain, in the British Nationality and Status of Aliens Act, 1933 (23 and 24 (Geo. 5, c. 49), introduced important changes in her law giving effect to the principles of Articles 8, 9, and 10 of the Convention as outlined above. These developments were completed by the British Nationality Act of 1948 (§§ 6 and 19), the general effect of which is that in the matter of citizenship the position of married women is the same as that of men. A woman who is a citizen of the United Kingdom and who marries an alien does not lose her citizenship unless she renounces it. An alien woman marrying a citizen of the United Kingdom is entitled to be registered as a citizen of the United Kingdom provided she takes an oath of allegiance. The same applies if her husband, hitherto an alien, becomes a United Kingdom citizen. According to the French Nationality Law of 1945 a foreign woman marrying a French national acquires French nationality. However, if her national law permits her to retain her nationality, she may decline French nationality. (Arts 37 and 38.) A French woman marrying a foreigner retains her French nationality unless she renounces it (Art. 94). If the husband is deprived of his French nationality such loss may be extended to the wife and minor children but only if they are of foreign origin and have retained their original nationality (Arts. 96 and 100). In the United States, the 'Cable Act' of September 22, 1922, had already abolished the rule that an American woman who married an alien lost her American nationality (the exception relating to women marrying aliens ineligible for citizenship, for example persons of Japanese, Chinese, or Indian nationality, was abolished by an Act of March 3, 1931). See also the Convention on the Nationality of Women adopted by the Seventh Pan-American Conference in December 1933, and consisting in effect of a single Article providing that as re-

gards nationality there shall be no distinction based on sex in the legislation or practice of the contracting parties: *A.J.*, 28 (1934), Suppl., pp. 61, 62.

Also by the United States 'Cable Act' of 1922 an alien woman who after the Act came into force marries an American citizen, or whose husband becomes an American citizen by naturalisation, does not thereby acquire American citizenship; but she may be naturalised after residence in the United States for one year instead of the usual five years. The Nationality Act of 1940 provided for an expeditious method of naturalisation for a person marrying a citizen of the United States 'if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalisation . . . upon compliance with all requirements of the naturalisation Law': Section 311, 54 Stat. 1145. The Immigration and Nationality Act of 1952 makes provision, in § 319, for the naturalisation of any person whose spouse is a citizen of the United States if such person has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years. The section contains other, somewhat detailed, requirements of residence both of the person thus seeking naturalisation and of the spouse. The requirement of residence is waived in certain cases, such as employment with the Government of the United States or an American firm or corporation engaged in foreign trade or a public international organisation in which the United States participates by treaty or statute. See Hershey, pp. 361-362; Hyde in *A.J.*, 24 (1930), pp. 742-745; Hover, *ibid.*, 26 (1932), pp. 700-719; Hackworth, iii, pp. 84-88.

As to the nationality of married women generally see the following: Schuster in *International Law Association's Thirty-second Report* (1924), pp. 9-25; Re, *id.* and discussion in the Association's *Thirty-third Report* (1925), pp. 26-53; Crane in *J.C.L.*, 3rd ser., 5 (1923), pp. 47-51, and 7 (1925), pp. 53-60 (as to the American 'Cable Act' of 1922); Thao, *De l'influence du mariage sur la nationalité de la*

(ii) legitimization,¹ (iii) option, (iv) acquisition of domicile, (v) appointment as Government official, (vi) grant on application. This last kind of naturalisation is naturalisation in the narrower sense of the term; it will be discussed in detail below, §§ 303-307.

Acquisition of Nationality through Redintegration

§ 300. The third mode of acquiring nationality is by so-called redintegration or resumption. Such individuals as were natural-born subjects of a State but have lost their original nationality through naturalisation abroad or for some other cause, may recover their original nationality on fulfilling certain conditions. This is called redintegration or resumption, in contradistinction to naturalisation, the favoured person being redintegrated and resumed into his original nationality.²

Acquisition of Nationality through Subjugation and Cession.

§ 301. The fourth and fifth modes of acquiring nationality are by subjugation after conquest and by cession of territory, the inhabitants of the subjugated or the ceded territory

femme (1929); Calbainec, *Traté de la nationalité de la femme mariée* (1929); Müller-Sprenger, *Die Staatsangehörigkeit der verheirateten Frau* (1930); Sausser-Hall, *La nationalité de la femme mariée* (1933); Waltz *The Nationality of Married Women* (1936); Llewellyn Jones in *Grotius Society*, 15 (1929), pp. 121-136; Harrison in *New York University Law Quarterly Review*, 9 (1931-1932), pp. 445-462; Scott and Lapradelle in *Annuaire*, 37 (1932) pp. 1-25; Bicknell in *Grotius Society*, 20 (1934), pp. 106-122; Makarov in *Hague Recueil*, vol. 60 (1937) (11), pp. 113-234; Simson in *Archiv des öffentlichen Rechts*, 76 (1949), pp. 55-84; *Nationality of Married Women* Report by the Secretary-General of the United Nations, 1950.

as the British Nationality and Status of Aliens Act, 1914 (as amended in 1918 and 1922), which had imperial scope. A decision of the House of Lords on appeal from the Court of Session in Scotland (where legitimization has prevailed from early times), *Shedden v. Patrick* (1854) 1 Macqueen 535 tends strongly to confirm the view here submitted. See also *Abraham v. Attorney General* [1934] P 17, *Annual Digest*, 1933-1934, Case No. 105 and Mann in *L.Q.R.*, 57 (1941) pp. 112-141. § 23 of the British Nationality Act of 1948 provides that a person born out of wedlock and legitimated in consequence of the subsequent marriage of his parents is to be treated as if he had been born legitimate as from January 1 1919, or from the date of the marriage, whichever is the later. For an analysis of this provision see Parry *British Nationality* (1951), pp. 54-57.

¹ It is believed that the Legitimacy Act, 1926, has not had the effect of adopting this rule into English law and naturalising *ipso facto* the illegitimate child born abroad of a British father upon that child's subsequent legitimization. It is unlikely that an Act which, like the Legitimacy Act, 1926, is confined in its operation to England and Wales could thus enlarge an enactment such

² Thus in § 14 of the British Nationality Act of 1948 it is provided that a married woman prior to the Act, ceased on marriage or during its continuance to be a British subject shall be deemed to have been a British subject immediately before the commencement of the Act.

acquiring *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory. These modes of acquisition of nationality are modes settled by customary International Law; details have been given above, §§ 219 and 240.

§ 302. Although it is at present left in the discretion ¹ of the different States ² to determine the grounds on which individuals lose their nationality, the matter is of direct ^{losing of Nationality.} importance for International Law. Five modes of losing nationality must be stated to exist according to the reason of the thing, although all five are by no means recognised by all the States. These modes are release, deprivation, expiration, renunciation,³ and substitution.

(1) *Release*. Some States give their citizens the right to ask to be released from their nationality. Such release, if granted denationalises the released individual.

(2) *Deprivation*.—For example, according to the Municipal Law of some States, as, for instance, Italy, the fact that a citizen enters into foreign civil or military service without permission of his sovereign deprives him of his nationality. After the First World War Soviet Russia, Italy, Turkey, Germany, and some other countries ⁴ passed decrees which had the effect of denationalising considerable numbers of their subjects on the ground of uninterrupted residence abroad, disaffection, or for other reasons.⁵ The legislation of many States recognises numerous grounds of deprivation of nationality. Thus the United States Immigration and Nationality Act of 1952 provides for loss of nationality, on

¹ See, however, below § 313.

² For a comparative study of the laws of various countries see Sandiler in *A.J.*, 29 (1935), pp. 261-278.

³ The term 'renunciation' has been substituted for 'option.'

⁴ Such as Poland in 1938, Roumania in 1938 and 1941, and France in 1940.

⁵ Trautenberg in *Répertoire*, v. pp. 338-350; Fischer Williams in *B.Y.*, 8 (1927), pp. 45-61; Stauffenberg in *Z.S.V.*, 4 (1934), pp. 261-276; Scelle in *Revue critique de droit international*, 29 (1936), pp. 63-76; Prouss in *Georgetown Law Review*, vol. 22,

1934, pp. 250-276; Abel in *Modern Law Review*, 6 (1942), pp. 57-68. On the question whether these decrees release the State in question from the international duty of receiving back its own subjects when expelled by other States see below, § 326. As to revocation of British naturalisation see below, § 307. As to denationalisation for political reasons see Prouss in *R.I.F.*, 4 (1937), pp. 10-19, 240-254, and in *American Political Science Quarterly*, 36 (1942), pp. 701-710. See also *Columbia Law Review*, 44 (1944), pp. 736-751.

the part both of naturalised and of native-born citizens, for such causes as entering, or serving in, the armed forces of a foreign State; voting in a political election in a foreign State or participating in an election or plebiscite to determine the sovereignty over foreign territory; deserting the armed forces of the United States in time of war, committing any act of treason against the United States; departing from or remaining outside the jurisdiction of the United States in time of war for the purpose of avoiding military service.¹ In so far as such deprivation of nationality results in statelessness, it must be regarded as retrogressive. That it is not dictated by any vital national interest may be seen from the fact that, subject to insignificant exceptions, it finds no place in the laws of other States, *e.g.* in the British Nationality Act of 1948.²

(3) *Expiration*.—Some States have provided by legislation that citizenship expires in the case of such of their subjects as have left the country and stayed abroad for a certain length of time.³

(4) *Renunciation*.—For example, some States Great

¹ § 349. As to denaturalisation under the United States Law of 1952 see L. H. Hambro in *Michigan Law Review*, 51 (1953), pp. 881-902.

² The exception is that in relation to naturalised persons, it has been acted upon in very rare cases. And see generally as to withdrawal of nationality Bonneau *R.G.* 52 (1948) pp. 50-81 (in addition to writers referred to above, at p. 657, n. 5).

³ Thus in the United States it is provided in § 352 of the Nationality Law of 1952 that a naturalised person shall lose his nationality by continuous residence for three years in the territory of the State of which he was a national or in which the place of his birth is situated, or by continuous residence for five years in any foreign State or States. The Act provides for certain exceptions in case of stay connected with governmental service, or service in international organisations, or representation of an American business, scientific, or charitable organisation. See Gordon in *Columbia Law Review*, 53 (1953), pp. 451-475. The provisions of § 20 (4) of

the British Nationality Act of 1948 are similar but less stringent both with regard to the periods of residence and to the application of the Act. In particular the Secretary of State must not deprive the person concerned of nationality unless he is satisfied that that measure is conducive to the public good. Also the consequences of continuous residence may be obviated by annual registration with a British consulate. English courts will not recognise in time of war any change of nationality brought about by a decree of an enemy State which purports to turn any of its subjects into a stateless person or a subject of a neutral State. *The King v. Home Secretary, Ex parte L.* [1945] K.B. 7. And see for comment thereon Abel in *Modern Law Review*, 8 (1945), pp. 77-90. See also *Re Mangold's Patent* (1951) 68 H.P.C. 1 and for comment thereon Abel in *I.L.Q.*, 4 (1951), pp. 373-377. For a different though somewhat hesitating attitude of American courts see *United States ex rel. Schwarzkopf v. Uhl* (1943) 137 F. (2d) 898.

Britain for instance¹—which declare a child born of foreign parents on their territory to be their natural-born subject, although he becomes at the same time, according to the Municipal Law of the home State of the parents, a subject of such State, give the right to such child to make, after coming of age, a declaration that he desires to cease to be a citizen. Such declaration of alienage creates *ipso facto* the loss of nationality.

(5) *Substitution*.—According to the law of many States, the nationality of their subjects is extinguished *ipso facto* by their naturalisation abroad. Some States, however, do not object to their citizens acquiring another nationality besides that which they already possess. Thus according to the British Nationality Act of 1948 naturalisation in a foreign State no longer involves loss of nationality—though the Act permits the persons concerned to renounce citizenship of the United Kingdom and Colonies.² On the other hand, the United States Nationality Act of 1952 provides that voluntary naturalisation in a foreign country results in loss of nationality.

Just as naturalisation abroad *ipso facto* extinguishes the nationality of their subjects according to the Municipal Law

¹ The British Nationality Act of 1948 provides generally that any citizen of the United Kingdom and Colonies of full age and capacity who is also a citizen of another Commonwealth country or a national of a foreign State may make a declaration of renunciation of citizenship of the United Kingdom and Colonies with resulting loss of citizenship. However, the Secretary of State may withhold the registration of any such declaration if made during any war in which the United Kingdom is engaged. See also *R. v. Commanding Officer* (1917) 33 T.L.R. 252. The rule of common law prohibiting naturalisation in a foreign State with which the United Kingdom is at war, has not been affected by the wide provisions of § 19 of the Nationality Act of 1948 permitting renunciation of citizenship. See below, p. 662, n. 5.

² § 19 (1). The reason for this change of the law is apparently the

fact that naturalisation in a foreign country is not always due to any lack of attachment to the original citizenship; it is often due to business reasons not deserving of disapprobation. However, the change of the law is indicative of the fact that, contrary to frequent assertions, the law of nationality is not so indissolubly bound up with fundamental notions of the legal system as to preclude changes required by considerations of national or international interest. Thus in Great Britain the rule that no person can abandon his British nationality (see below, p. 662) was represented to be a fundamental principle of the common law. That rule was abandoned in 1948 so as to permit naturalisation in a foreign country—subject, however, to the automatic loss of British nationality. The Act of 1948 abandoned that latter condition.

of some States, so, according to International Law, through subjugation or cession the inhabitants of the conquered or ceded territory become subjects of the State which annexes the territory, and their former nationality is extinguished by substitution of the new.¹

IV

NATURALISATION IN ESPECIAL

Vattel, i. § 214—Hall, §§ 71, 71*—Westlake, § 1. pp. 232-237—Lawrence, §§ 95, 96—Phillimore, i. §§ 325-332—Moore, iii. §§ 377-380—Hackworth, iii. §§ 223-241—Hyde, i. §§ 350-371—Bluntschli, §§ 371, 372—Pradier-Fodéré, iii. §§ 1656-1659—Fauchille, § 422—De Loutch, i. pp. 268-271—Cruchaga, §§ 372-374—Calvo, ii. §§ 581-646—Martens, ii. §§ 47, 48—Keith's Wheaton, pp. 307-318—Cockburn, *Nationality* (1869), ch. 2—Stoicescu, *Étude sur la naturalisation* (1875)—Folleville *Traité de la naturalisation* (1880)—Cogorlan, *La nationalité, etc.* (2nd ed., 1890), pp. 117-282 307-313—Delécaulle, *De la naturalisation* (1893)—Piggott, *Nationality and Naturalisation, etc.*, 2 vols. (1907)—Baldassarri, *La naturalizzazione* (1912)—Borchard, §§ 228-252, 263-272—Keith, *Responsible Government in the Dominions* (2nd ed., 1928), ii. pp. 1041-1048—Butler and Maccoby, *The Development of International Law* (1928) ch. x. Mervyn Jones, *op cit.* (at p. 642), pp. 158-177—Hart, Edwards, Sargent and Phillimore in *J.C.L.*, New Ser., 2 (1900), pp. 11-26; 14 (1914) pp. 314-336; and 17 (1917), pp. 165-171—Edwards in *L.Q.R.*, 30 (1914), pp. 433-447—Flournoy in *Yale Law Review*, 31 (1922), pp. 702-719, 848-868—Randall in *L.Q.R.*, 40 (1924), pp. 18-30—Hackworth in *A.S. Proceedings*, 1925, pp. 56-69—Hazard, *ibid.*, 1926, pp. 67-84—*Harvard Draft Convention* (and Comment), *A.J.*, 23 (1929), April, Special Number, pp. 41-76—Triepel in *Z.o.F.*, 1 (1920), pp. 191-196.

Concep-
tion and
Import-
ance of
Natural-
isation.

§ 303. Naturalisation in the narrower sense of the term—in contradistinction to naturalisation *ipso facto* through marriage, legitimation, option, domicile, and Government office (see above, § 299)—can be defined as reception of an alien into the citizenship of a State through a formal act on the application of the individual concerned. International Law does not at present provide any rules for such reception, but it recognises the competence of every State to increase the number of its subjects through naturalisation.²

¹ See above, § 301. Concerning the option sometimes given to inhabitants of ceded territory to retain their former nationality, and as to changes of nationality due to the Treaties of Peace after the First World War, see above, § 219.

² In *Apostolides v. Turkish Government* the Franco-Turkish Mixed Arbitral Tribunal held, in May 1928, that the effects of naturalisation granted by one State ought to be recognised by other States: *Annual Digest*, 1927-1928, Case No. 207.

§ 304. The object of naturalisation is always an alien. Object of Naturalisation. Some States will naturalise such aliens only as are stateless because they never have been citizens of another State or because they have renounced, or been released from, or deprived of, the citizenship of their home State. But other States naturalise also such aliens as are, and remain, subjects of their home States. Most States, such as Great Britain,¹ naturalise such persons only as have taken up their domicile in their country, have been residing there for some length of time, and intend permanently to remain in their country. Although every alien may be naturalised, no alien has, according to the Municipal Law of most States, a claim to become naturalised, naturalisation being a matter of discretion for the Government, which can refuse it without giving any reasons.²

§ 305. If granted, naturalisation makes an alien a citizen. Conditions of Naturalisation. But it is left to the discretion of the naturalising State to grant naturalisation upon any conditions it likes. Naturalisation need not give an alien absolutely the same rights as are possessed by natural born citizens. Thus according to

¹ An exception being made in the case of persons employed in the service of the British Government. The law of the United States provides for voluntary naturalisation, after four years of honourable service in the army, even if the person concerned has never resided in the United States. See Hazard in *I J* 46 (1952) pp. 270-271.

² Formerly the law of the United States of America discriminated for this purpose between aliens of different races: see Garner in *J.C.L.*, 3rd ser., 6 (1924), pp. 210-212; Hershey, § 234; Hazard in *R.L.*, 3rd ser., 12 (1931), pp. 700-736, 13 (1932) pp. 131-183. However, § 311 of the Immigration and Nationality Law of 1952 provides that 'the right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such a person is married.'

In the United States the proceedings following upon a petition for naturalisation are of a judicial nature. Unlike in Great Britain, the

grant of naturalisation is not a matter of administrative discretion. See also, as to the French Nationality Law of 1927, Garner in *A.J.*, 22 (1928), p. 381; Louis-Lucas, *La nationalité française* (1929). And see the interesting decision of the Supreme Court of the United States, given by a bare majority, to the effect that professed conscientious objectors refusing to subscribe to the part of the oath pledging them to defend the United States against domestic and foreign enemies are ineligible for naturalisation: *United States v. Schurimmer* (1929) 279 U.S. 644; *Macintosh v. United States* (1931) 283 U.S. 605; *Bland v. United States* (1931) 283 U.S. 636 - all reported in *Annual Digest*, 1929-1930, Cases Nos. 136-138. For comment thereon see *A.J.*, 23 (1929), pp. 626-632; Hazard, *ibid.*, pp. 793-808. All these cases were overruled in *Girouard v. United States* (1946) 328 U.S. 61; *Annual Digest*, 1946, Case No. 52. On the facilitation of naturalisation in the United States through military service see R. R. Wilson in *A.J.*, 36 (1942), pp. 454-460.

Article 2 of the Constitution of the United States of America a naturalised alien can never be elected President. A naturalised British subject is entitled to all rights, powers, and privileges, and is subject to all obligations, duties, and liabilities, to which a natural-born British subject is entitled or subject.¹ However, this is so, in some respects, subject to the provisions of the Nationality Act of 1948. Thus a naturalised subject may be deprived of nationality on account of disloyalty or prolonged stay abroad.² The United States Nationality Law of 1952 discriminates, in these matters, more stringently against naturalised persons.³

Effect of
Natural-
isation
upon
Previous
Citizen-
ship.

§ 306. Since the Law of Nations does not at present contain any rules concerning naturalisation, the effect of naturalisation upon previous citizenship is exclusively a matter for the Municipal Law of the States concerned. According to the law of some States, such as Great Britain before 1948,⁴ any one of their subjects who becomes naturalised abroad thereby loses his previous nationality⁵; other States have not followed that principle. In any case, there can be no doubt that a person who is naturalised abroad, and temporarily or permanently returns to the country of his origin, can be held responsible⁶ for all acts and omissions occurring before his naturalisation abroad.

¹ Except that in certain circumstances (see below, § 307) the British Government may deprive a naturalised British subject of his British nationality, which it cannot do in the case of a natural-born British subject.

² See below, p. 663, n. 4.

³ See above, p. 658, n. 3.

⁴ Up to the Naturalisation Act of 1870, Great Britain upheld the rule *nemo potest exuere patriam*. Its antithesis is the rule *ne quis inritus civitate mutetur, neve in civitate maneat inritus* (Cicero, *pro Balbo*, c. 13, § 31; see Rattigan, *Private International Law* (1895), p. 29, No. 21).

⁵ § 13 of the Act of 1914; but not in a State at war with Great Britain (*R. v. Lynch* [1903] 1 K.B. 444), in which case the act of becoming naturalised amounts to treason; nor can a person holding British and another nationality, and entitled in the normal course to divest him-

self of his British nationality by a declaration of alienage, make such a declaration when Great Britain is at war so as 'to become solely the subject of an enemy State' (*Ex parte Freyberger* [1917] 2 K.B. at p. 139), nor (possibly) so as to become solely the subject of a neutral State (*Veché v. Taylor* [1917] 116 L.T. 446); nevertheless, a *bona fide* marriage between a British woman and an enemy national in time of war is valid and not criminal, and operates under § 10 of the Act of 1914 to cause her to lose her British and acquire enemy nationality. *Fasbender v. Attorney-General* [1922] 2 Ch. 850. And see above, § 302.

⁶ Many instructive cases concerning this matter are reported by Wharton, n. §§ 180, 181, and Moore, iii. §§ 401-407. See also Hall, § 71, where details concerning the practice of many States are given with

§ 307. The present law of Great Britain¹ concerning naturalisation² is contained in the British Nationality Act, 1948. The applicant must satisfy certain conditions as to length of residence in British territory or of service of the Crown, as to character and knowledge of the English language, and as to his intentions with regard to future residence or service of the Crown.³ The grant of a certificate of naturalisation is entirely in the discretion of the Home Secretary. Upon the application of the naturalised person, the Home Secretary may include in the certificate the name of any child who is a minor; within one year of attaining his majority (twenty-one years) that child may make a declaration of alienage and cease to be a British subject.

Naturalisation in Great Britain.

regard to their subjects naturalised abroad, and Borchard, § 234, the case of *Lutz v. Liberty* (1852) in *United States Documents, 1850-1860*, ii. 176, and Pitt Cobbett, *Leading Cases on International Law*, (6th ed., 1917), p. 218. On the position, in the United States, of declarant aliens, i.e. of persons who have applied for naturalisation, see Koesler in *University of Pennsylvania Law Review*, 91 (1942), pp. 321-338.

¹ See McNair in *L.Q.R.*, 35 (1919), pp. 216-223, and *Legal Effects of War* (2nd ed., 1944), pp. 17-24. As regards naturalisation in the United States of America see Moore, iii. §§ 381-389; Hackworth, iii. §§ 223-241; Sections 310-318 of the Nationality and Immigration Act, 1952. And see above, p. 661, n. 2. See also the Convention adopted by the Seventh Pan-American Conference in December 1933: *A.J.*, 28 (1934), Suppl. pp. 63, 64.

² Not to be confused with naturalisation proper is naturalisation through denization by means of letters-patent under the Great Seal. It is expressly provided by § 25 of the British Nationality and Status of Aliens Act, 1914, that nothing in this Act shall affect the grant of letters of denization by His Majesty. This way of making an alien a British subject is based on a very ancient practice (see Hall, *Foreign Powers and Jurisdiction*, § 22) which, though still lawful, has not been used for

many years and seems not likely to be resorted to. It is not referred to in the Nationality Act of 1948.

³ According to the Nationality Act of 1948 the principal qualifications for naturalisation of an alien are as follows: that he has either resided in the United Kingdom or been in Crown service in the United Kingdom, or partly the one and partly the other, throughout the period of twelve months immediately preceding the date of the application: that during the seven years immediately preceding that period of twelve months he has either resided in the United Kingdom or any colony, protectorate or United Kingdom trust territory or been in Crown service, or partly the one and partly the other, for periods amounting in the aggregate to not less than four years; and that he is of good character, has sufficient knowledge of the English language and intends to reside in the United Kingdom or in any colony, protectorate or United Kingdom trust territory or to enter into or continue in Crown service, or service under an international organisation of which the United Kingdom is a member, or service in the employment of a society, company or body of persons established in the United Kingdom or in any colony, protectorate or United Kingdom trust territory.

Revocation of Certificate of Naturalisation.—Until January 1, 1915, no provision existed for the revocation

V

DOUBLE NATIONALITY AND STATELESSNESS

Hall, §§ 71, 74—Westlake, i. pp. 228-232.—Wheaton, § 85 (Dana's Note)—Moore, iii. §§ 428-430—Hackworth, iii. § 255—Hyde, i. §§ 372-375—Fauchille, § 422—Pradier-Fodéré, iii. §§ 1660-1665—Rivier, i. pp. 304-306—Calvo, ii. §§ 647-651—Martens, ii. § 46—Borchard, §§ 11, 253-262—De Louter, i. pp. 271-274—Kunz, *Die völkerrechtliche Option*, ii. (1928), pp. 290-301, and in *Ostrecht*, ii. (1928), pp. 401-437—Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), pp. 131-150—Colaninri, *De la condition des 'Sans-patrie'* (1932)—Seckler-Hudson, *Statelessness: With special reference to the United States* (1934)—Lipovano, *L'apatridie* (1935)—Vishniac, *Legal Status of Stateless Persons* (1945)—Flournoy, *Yale Law Journal* 31 (1922), pp. 702-719, 848-868, and in *A.S. Proceedings*, 1925, pp. 69-78—Audinet in *l'Année* (1925) pp. 882-896—*International Law Association Report*, 33 (1925), pp. 25-53—Gargas in *Bibliotheca Visseriana*, 7 (1928) pp. 1-130—*Répertoire*, iv. pp. 638-693, and viii. pp. 357-574—Bouvé in *A.S. Proceedings* 1928, pp. 31-50—Becker in *Z.V.*, 15 (1930), pp. 478-518—Vishniac in *Hague Recueil*, vol. 43 (1933) (i.), pp. 119-246—Philonenko in *l'Année* 60 (1933), pp. 1161-1187—Scheftel, *ibid.*, 61 (1934), pp. 36-69—François in *Hague Recueil*, vol. 53 (1935) (ii.), pp. 287-374—Louis-Lucas, *ibid.*, vol. 61 (1938) (ii.), pp. 5-65—Biscottini in *Rivista*, 32 (1940), pp. 370-422—Loewenfeld in *Grotius Society*, 27 (1941), pp. 59-112—*A Study of Statelessness* (United Nations Department of Social Affairs, 1949)—*International Law Association Report*, 44 (1950), pp. 36-62—Samore in *A.J.*, 45 (1951), pp. 476-494

Possibility of Double and Absent Nationality.

§ 308. As the Law of Nations has at present no generally binding rules concerning acquisition and loss of nationality

of a certificate of naturalisation, but the Acts of 1914 and 1918 and now of 1948 (Section 20) enable the Home Secretary in his discretion (but, as stated below, after an inquiry of a judicial character) to revoke a certificate of naturalisation upon a variety of grounds which may be summarised as follows: (i) the use of fraud, active, or passive, in obtaining the certificate; (ii) disaffection or disloyalty to His Majesty; (iii) intercourse with an enemy during war; (iv) within five years of the date of the grant of the certificate, the fact of being sentenced by a British court to imprisonment for a term of not less than twelve months; (v) residence in foreign countries for a contiguous period of seven years unless during that period the person in question has: (a) either been in the service of the

British Government or of an international organisation of which the Government in any part of Her Majesty's dominions is a member, or (b) registered annually at a United Kingdom consulate his intention to retain the citizenship of the United Kingdom and colonies. However, it is provided that the Secretary of State shall not deprive a person of citizenship unless he is satisfied that it is not conducive to the public good that that person shall continue to be a citizen. Moreover, it is laid down that no order depriving a person of his citizenship by way of penalty shall be made without giving him notice of the proposed measure and of the grounds thereof and before referring the case to a committee of inquiry presided over by a person of judicial experience.

beyond this, that nationality is lost and acquired through subjugation and cession, and as the Municipal Laws of the different States differ in many points concerning this matter, the necessary consequence is that an individual may possess more than one nationality as easily as none at all. The points to be discussed here are therefore: How double¹ nationality occurs; the position of individuals with double nationality; how statelessness occurs; the position of stateless individuals; and, lastly, means of redress against difficulties arising from double nationality and statelessness.

§ 309. An individual may possess double nationality knowingly or unknowingly, and with or without intention.² And double nationality may be produced by every mode of acquiring nationality. Even birth can invest a child with double nationality. Thus, every child born in Great Britain of German parents acquires both British and German nationality, for such child is British according to British, and German according to German, Municipal Law. Legitimation of illegitimate children can produce the same effect. Thus, the illegitimate child of a German born in England of an English mother is a British subject according to British and German law; but if after the birth of the child the father marries the mother and remains a resident in England, he thereby legitimates the child according to German law, and such child acquires thereby German nationality without losing its British nationality. Naturalisation in the narrower sense of the term is frequently a cause of double nationality, since individuals may apply for, and receive, naturalisation in a State without thereby losing the nationality of their home State.³ This is, since 1948, the position in Great Britain.⁴

¹ It may be plural nationality.

² The following cases in which double nationality has been discussed may be mentioned: *Ex parte Freyberger* (1917) 2 K.B. 129; *Veicht v. Taylor* (1917) 116 L.T. 446; *Kramer v. Attorney-General* [1923] A.C. 528. *Baron Frédéric de Horn v. Yugoslav State*, decided on July 12, 1926, by

the Yugoslav-Hungarian Mixed Arbitral Tribunal; *Annual Digest*, 1926 1926, Case No. 205; *Barthez de Montfort v. Treahander Hauptverwaltung*, decided on July 10, 1926, by the Franco-German Mixed Arbitral Tribunal, *ibid.*, Case No. 206.

³ See below, §§ 310 and 313a.

⁴ See above, p. 650.

How
Double
National-
ity
occurs.

Position
of Indi-
viduals
with
Double
Nation-
ality.

§ 310. Persons possessing double nationality bear, in the language of diplomatists, the name *sujets mixtes*. The position of such 'mixed subjects' may be awkward on account of the fact that two different States claim them as subjects, and therefore claim their allegiance. In case of war between these two States, an irreconcilable conflict of duties is created for these individuals.¹ Each of the States claiming such an individual as a subject is internationally competent to do this, although they cannot claim him against one another, since each of them correctly maintains that he is its subject. But against third States each of them appears as his sovereign, and it is therefore possible that each of them can exercise its right of protection over him within third States. On the other hand, a third State can treat a person possessing two nationalities as a subject of either of the two States to which he owes allegiance.

Hague
Codifica-
tion
Confer-
ence and
Double
Nation-
ality.

§ 310a. The inconveniences resulting from double nationality became particularly² prominent in consequence of the changes of nationality arising out of the Peace Treaties of 1919, and this was probably one of the reasons why the Hague Codification Conference of 1930 reached agreement on certain aspects of the matter. The Convention on Certain Questions Relating to the Conflict of Nationality Laws (see above, § 35) expressly declares that a person having two or

¹ In *Tsunaya Kawakita v. U.S.* an United States Court of Appeals sentenced for high treason the accused who was of both American and Japanese nationality. The treasonable activities consisted in committing brutalities upon United States prisoners of war in a Japanese camp for prisoners of war. It was apparent from the judgment that the nature of the treasonable activity was a decisive element in the situation (1951) 190 F. (2d) 606; *A.J.*, 46 (1952), p. 147. It was principally for that reason that the Supreme Court affirmed the conviction: (1952) 343 U.S. 717; *A.J.*, 45 (1953), p. 146. See also *Dos Reis v. Nicolle* (1947) 161 F. (2d) 869; *Annual Digest*, 1947, Case No. 51, where the Court declined to deprive of nationality a person of double nationality who was compelled to

serve in the army of the other State.

² In 1812, a time when Great Britain still kept to the rule that no natural born British subject could lose his nationality, the impressment of Englishmen naturalised in the United States proved one of the causes of the war between the two countries. There were also, for a similar reason, frequent disputes in the nineteenth century between the United States and Prussia. For a survey of the various treaties concluded between the United States and other States since 1868 (in which year the so-called 'Bancroft Conventions' were concluded with the North German Confederation and other German States) in order to regulate conflicting claims to the allegiance of naturalised persons, see Hackworth, *iii.* § 256.

more nationalities may be regarded as its national by each of the States whose nationality he possesses (Article 3), and that a State may not give diplomatic protection to one of its nationals against a State whose nationality that person possesses (Article 4). Further, the Convention provides that if a person has more than one nationality, he shall, within a third State, be treated as if he had only one; in particular, it is laid down that that third State shall recognise exclusively either the nationality of the State in which he is habitually and principally resident, or the nationality of the State with which he appears in fact to be most closely connected (Article 5). The Convention thus gives effect to what may be called the principle of effective nationality.¹ It is laid down that if a person, without any voluntary acts of his own, possesses double nationality, he may renounce one of them with the permission of the State whose nationality he wishes to surrender, but that, subject to the laws of the State concerned, such permission shall not be refused if that person has his habitual residence abroad (Article 6). In a special Protocol Relating to Military Obligations in Certain Cases of Double Nationality² it was agreed that if a person of two or more nationalities possesses the effective nationality of one country in the meaning described in Article 5, he shall be exempt from all military obligations in the other country or countries subject to the possible loss of nationality in those countries (Article 1).³ It is provided, secondly, that if a person possessing two or more nationalities is entitled, under the law of any of the States, to renounce its nationality on coming of age, he shall be exempt during his minority

¹ See Pfeiffer, *Das Problem der effektiven Staatsangehörigkeit im Völkerrecht* (1933).

² *A.J.*, 24 (1930) Suppl., p. 201; Hudson, *Legislation*, v. p. 374. The Protocol has been ratified, among others, by Great Britain, the United States and Brazil, and has entered into force.

³ The Treaty of November 1, 1930, between Norway and the United States provides that a person born in the territory of one party of parents

who are nationals of the other party, and having the nationality of both parties, shall not, if he has his habitual residence in the State of his birth, be held liable for military service or any other act of allegiance during a temporary stay in the territory of the other party. (*U.S. Treaty Series*, No. 832; *A.J.*, 25 (1931), Suppl., p. 151. As to the Franco-Belgian Treaty of September 12, 1928, for avoiding conflicts in the matter of recruitment see Dreyfus in 56 *Cinet* (1929), pp. 939-950.

from military service in the State in question (Article 2).¹ Finally, it is laid down that if under the law of a State a person has lost its nationality and has acquired another nationality, he shall be exempted from the military obligations in the State whose nationality he has lost (Article 3).

How
State-
lessness
occurs.

§ 311. An individual may be without nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality, because according to German law it does not acquire German nationality, and according to British law it does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German law, stateless. But statelessness may take place after birth, for instance as the result of deprivation or loss of nationality by way of penalty or otherwise (see above, § 302 (2)). All individuals who have lost their original nationality without having acquired another are, in fact, destitute of nationality.²

Position
of Indi-
viduals
destitute
of Nation-
ality.

§ 312. Since stateless individuals do not own a nationality, the principal link³ by which they could derive benefits from International Law is missing, and thus they lack protection as far as this Law is concerned.⁴ Their position may be compared to vessels on the open sea not sailing under the flag of a State, which likewise do not enjoy any protection. In practice, stateless individuals are in most States treated more or less as though they were subjects of foreign States. If they are maltreated,⁵ apart from the provisions of the Charter of the United Nations in the matter of human rights and fundamental

¹ In the part of the Final Act relating to Nationality it was recommended: (a) that States should adopt legislation designed to facilitate, in cases of persons possessing more than one nationality, the renunciation of nationality in the countries in which they are not resident, and (b) that effect be given to the principle that the acquisition of a foreign nationality through naturalisation

involves the loss of previous nationality: *A.J.*, 24 (1930), Suppl., p. 182.

² As to English law see *Stoek v. Public Trustee* [1921] 2 Ch. 67, and cases therein discussed.

³ See above, § 201.

⁴ It cannot be considered maltreatment if a State compels individuals destitute of nationality either to become naturalised or to leave the country.

freedoms,¹ International Law² as at present constituted cannot aid them unless their position is made the subject of express regulation in treaties, in which case every contracting party acquires the right to protect them notwithstanding the rule as to nationality of claims.³

§ 313. The rules of International Law relating to diplo-Regula-
matic protection are based on the view that nationality is tion of
the essential condition for securing to the individual the Stateless-
protection of his rights in the international sphere. This ness by
being so, the admissibility of statelessness must be regarded Treaty.
as a serious defect in this branch of International Law. There is now a growing tendency to reduce by inter-
national conventions the possibilities of statelessness or, where that is impossible, to render less difficult the position of stateless persons.

The Hague Codification Conference of 1930⁴ adopted a number of provisions calculated to reduce the possibility of statelessness :

(1) *Loss of Nationality as the Result of an Expatriation Permit.*—The Convention on Certain Questions Relating to the Conflict of Nationality Laws⁵ provides that an expatriation permit issued by a State shall not entail the loss

¹ See below, § 340f.

² As to humanitarian intervention see above, §§ 137 and 202. The position of the Jews in Roumania before 1919 furnished an example. According to Municipal Law they were, with a few exceptions, considered as foreigners for the purpose of avoiding the consequences of Article 44 of the Treaty of Berlin, 1878, according to which no religious disabilities were to be imposed by Roumania upon her subjects. But as these Jews were not subjects of any other State, Roumania compelled them to render military service, and actually treated them in every way according to discretion without any other State being able to exercise a right of protection over them. See Rey in *R.G.*, 10 (1903), pp. 480-526; Bar in *R.J.*, 2nd ser., 9 (1907), pp. 711-716; Stambler, *L'histoire des Israélites roumains et le droit d'intervention* (1913); Kohler and Wolf, *Jewish Dis-*

abilities in the Balkan States (1916); Kohler in *Bulletin of the Jewish Academy of Arts and Sciences*, No. 1 (1933). See also above, § 293. But on December 2, 1919, Roumania undertook, by a Treaty with the Principal Allied and Associated Powers (Treaty Series (1920), No. 6, Cmd. 588), to recognise as Roumanian subjects *ipso facto* and without any formality Jewish inhabitants who were stateless. See Rey in *R.G.*, 32 (1925), pp. 133-162, and *Kahane v. Paris*, decided on March 19, 1929, by the Austro-Roumanian Mixed Arbitral Tribunal: *Annual Digest*, 1929-1930, Case No. 131.

³ See above, § 291 (n.).

⁴ The conference adopted a unanimous recommendation to the effect that it is desirable that in regulating questions of nationality States should make every effort to reduce so far as possible cases of statelessness.

⁵ See above, §§ 35 and 310a.

of the nationality of that State unless the person to whom it is issued possesses another nationality or unless he acquires another nationality.

(2) *Married Women*.—The provisions of the Convention on this subject have been noted above, p. 654, n. 3.

(3) *Nationality of Children*.—The same Convention provides that if children do not acquire the nationality of their parents as a result of the naturalisation of the latter, they shall retain their existing nationality (Article 13); that a child whose parents are unknown or who have no nationality, or whose nationality is unknown, shall have the nationality of the country of birth; and that, where adoption causes loss of nationality, that result shall be conditional upon the acquisition by the adopted person of the nationality of the person by whom he is adopted (Article 17).

(4) *Special Cases*. In a special Protocol Relating to a Certain Case of Statelessness¹ it was laid down that in a State whose nationality is not conferred by the mere fact of birth in its territory, a person born there of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of that State (Article 1).

(5) *Mitigation of Consequences of Statelessness*. Finally, in a special Protocol Concerning Statelessness,² provision was made for the case of persons rendered stateless as the result of being deprived of their nationality after they entered a foreign country. It is there laid down that the State of origin is bound to admit such persons at the request of the State in whose territory he is if he is permanently indigent,³ or if he has been sentenced to not less than one month's imprisonment.

¹ See above, § 35.

² See above, § 35.

³ However, his home State may even in that case refuse to receive him if it undertakes to meet the cost of relief. It will be noted that the provisions of the Protocol may be liable to objection in so far as they are calculated to interfere with the principle

of asylum for political refugees—a category of persons most likely to be affected by measures of denationalisation. By 1945 the Protocol had not entered into force. See generally as to expulsion of stateless persons Philonenko in 60 *Cunet* (1933), pp. 1161-1187, and Trachtenberg in *R.J.*, 3rd ser., 17 (1936), pp. 552-563.

At the same time, attempts have been made in some cases to mitigate the lot of particular categories of stateless persons.¹ Thus in the Convention of October 28, 1933,² relating to the International Status of Refugees, the contracting parties undertook definite obligations with regard to the treatment of Russian, Armenian, and assimilated refugees as defined in previous Agreements concluded in 1926 and 1928.³ They agreed to grant to these persons so-called Nansen passports; not to expel, except for reasons of public order and safety, refugees regularly residing in the State concerned; and to grant to them free access to the courts and exemption from the requirement of reciprocity applying in some cases to aliens.⁴ After the Second World

¹ See Trachtenberg in *Répertoire*, vii, pp. 582-599; Nitti in *R.G.*, 36 (1929), pp. 739-750; Scheffel in 61 *Clunet* 193, pp. 36-69; Bentwich in *Geneva Special Studies*, vi, No. 5 (1935) and in *B.Y.*, 16 (1935), pp. 114-129; Kuhn in *A.J.*, 30 (1936) pp. 495-499; Rubinstein in *International Affairs*, 15 (1936), pp. 716-734; Poulin in *Annuaire Suisse de droit international*, 3 (1946), pp. 95-196; Merger in *Nouvelle Revue de droit international privé*, 13 (1946), pp. 56-95. As to the legal status of political refugees see Holborn in *A.J.*, 32 (1938), pp. 680-703.

² Treaty Series, No. 4 (1937). (Cmd 317. Great Britain acceded in October 1936. See as to this Convention Tager in 63 *Clunet* (1936), pp. 1136-1167.

³ For the Agreement of May 12, 1926, concerning the Issue of Certificates to Russian and Armenian Refugees see *L.N.T.S.*, 59, p. 47; Hudson, *Legislation*, iii, p. 1894. For the Arrangement of June 30, 1925, concerning the Legal Status of Russian and Armenian Refugees see *League Doc. L.S.C. 11-1928 (1)*; *Off. J.*, 1929, p. 485; *L.N.T.S.*, 89, p. 53. Hudson, *Legislation*, iv, p. 2486. As to the validity of that Arrangement in France see *Clot v Schpoliansky Annual Digest*, 1929-1930, Case No. 218 and Note. Previously the work of relief of refugees had been transferred in 1925 to the International Labour Office and re-transferred in 1930 to the Secretariat of the League. On

January 19, 1931, the Council approved the Statutes of the Nansen International Office for Refugees, which was placed under the direction of the League in accordance with Article 24 of the Covenant (see above, § 167h). *Off. J.*, 1931, p. 156; Hudson, *Legislation*, v, p. 872. The Office was liquidated in 1939, as provided by the Seventeenth Assembly, 1936, *Plenary Meetings* p. 139. And see generally on the problem of refugees and displaced persons Reut-Nicolussi in *Haque Recueil* 73 (1948) (ii) pp. 5-61; Nathan Chapotot *Les Nations Unies et les Réfugiés* (1949); Balogh in *Haque Recueil* 75 (1949) (ii), pp. 371-488; Holborn in *Year Book of World Affairs*, 1949, pp. 124-148; Vernant, *Refugees after the War* (1953).

⁴ A similar Arrangement was concluded on July 4, 1936, concerning the Status of Refugees from Germany. Treaty Series, No. 33 (1936), Cmd 5338; Hudson, *Legislation*, vii, p. 376. This provisional agreement was replaced by a Convention signed on February 10, 1938 (*L.N.T.S.*, vol. 192, p. 59). And see *Off. J.*, 1939, p. 309, extending the Convention to Austrian refugees. In September 1933 the Fourteenth Assembly of the League decided on the proposal of the Dutch Government, that the problem of German refugees should be dealt with by international co-operation. As from 1939 a new organisation was set up under a 'High Commissioner for Refugees under the Protection of the

War the persistence of the problem of refugees led to the adoption, on July 25, 1951, of a Convention on the Status of Refugees.¹ The Convention applies: (a) to persons who had been considered refugees in accordance with previous treaties and arrangements on the subject, and (b) every person who as a result of events occurring before January 1, 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former residence as a result of such events, is unable or unwilling to return to it. The Convention includes provisions protecting refugees against discrimination on account of race, religion, or country of origin and provides for religious freedom and equal treatment with aliens unless the Convention contains more favourable provisions. The latter include most favourable treatment with regard to rights given to nationals of a foreign country regarding employment and the lifting of any restrictive measures imposed on aliens for the protection of national labour in all cases in which the refugee has resided in the

League of Nations'. *Off J*, 1938, p. 365. As the result of the Evian Conference held in July 1938 there was created an Intergovernmental Committee on Refugees. Doc. C' 244, M 143, 1938, XII. In December 1946 the General Assembly adopted the Constitution of the International Refugee Organisation, which has taken the place of the Intergovernmental Committee on Refugees (For the Constitution of the Organisation see *Treaty Series* No. 25 (1950), Cmd 7934. Its main purpose is the repatriation, legal protection, and resettlement of about one and a half million refugees and displaced persons. In October 1946 an Agreement was signed relating to the issue of a travel document to refugees who were the concern of the Intergovernmental Committee on Refugees: Cmd. 7033. See also Jennings in *B.Y.*, 20 (1939), pp. 98-114; Simpson, *The*

Refugee Problem (1939), and Cohn in *Modern Law Review* 4 (1941) pp 200-209. The International Refugee Organisation terminated its activities in 1952. Its principal functions were taken over by the Office of the United Nations High Commissioner for Refugees. The General Assembly had previously adopted, in 1950, the Statute of the Office of the High Commissioner (Doc. A/1750). In connection with the work of the International Refugee Organisation there may be noted the Convention of 1950 on the Declaration of Death of Missing Persons, the purpose of which is to simplify the judicial procedure on the subject in the countries of the Contracting Parties.

¹ For the text see United Nations Doc. A/Conf. 2/108 and, in part, *United Nations Year Book*, 1951, p. 521. See Weiss in *B.Y.*, 30 (1953), pp. 478-489.

country for three years or has a spouse or children possessing the nationality of the country. The Convention also provides for at least equal treatment with aliens with regard to the right to engage in agriculture, industry, commerce, practising a profession, education, and the like. It includes provisions for equal treatment with nationals with regard to elementary education, rationing system, public relief and social security. No penalty may be imposed upon the refugee on account of illegal entry or presence when coming directly from a country where his life and freedom was threatened. The Convention also provides for safeguards against expulsion, in particular to countries where the life or freedom of the refugee would be threatened.¹ As noted, the Convention does not apply to persons who are refugees as the result of events subsequent to January 1, 1951. Moreover it is left to each of the Parties to decide whether it intends to apply it to refugees outside Europe.

§ 313a. The attempts, as outlined above,² to reduce the occasions for statelessness are not only an expression of the desire to do away with a source of inconvenience to Governments and of grave hardship to individuals. They also constitute recognition of the fact that so long as nationality is the link between the individual and the protection of rights accruing to him by virtue of International Law,³ it is both illogical and offensive to human dignity that International Law should permit a condition of statelessness. As may be seen from some of the provisions of the Hague Convention of 1930,⁴ there are no vital interests of States which stand in the way of introducing such a measure of uniformity in the law relating to acquisition of nationality by birth, marriage, naturalisation or otherwise as may be sufficient to prevent statelessness arising on that account. The same applies to the abandonment of the practice, which is of comparatively recent origin, of adding the penalty of

Abolition
of State-
lessness.

¹ By the end of 1951 the Convention had been signed by Austria, Belgium, Colombia, Denmark, Federal Republic of Germany, Israel, Liechtenstein, Luxembourg, Netherlands, Norway, Sweden, Switzerland,

Turkey, the United Kingdom and Yugoslavia.

² See above, § 313.

³ See above, § 291.

⁴ See above, § 310a.

deprivation of nationality for disloyalty or other reasons to the manifold and severe punishments available to States under their Municipal Law.¹ Probably measures to abolish statelessness can best be attempted on the lines of the following two principles: (1) that every individual shall be entitled to the nationality of the State where he or she is born unless on attaining majority he or she declares for the nationality which may be open to him or her by virtue of descent; (2) that no person shall be deprived of his or her nationality² by way of punishment or deemed to have lost his or her nationality for any other reason, such as marriage or stay abroad, except concurrently with the effective acquisition of a new nationality. These two principles underlie the Draft Conventions, formulated in 1953 by the International Law Commission, on the Elimination of Statelessness and on the Reduction of Statelessness.³ To the

¹ See above, § 302 (2). Most States apply the penalty of denationalisation to naturalised subjects only (by way of cancellation of naturalisation) a limitation which lends itself to the interpretation that naturalised persons are bound by duties of allegiance more exacting than natural born subjects. It is clear that in most cases the persons affected live abroad and that their denationalisation takes place without regard to the legitimate interests of the State where they are resident at the time. For an attempt to safeguard some of these interests see above, § 313 (5).

² The Universal Declaration of Human Rights (see below, § 310n) lays down, perhaps somewhat inconsistently, that 'everyone has the right to a nationality' and that 'no one shall be arbitrarily deprived of his nationality.' For deprivation, even if not arbitrary, may result in statelessness and thus in an effective denial of the right to nationality.

³ See the Report of the Commission for 1953. Apart from minor details the two Draft Conventions are identical. Article 1 of the Draft provides that a child who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory it is born. In Article 3 it is laid down that if the law of a Party

entails loss of nationality as a consequence of a change in the personal status of a person such as marriage, legitimation or adoption, such loss shall be conditional upon acquisition of another nationality. It is laid down, in Article 6 (1), that renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality. Article 6 (3) provides, in a comprehensive manner, that persons shall not lose their nationality, so as to become stateless on the ground of departure, stay abroad, failure to register or 'any other similar ground.' The most frequent ground of statelessness, namely, deprivation of nationality, is covered by Articles 7 and 8. The former lays down that the Parties shall not deprive their nationals of nationality by way of penalty if such deprivation renders them stateless. The latter prohibits the Parties to deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds. With regard to territorial changes, which constitute a frequent cause of statelessness, Article 9 lays down that new States or States acquiring new territory shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or other-

extent to which they give expression to the deliberate practice of many States to reduce or eliminate causes of statelessness, insofar as it results from their legislation, these drafts codify a substantial volume of existing practice.¹

VI

RECEPTION OF ALIENS AND RIGHT OF ASYLUM

Vattel, ii. § 100—Hall, §§ 63, 64—Westlake, i. pp. 215-217—Lawrence, §§ 97, 98—Phillimore, i. §§ 365-370—Twiss, i. § 238—Moore, iv. §§ 560-566—Hackworth, in. §§ 293, 294, 297-301—Hyde, i. §§ 59, 60—Bluntschli, §§ 381-398—Fauchille, § 141—Sibert, pp. 573-594—Despagnet, §§ 338-343—Rivier, i. pp. 307-309—Nys, ii. pp. 275-283—Calvo, ii. §§ 701-706, vi. 119—Martens, ii. § 46—De Louter, i. pp. 287-291—Suarez, §§ 194-198—Borchard, § 26—Overbeck, *Niederlassungsfreiheit und Ausweisungsgerecht* (1906)—Henriques, *The Law of Aliens*, etc. (1906)—Sibley and Elias, *The Alien Acts*, etc. (1906)—*A.S. Proceedings*, 5 (1911), pp. 65-116—Verdross in *Hague Recueil*, vol. 37 (1931) (3), pp. 327-347—Morgenstern in *B.Y.*, 26 (1949), pp. 327-357—Freeman in *A.S. Proceedings* 1951, pp. 120-130.

§ 314. Apart from special treaties of commerce, friendship, Admission of Aliens. and the like, no State can claim the right for its subjects to enter into, and reside on, the territory of a foreign State. The reception of aliens is a matter of discretion,² and every

wise or unless they have or acquire another nationality. The Drafts contain detailed provisions for giving effect to the obligations of the Conventions, in particular by way of a special agency to be created for that purpose within the United Nations and accessible directly to individuals and an arbitral tribunal competent to hear complaints at the instance of the agency thus created.

¹ The law of some countries is framed so as to eliminate, for all or most practical purposes, the condition of statelessness. Thus the British Nationality Act of 1948 apart from minor exceptions relating to withdrawal of nationality of naturalised persons (see above, p. 661) and loss of nationality on account of prolonged stay abroad coupled with failure to register (see above, p. 664) leaves practically no room for statelessness. Thus it has been stated on behalf of the United Kingdom in 1952 that since

1945 only three cases of withdrawal of the nationality of naturalised persons had occurred (*Consolidated Report of the Secretary-General of the United Nations*: Doc. E/2230/A/CN.4/56, p. 155). Some States, such as France in her Law of 1945, make deprivation of nationality on account of disloyalty dependent upon the possession of another nationality (*ibid.*, p. 158). In some countries (such as Uruguay and Switzerland, *ibid.*, p. 150) withdrawal of nationality is not permissible if it leads to statelessness. Other countries have enacted laws facilitating the acquisition of their nationality by stateless persons. Thus the Swedish Act of 1950 lays down that a stateless person born in Sweden and residing there continuously 'has an unconditional right to become a Swedish national.'

² See the Aliens Restriction Acts, 1914 and 1919, as amended by the Former Enemy Aliens (Disabilities

State is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory.¹

Reception
of Aliens
under
Condi-
tions.

§ 315. It is obvious that, if a State need not receive aliens at all, it can receive them only under certain conditions.² Most States make a distinction between such aliens as intend to settle down in the country, and such as intend only to travel in the country; no alien is allowed to settle in the country without having asked for and received a special authorisation, whereas, subject to police and visa regulations, the country is open to all aliens who are merely travelling.

The
so-called
Right of
Asylum.

§ 316. The fact that every State exercises territorial supremacy over all persons on its territory, whether they are its subjects or aliens, excludes the exercise of the power of foreign States over its nationals in the territory of another State.³ Thus, a foreign State is, provisionally at least, an asylum for every individual who, being prosecuted at home,

Removal) Act, 1925. See also Henriquez, *The Law of Aliens*, etc. (1906), and Sibley and Elias, *The Aliens Act*, etc. (1906), with regard to the position of aliens under British law prior to the First World War. See also Bouvé, *A Treatise on the Laws governing the Exclusion and Expulsion of Aliens in the United States* (1912). Certain States discriminate against immigrants of particular nationalities and races: for instance, the United States of America and the Commonwealth of Australia: see Hyde, i. §§ 59, 60, Hackworth, iii. §§ 299-303; Parker in *A.J.*, 18 (1924), pp. 737-754, and *ibid.*, 19 (1925), pp. 23-47. See also Iohihashi, *Japanese in the United States* (1932). Treat, *Diplomatic Relations between the United States and Japan, 1853-1896* (1932); MacKenzie, *The Legal Status of Aliens in Pacific Countries* (1937). In December 1943 the United States repealed its Chinese Exclusion Acts.

¹ *Mugrove v. Chun Teong Toy* [1891] A.C. 272, and authorities cited.

² See the Aliens Restriction Acts, 1914 and 1919, as amended by the Former Enemy Aliens (Disabilities Removal) Act, 1925.

The League of Nations summoned a conference upon Passport Regula-

tions which was held at Geneva in May 1926, for the Report see *Off. J.*, August 1926, pp. 1088-1098, and *R.O.*, 24 (1927), pp. 242-248. See also Wehberg, *Das Passwesen* (1923). Reale, *Le régime des passeports et la Société des Nations* (1930) and *Manuel pratique des passeports* (1931), and in *Hugue Recueil*, vol. 50 (1934) (iv.), pp. 80-182, Roscoe in *Grotius Society*, 16 (1930), pp. 65-72. There exist a considerable number of conventions providing for the abolition of visas on the passports issued by the contracting parties. An agreement of June 12, 1929, concerning the preparation of a transit card for emigrants provides that, subject to certain conditions, the contracting parties will permit emigrants to pass in transit through their respective territories without requiring their passports to have a consular visa and without any control or traffic charges: *Off. J.*, 1929, p. 1351. It entered into force on September 12 of that year as between thirteen of its original signatories. As to American passports see Hyde, i. §§ 399-400; Hackworth, iii. §§ 259-273. See also Whelan in *Georgetown Law Journal*, 41 (1952), pp. 63-90.

³ See above, § 128.

crosses its frontier. In the absence of extradition treaties stipulating to the contrary, no State is by International Law obliged to refuse admission into its territory to such a fugitive or, in case he has been admitted, to expel him or deliver him up to the prosecuting State. On the contrary, States have always upheld their competence to grant asylum, if they choose to do so.¹ Now the so-called right of asylum is certainly not a right possessed by the alien to demand that the State into whose territory he has entered with the intention of escaping prosecution in some other State should grant protection and asylum. For such State need not grant such demands. The Constitutions of a number of countries expressly grant the right of asylum to persons persecuted for political reasons,² but it cannot yet be said that such a right has become a 'general principle of law' recognised by civilised States and as such forming part of International Law. Neither is any such right conferred by Article 14 of the Universal Declaration of Human Rights,³ which lays down that 'everyone has the right to seek and to enjoy in other countries asylum from persecution.' The Declaration, which in any case is not a legally binding

¹ See the Convention on Political Asylum adopted in December 1933 by the Pan-American Conference (A.J., 26 (1934), Suppl., pp. 70 *et seq.* Article 3 lays down that political asylum, being an institution of a humanitarian character, is not subject to reciprocity and that any person may resort to its protection whatever his nationality. The United States did not sign the Convention on this ground that they did not recognise the doctrine of asylum as part of International Law. See Mettgenberg, *Freies Gebiet und Exterritorialität* (1929). See on the right of asylum generally Reale in *Hague Recueil*, vol. 63 (1938) (i.), pp. 473-510, 541-561; Raestad in *R.I.*, 3rd ser., vol. 19 (1938), pp. 115-131; De Moncada in *Z.d.R.*, 23 (1944), pp. 403-472; Morgenstern in *B.Y.*, 26 (1949), pp. 327-357. See also Balogh, *Political Refugees in Ancient Greece* (1943). For an affirmation of the principle of asylum with regard to 'quintings and traitors' among displaced persons see *Journal of the First General*

Assembly of the United Nations, First Session, 1946, pp. 544-564. The Russian proposal that such persons should not be entitled to the protection of the United Nations was rejected (p. 564). This does not apply to war criminals (see *ibid.*, p. 661). The Convention of July 26, 1951, on the Status of Refugees (see above, p. 672) does not apply to any person as to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity; (b) he has committed a serious non-political crime outside the country of refuge; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations. Article 14 (2) of the Universal Declaration of Human Rights (see § 340n) is to the same effect.

² See e.g. the Preamble to the French Constitution of 1946; Article 10 of the Italian Constitution of 1947; Article 16 of the Constitution of the German Federal Republic of 1949.

³ See below, § 340n.

instrument, does not confer a right to *receive* asylum.¹ So long as the effective international protection of human rights from persecution and otherwise is not part of International Law, it is consonant with principle that such right of asylum should be recognised and that the sanctity of human life and freedom should prevail over the inconvenience—economic and other—resulting from the obligatory admission of large numbers of persecuted refugees.² However, no such obligation forms at present part of the law. At present it is probable that the so-called right of asylum is nothing but the competence of every State to allow a prosecuted alien to enter, and to remain on, its territory under its protection, and thereby to grant asylum to him. Such fugitive alien enjoys the hospitality of the State which grants him asylum; but it might be necessary to place him under surveillance, or even to intern him at some place, in the interest of the State which is seeking to prosecute him. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organising hostile expeditions or by preparing common crimes against its Head, members of its Government or its property.³

VII

POSITION OF ALIENS AFTER RECEPTION⁴

Vattel, i. § 213, ii. §§ 101-115—Hall, §§ 63, 87—Westlake, i. pp. 218, 219, 327 330—Lawrence, §§ 97, 98—Phillimore i. §§ 332-339—Wharton, ii. §§ 201

¹ This is also probably the meaning of Article 11 of the Treaty of Montevideo on Political Asylum of August 4, 1939, which provides that 'asylum granted within the territory of the High Contracting Parties is inviolable' for the persons prosecuted in the circumstances laid down in the Treaty.

² The Resolution of the Bath meeting of the Institute of International Law in 1950 imposes upon States the duty of consultation, in such cases, with the view to concerted action in pursuance of obligations of humanity: *Annuaire*, 43 (2) (1950), p. 377.

³ See above, § 127a. The Resolution of the Institute of International

Law of 1950 (see above, n. 2) lays down expressly that a State which, in the fulfilment of its duties of humanity, grants asylum to a person in its territory does not on that account incur any international responsibility other than that arising from the activity of any other alien living on its territory (*ibid.*, p. 376).

⁴ The student desiring information on a special point arising out of the position of aliens after reception, or concerning citizens and their property abroad, must study the standard work of Borchard, *The Diplomatic Protection of Citizens Abroad* (1916).

205 -Wheaton, §§ 77-82 -Moore, iv. §§ 534-549 -Hackworth, iii. §§ 277-291 -Bluntschli, §§ 385-393 -Fauchille, § 442 -Sibert, pp. 594-614 -Despagne, §§ 339-343 -Rivier, i. pp. 309-311 -Calvo, ii. §§ 701-706 -Martens, ii. § 46 -De Loutre, i. pp. 274-287, 295-299 -Cruchaga, §§ 406-409 -Suarez, §§ 167-179 -Keith's Whenton, pp. 207-211 -Stowell, pp. 279-285 Scelle, ii. pp. 63-135 -Frisch in *Strupp, W'ort.*, i. pp. 330-334 -Jaston de Leval, *De la protection des nationaux à l'étranger* (1907) -Delessert, *L'établissement et le séjour des étrangers* (1924) -Steinbach, *Untersuchungen zum internationalen Fremdenrecht* (1931) -*The Legal Status of Aliens in Pacific Countries* (edited by MacKenzie, 1937) -Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940) -Gibson, *Aliens and the Law* (1940) (as to the United States) -Konvitz, *The Alien and the Asiatic in American Law* (1946) -Wheeler in *A.J.*, 3 (1909), pp. 869-884 -*A.S. Proceedings*, 5 (1911), pp. 32-60, 150-225 -Borchard, §§ 6-8, 14-25, 34-46, 133-136, and in *A.J.*, 7 (1913), pp. 497-520, and in *Bibliotheca Visseriana*, 3 (1924), pp. 3-52 -Churchill in *L.Q.R.*, 31 (1920), pp. 402-428 -Hobbsworth in *Revue d'histoire du droit*, 3 (1921), pp. 175-214 -Fachiri in *B.Y.*, 1925, pp. 159-171 -Zaitzeff in *Michigan Law Review*, 24 (1926), pp. 441-460 (as to aliens in Russia) -S. Basdevant in *Repertoire*, 8, pp. 3-61 -Cavaglieri in *Hague Recueil*, vol. 26 (1929) (i.), pp. 452-487 -Healy, *ibid.*, vol. 27 (1929) (ii.), pp. 405-492 -Verdroess in *Hague Recueil*, vol. 37 (1931) (iii.), pp. 348-406 -Kelsen, *ibid.*, vol. 42 (1932) (iv.), pp. 248-260 -Cutler in *A.J.*, 27 (1933), pp. 225-246 -Bouré in *A.S. Proceedings*, 1934, pp. 92-105 -Borchard, *ibid.*, 1939, pp. 51-63 -Castén in *Z.b.V.*, xi. (1943), pp. 325-417.

§ 317. With his entrance into a State, an alien, unless he belongs to the class of those who enjoy so-called extraterritoriality, falls at once under the territorial supremacy of that State, although he remains at the same time under the personal supremacy of his home State. He is therefore under the jurisdiction¹ of the State in which he stays, and is responsible to it for all acts he commits on its territory.²

¹ On the punishment of aliens for political crimes see Preuss in *Grotius Society*, 20 (1934), pp. 85-105. In *Eisler v. United States* it was held that an alien is under a duty to testify before a Congressional Committee in the same way as a citizen: (1946) 170 F. (2d) 273; *A.J.*, 43 (1949), p. 379.

² From November 5 to December 5, 1929, there sat in Paris a conference with a view to accepting a convention on the treatment of foreigners and foreign enterprises. No convention was adopted. See Kuhn in *A.J.*, 24 (1930), pp. 570-572. And see *Off. J.*, 1930, No. 2, p. 84; *League Doc. C. 36. M. 21. 1929. II.* (prepara-

tory documents for the Conference on the treatment of aliens) and C. 97. M. 23. 1930. II. (minutes of the Conference). And see *League Doc. of 1928: C. 562. M. 178. 1928. II.* (a general report of governmental experts) and C. 345. M. 102. 1928. II. and Supplement No. 1 (1929) (a collection of treaties and municipal regulations); Report of the General Meeting of Government Experts on Double Taxation and Tax Evasion in *League Doc. C. 562. M. 178. 1928. II.* For a list of fourteen conventions concluded between 1930 and 1935 see *Fiscal Committee Report to the Council of June 17, 1935, in League Doc. C. 262. M. 124. 1935. IIa.*

Aliens as
Subject
to Terri-
torial Su-
premacy.

He owes allegiance, for the duration of his residence, to the State within the territory of which he resides. Moreover, it has been held that an alien who on leaving the territory of the State submits himself to the protection of that State, i.e. by asking for and receiving a passport entitling him to diplomatic protection, continues to owe allegiance to it and is liable for treason committed abroad.¹ If in consequence of a public calamity, such as the outbreak of a fire or an infectious disease, certain administrative restrictions are enforced, they can be enforced against all aliens, as well as against citizens. But apart from jurisdiction, and mere local administrative arrangements, which concern all aliens alike, a distinction must be made between such aliens as are merely travelling, and stay, therefore, only temporarily on the territory, and such as take up their residence there either permanently or for some length of time. A State has wider powers over aliens of the latter kind; it can make them pay rates and taxes,² and can even

¹ *Joyce v. Director of Public Prosecutions* (1946), 62 T.L.R. 208. See Lauterpacht in *Cambridge Law Journal*, 1947, pp. 33, 92-342. And see Diplock in *Grotius Society*, 32 (1946), pp. 42-59.

² See Albrecht in *B.F.*, 29 (1932), pp. 145-186, and Udina, *Il diritto internazionale tributario* (1949). On the liability of foreigners to the French tax of national solidarity see Dahm in *Clunet*, 80 (1953), pp. 59-97.

The questions of Double Taxation and Tax Evasion received attention from a Committee of Experts appointed by the League of Nations see their Reports, C. 115. M. 55. 1925. II. F. 212, and C. 216. M. 85. 1927. II. 40, and memorandum by Sir Basil Blackett (E.F.S. 16, A. 16. 1921) and Report by Bruns, Einaudi, Seligman, and Sir Josiah Stamp (E.F.S. 73. F. 19); Resolution of the Institute of International Law (as to death duties) in *Annuaire*, 29 (1922), p. 258; Wittmann in *International Law Association's Twenty-fifth Report* (1908), pp. 518-530; Bayling in the Association's *Thirtieth Report* (1921), vol. i. pp. 424-431; Salvioi, *Le doppie imposte in diritto internazionale* (1914); see also Hyde,

i. §§ 205, 206; Beale in *H.L.R.*, 32 (1919), pp. 587-633; Hackworth, in § 281; Grizzotti in *Hague Recueil*, 1926 (iii.), pp. 5-156; Picard in 52 *Clunet* (1925), pp. 40-53; Dorn in *Verkehrswissenschaft für Steuer- und Finanzrecht*, 1 (1927) pp. 189-240. Niboyet in *Répertoire*, v. pp. 672-692, and in *Hague Recueil*, vol. 31 (1930) (i.), pp. 5-100; Sack in *R.G.*, 37 (1930), pp. 97-143; Peeters in *B.I.I.*, 23 (1930), pp. 14-25; Carroll in *A.J.*, 29 (1935), pp. 586-597; Bühler in *Hague Recueil*, vol. 55 (1936) (i.), pp. 437-502; Guggenheim, *L'imposition des successions en droit international et le problème de la double imposition* (1928); Seligman, *Double Taxation and International Fiscal Cooperation* (1924); Ehrenzweig and Koch, *Income Tax Treaties* (1950); Koch, *Double Taxation Conventions* (1950); Gregg in *Grotius Society*, 33 (1947), pp. 99-118; and, as to double taxation of shipping, McNair in *A.J.*, 19 (1925), pp. 509-523. On April 16, 1945, two important Conventions, aiming at reducing the evil of double taxation, were concluded between Great Britain and the United States. The first (Cmd. 6624) refers to taxes on income; the second (Cmd. 6225)

compel them in case of need, and under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety. On the other hand, an alien does not fall under the personal supremacy of the local State, therefore he cannot, unless his own State consents,¹ be made to serve² in its army or navy,

to taxation on estates of deceased persons. In both Conventions residence is made the principal test of taxation. Thus, for instance, it is provided that a teacher resident in Great Britain who visits the United States for a period not exceeding two years for the purpose of giving lectures shall be exempt in the United States from taxation on income derived therefrom. See Parry in *BY* 23 (1946), pp. 326, 330. See also Cmd 6602 for the Treaty with France of October 19, 1945. And see Allen in *Hague Recueil*, vol. 61 (1937) (iii), pp. 548, 637, and Koch, *The Double Taxation Conventions* (1947).

¹ In Great Britain, by the Allied Powers (War Service) Act 1942 (5 and 6 Geo 6, ch. 29), nationals of Allied Powers were under certain conditions, made liable to national service under the various National Service Acts. Previously, under Defence Regulation 58A, International Labour Force Orders were issued by the Minister of Labour and National Service (see e.g. S. R. & O., 1941, No. 719, with regard to Belgian nationals). It appears that both the Act of 1942 and the various Orders issued in 1941 were preceded by agreements made with the various Allied Governments concerned. For a statement to that effect made before Parliament in connection with the Act of 1942 see Hansard, House of Commons Debates, vol. 340 col. 2178. And see S. R. & O. 1943, No. 331, for the Order applying the Act to various Allied nationals. See Hauptmann in *Modern Law Review*, 6 (1942), pp. 72, 75; Oppenheimer in *AJ* 36 (1942) p. 588; Schwelb, *ibid.*, 39 (1945) pp. 109-111. As to the practice of the United States, during the First World War of exacting military service from aliens who have declared their intention to become citizens of the United States (so called declarant aliens), and

the protests of various countries against that practice see Hackworth, in § 282. By an Act of Congress approved in December 1941 all male persons between the ages of 20 and 45, residing in the United States were made liable for training and service in the land or naval forces. However, it was provided that nationals of neutral countries could apply for exemption as aliens such application to have the effect of debarring the alien in question from becoming a citizen of the United States. The United States Immigration and Nationality Act of 1952 provides in Section 315 (a) that an alien who at his request has been exempted or discharged from service in the armed forces on the ground that he is an alien shall be permanently ineligible to become a citizen of the United States. For comment see Houck in *Michigan Law Review* 52 (1953) pp. 265, 276. In 1953 France as a reprisal for the practice said to have been adopted by the United States enacted a law providing that foreign subjects resident in France for a period exceeding one year shall be liable to military service in France in cases in which the country of which he is a national adopts an identical practice. In *Polites v The Commonwealth* [1945] C.L.R. 60, *Annual Digest* 1943-1945 Case No. 61, the High Court of Australia felt itself obliged to give effect to an Act of the Australian Parliament admittedly at variance with International Law compelling aliens to serve in the armed forces. A French Decree of April 10¹ prescribed that stateless persons and aliens enjoying the right of sanctuary in France shall be subject to all obligations incumbent upon French nationals under the Law of July 11 1938 providing for the organization of the nation in time of war.

² See above, § 127.

and cannot, like a citizen, be treated according to discretion.¹

It must be emphasised that an alien is responsible to the local State for any illegal acts which he commits while the territory concerned is during war temporarily occupied by the enemy. An illustrative case is that of *De Jager v. The Attorney-General for Natal*.² De Jager was a burgher of the South African Republic, but a settled resident in Natal when the South African War broke out. In October 1899 the British forces evacuated that part of Natal in which Waschbank, where he lived, is situated, and it was occupied by the Boer forces for some six months. He joined them, and served in different capacities until March 1900, when he went to the Transvaal and took no further part in the war. He was tried in March 1901, convicted of high treason, and sentenced to five years' imprisonment and a fine of £5,000, or, failing payment thereof, to a further three years of imprisonment.

Aliens in
certain
Asian and
African
Countries.

§ 318. The rule that aliens fall under the territorial supremacy of the local State found, until recently, an exception with regard to a considerable number of States on the ground that their institutions were inferior to or different from the civilisation of most European and American States and of Japan.³ Many States entered into treaties (some-

¹ See above, § 155*d*, as to the plea of non discrimination. As regards religious disabilities of foreigners see Henriques in *Law Magazine and Review*, 39 (1914), pp. 320-326, and Hackworth, *ibid.* § 286. As to the position of aliens in Soviet Russia see Bogolepoff, *Die Rechtsstellung der Ausländer in Sowjet Russland* (1927), and Zaitzeff, *op. cit.* See also Einaudi in *Hague Recueil*, vol. 25 (1928) (v.), pp. 5-118. The Italian Court of Cassation held in 1945 that the rupture of diplomatic relations between Italy and Venezuela did not have the effect of suspending the operation of the Italian Civil Code providing for equality of treatment of aliens: *Galatioto v. Orhoa*, *Annual Digest*, 1946, Case No. 64.

² (1907) A.C. 326. See to the same effect *Public Prosecutor v. Drechsler*, decided in 1946 by the Supreme Court

of Norway *Annual Digest*, 1946, Case No. 29, *Re Penati*, decided in 1946 by the Italian Court of Cassation, *Annual Digest*, 1946, Case No. 30; *In re Friedman*, decided in 1947 by the Belgian Court of Cassation: *Annual Digest*, 1947, Case No. 59. See also *R v. Neumann* [1919] 3 South African Law Reports 1238, where the accused, a German resident in South Africa who served in the South African army and, after having been captured by the Germans, assumed German uniform and performed services for the German army, was convicted of high treason.

³ As to this kind of extritorial jurisdiction in general see literature cited above, § 317, and particularly Twiss, *l. c.* § 163; Phillimore, *l. c.* §§ 333-339; Hall, *Foreign Powers and Jurisdiction* (1894), §§ 59-61; Piggott, *Extraterritoriality* (1907).

times called Capitulations) with some Asian and African States as the result of which their subjects when entering into the territory of these Asian and African States remain wholly under the jurisdiction of their home States, whose consuls exercise that jurisdiction over their fellow-subjects, usually upon the basis of the enactments of the Municipal Law of the home States; for instance, in the case of Great Britain, upon the basis of the Foreign Jurisdiction Act, 1890. Exterritorial jurisdiction¹ came to an end in Japan in 1899, in Turkey in 1914 (with regard to the Central Powers which recognised their unilateral denunciation by Turkey) and 1923,²

Hyde, i. §§ 259-265; Borchard, §§ 201-205; Hackworth, ii. §§ 177-190; Thornley in *B.Y.*, 1926, pp. 121-134; Fauchille, §§ 777-791 (19); Travers, §§ 1724-1745; Mettgenberg in *Völkerbund und Völkerrecht*, iii. pp. 528-534, and also literature cited below, §§ 439-441. As to extritorial jurisdiction in the ancient world see Kassin in *A.J.*, 29 (1935), pp. 237-247. A privilege, not amounting to extritoriality, which was granted to aliens in Japan in the form of so-called perpetual leases not subject to ordinary taxation was largely abolished in 1937 as the result of separate agreements made between Japan and the foreign Powers concerned. For the agreement with Great Britain see Treaty Series, No. 29 (1937). See also Hudson in *A.J.*, 32 (1938) pp. 113-116.

¹ As to the effect of war upon extritoriality see Keeton, *The Development of Extritoriality in China*, i. (1928), ch. x, sec. viii.

² In September 1914 Turkey announced the abrogation of the many treaties or 'Capitulations' with foreign States as from October 1, 1914, and by clause 28 of the Treaty of Lausanne of 1923 the other contracting parties accepted 'the complete abolition of the Capitulations in Turkey in every respect.' Annexed to the Treaty are (i) a 'Convention respecting conditions of Residence and Business and Jurisdiction' containing some important provisions with reference to jurisdiction over foreigners in Turkey (see the case of the *Lotus*, above, § 147a, which turned upon Article 15

of this Convention), and (ii) a 'Declaration by the Turkish Government relating to the Administration of Justice,' whereby it undertook to accept, as observers in its civil, commercial, and criminal courts for a period of not less than five years, 'a number of European legal counsellors' selected by it from a list, to be prepared by the Permanent Court, of jurists who are nationals of countries which were neutral in the First World War. Germany in 1917 and Soviet Russia in 1921 renounced the 'capitulations in Turkey.' See Pelissé du Rausus, *Le régime des capitulations dans l'Empire Ottoman* (2nd ed., 1910); Mandelstam, *La justice ottomane dans ses rapports avec les Puissances étrangères* (1911), and in *R.G.*, 14 (1907), pp. 5 and 534, and 15 (1908), pp. 329-384; Overboek, *Die Kapitulationen des osmanischen Reichs* (1917); Mestre, *L'étranger en Turquie d'après le Traité de Lausanne* (1924); Jones, *Extritoriality in Japan* (1931); Sousa *The Capitulatory Régime in Turkey* (1933); Thayer in *A.J.*, 17 (1923), pp. 207-233; Bentwich in *J.C.L.*, 3rd ser., 5 (1923), pp. 182-188, and *ibid.*, 6 (1924), pp. 330-332; Abi-Chakla, *L'extinction des capitulations en Turquie et dans les régions arabes* (1924); Ténékidès in *si Clunet* (1924), pp. 339-351; Caralmer in *Réper.*, s. iii. pp. 39-87; Rechied in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 169-224, and in *R.G.*, 42 (1935), pp. 293-311. The 'capitulations in Syria, Palestine and Iraq have also been abolished. See Hackworth, ii. § 181; Goadby in *J.C.L.*, 3rd ser.,

in Siam in 1927,¹ and in Persia on May 10, 1928.² With regard to China, in pursuance of a resolution adopted at the Washington Conference on the Limitation of Armaments in 1921,³ representatives of the interested Powers met in Peking in 1920 and prepared a Report upon Extraterritoriality in China, containing certain recommendations regarding the eventual relinquishment of extraterritorial rights in China.⁴ Subsequently, China concluded treaties with

6 (1924), pp. 258-271; and Bentwich in *R.Y.*, 14 (1933), pp. 97-100. The Judicial Agreement of March 4, 1931, between Great Britain and Iraq abolished, subject to certain safeguards, the special judicial régime in favour of certain foreigners established by the Judicial Agreement of March 25, 1924. Treaty Series, No. 33 (1931), Cmd. 3933.

¹ As the result of a series of treaties; see for a detailed examination and enumeration Sayre in *A.J.*, 22 (1928), pp. 70-88; and see also James in *A.J.*, 16 (1922), pp. 585-603, Moncharville in *R.Q.*, 33 (1926), pp. 321-344; and Treaty between Great Britain and Siam in *A.J.*, 22 (1928), Suppl., pp. 12-18. And see Toynbee, *Survey* (1929), pp. 405-417.

² Subject, however, to certain safeguards stipulated for by a convention; see Matine-Daftary, *La suppression des capitulations en Perse* (1930), and *Documents*, 1928, pp. 200-209.

³ Cmd 1627, at p. 86.

⁴ As to China see Report of the Commission on Extraterritoriality in China, Cmd. 2774 of 1926 (for extracts see *A.J.*, 21 (1927), Suppl., pp. 58-60); Tchéou, *Le régime des capitulations en Chine* (1915); Fauchille, §§ 791-791 (10); Willoughby, *Foreign Rights and Interests in China* (1927); Keeton, *The Development of Extraterritoriality in China* (1928); Tsau in *B.Y.*, 1921-1922, pp. 133-149; Williams in *A.J.*, 16 (1922), pp. 43-58; Hyde, *ibid.*, pp. 70-74; Hackworth, *id.* § 178; Denby, *ibid.* (1924), pp. 667-675; Wing Mah, *ibid.*, pp. 676-695; Quigley, *ibid.*, 20 (1926), pp. 46-68; Bishop, *ibid.*, pp. 281-299; Keeton in *L.Q.R.*, 42 (1926), pp. 101-108, 481-501; *ibid.*, 43 (1927), pp. 236-261; and in *J.C.L.*, 3rd ser., 8 (1926), pp. 225-238; discussion in

A.S. Proceedings, 1927, pp. 82-100. As to the abrogation of extraterritorial rights in Manchukuo see Tabouillot in *Völkerbund und Völkerrecht*, iii, pp. 459-464. And see on extraterritoriality generally Keeton in *Haque Recueil*, 72 (1948) (1), pp. 287-385.

As to the Belgian treaty with China see Orders of the Permanent Court on the Denunciation of the Treaty of November 2, 1865, between China and Belgium, Series A, Nos. 8 and 14; and Woolsey in *A.J.*, 21 (1927), pp. 280-294. With regard to the Mixed Court at Shanghai which was established in 1869, it was agreed in a Provisional Agreement signed on August 31, 1926, that, with the exception of cases covered by treaties involving the right to invoke consular protection, a Court established by the Kiangsu Provisional Government shall replace the Mixed Court in the International Settlement at Shanghai; Martens, *N.R.G.*, 3rd ser., 20, p. 128; Hudson, *Legislation*, in p. 1994, and in *A.J.*, 21 (1927), pp. 451-471. According to a further Agreement of February 17, 1930, the Provisional Court was replaced by a District Court and a branch of the High Court established by the Chinese Government (Treaty Series, No. 20 (1930), Cmd 3563); Hudson, *Legislation* iii, p. 1997; Escarra in *R.I. (Paris)*, 6 (1930), pp. 326-336. See also above, § 171 (3), as to the foreign Concessions in China. As to protection of Catholic missions in China and other non-Christian countries see Goyau in *Haque Recueil*, vol 26 (1929) (1.), pp. 81-202; Delos in *R.Q.*, 39 (1932), pp. 565-613.

For a valuable List of Treaties, etc., between Great Britain and China and of Treaties between Great Britain and Foreign Powers relating to China, see Treaty Series, No. 34 (1925), Cmd. 2502.

a number of countries such as Belgium, Italy, Poland, Spain, and Denmark, which, subject to certain conditions, abolished extraterritoriality. In December 1929 the Chinese Government issued a Mandate to the effect that on and after New Year's Day 'all foreign nationals in the territory of China who are enjoying extraterritorial privileges shall abide by the laws, ordinances and regulations' of the Chinese Government.¹ But no effective steps were taken to abolish extraterritoriality, although some of the interested Powers expressed in principle their willingness to relinquish the rights connected therewith.² On January 11, 1943, Great Britain³ and the United States signed treaties with China in which they relinquished extraterritorial rights in that country. Other countries followed suit.

With regard to Egypt, the position until 1937 was that in civil and commercial matters and for some police offences most foreigners in Egypt were subject to the jurisdiction of international courts, called Mixed Courts, while as regards other criminal matters they were subject to the jurisdiction of their own courts.⁴ Following upon the Treaty of Alliance of August 1936⁵ with Great Britain, a conference took place in Montreux in April 1937,⁶ which, in a Convention signed

¹ See *Documents*, 1929, pp. 284 et seq.; Cmd. 3480 (1930), China No. 1. Toynbee, *Survey*, 1929, pp. 316-322; Millard, *The End of Extraterritoriality in China* (1931); Tchou, *Evolution des relations diplomatiques de la Chine avec les puissances, 1592-1929* (1931); Ounag, *Essai sur le régime des capitulations en Chine* (1933); Escarra, *Droits et intérêts étrangers en Chine* (1928), the same in *Répertoir*, iii. pp. 428-439, and the same, *La Chine et le droit international* (1931), pp. 38-209; Turner in *B.Y.*, 10 (1929), pp. 56-64; Wright in *A.J.*, 24 (1930), pp. 217-227; Wu in *A.S. Proceedings*, 1930, pp. 182-194.

² *A.J.*, 37 (1943), Suppl., pp. 65 et seq. See Wright in *A.J.*, 37 (1943), pp. 280-289.

³ Cmd. 6417. China No. 1 (1943); Cmd. 6456.

⁴ See Brinton, *The Mixed Courts of Egypt* (1930); Awad, *Les pouvoirs des Tribunaux mixtes d'Egypte* (1930); Dykmans, *Le Statut contemporain des*

étrangers en Egypte vers une réforme du régime capitulaire (1933); Messina in *Hague Recueil*, vol. 41 (1932) (iii.), pp. 361-497; Bentwich, in *B.Y.*, 14 (1933), pp. 93-95; Hanson in *Nordisk T.A.*, 5 (1931), pp. 104-122; Stross in *Z.N.R.*, 15 (1935), pp. 394-407; Peter-Pirkham, *ibid.*, pp. 471-484; 62 *Clunet* (1935), pp. 5-44.

⁵ Treaty Series, No. 6 (1937), Cmd. 5360, Article 13 and Annex thereto.

⁶ For the Final Act, the Convention, and other documents regarding the abolition of 'capitulations in Egypt see Cmd. 5491 (1937); *Documents*, 1937, pp. 538-553. See also Gordon in *R.I.*, 3rd ser., 16 (1937), pp. 267-275. Wathelet, *ibid.*, pp. 391-437; Anonymous in *B.Y.*, 18 (1937), pp. 95, 96, and 19 (1938), p. 16; Hackworth, ii. § 180; Chrétien in *R.G.*, 45 (1938), pp. 302-372. See also Christophe, *L'Egypte et le régime des capitulations* (1937); Aghion and Feldman, *Les Actes de Montreux* (1937); Fahmi, *La Conférence de*

on May 8, 1937, agreed to the abolition of the Capitulations but provided for a transitional period of twelve years during which certain cases involving foreigners were to be tried by mixed courts composed of Egyptian and foreign nationals.¹ It may therefore be said that, apart from the transitional régime in Egypt and some minor but highly complicated exceptions like the Sultanate of Muscat and Oman,² Capitulations are now a matter of the past.³

Aliens
and the
Protec-
tion of
their
Home
State.

§ 319. Although aliens fall at once under the territorial supremacy of the State they enter, they remain, nevertheless, under the protection of their home State. By a universally recognised customary rule of International Law every State holds a right of protection over its citizens abroad, to which there corresponds the duty of every State to treat foreigners on its territory in accordance with certain legal rules and principles.⁴ The question here is only when and how this right of protection can be exercised. As far as International Law is concerned, there is no duty incumbent upon a State to exercise its protection over its citizens abroad. The matter is in the discretion of every State, and no citizen abroad has by International Law a right to demand

Montreux 1937 (1938); Beeley in *Toynbee Survey*, 1937 (1), pp. 581-605; v. Tabouillot in *Z.o V.*, 7 (1937), pp. 511-535; Löwenfeld in *Grotius Society*, 26 (1940), pp. 83-123. On the termination of the Egyptian Mixed Courts see McDougall in *B.Y.*, 25 (1945), pp. 386-390, and on various questions connected with the position of foreigners in Egypt subsequent to the termination of the Mixed Courts see the same, *ibid.*, 26 (1949), pp. 358-379. See also Brinton in *A.J.*, 44 (1950), pp. 303-312.

¹ Following upon the abolition of Capitulations in Egypt by the Convention of Montreux, a convention was signed on July 29, 1937, between Great Britain and France for the abolition of British capitulatory rights in the French Zone of Morocco as well as for the abolition of French capitulatory rights in Zanzibar: *Treaty Series*, No. 8 (1938); *A.J.*, 34 (1940), p. 225. The United States has not recognised the abolition of extraterritoriality in the French and Spanish Zones of Morocco and in

Muscat. See Haakworth, vol. II, pp. 506, 508, 530. As to Great Britain see *B.Y.*, 20 (1939), pp. 58-82. In the case concerning *Rights of Nationals of the United States in Morocco* the International Court of Justice declined to assent to the view that consular jurisdiction and other capitulatory rights in Morocco were founded upon custom and usage as distinguished from rights established by treaty. *I.C.J. Reports*, 1952, p. 199. See on this case *I.C.L.Q.*, 2 (1953), p. 360; Johnson in *B.Y.*, 29 (1952), pp. 411-418; De Soto in *Cunet*, 80 (1953), pp. 517-584.

² See Young in *A.J.* 42 (1948) pp. 418-423.

³ See Carabiber in *Répertoire*, III, pp. 87-94. For an account of the régime of Capitulations in Abyssinia until 1936 see Gardiner in *R.Q.*, 44 (1937), pp. 90-96. On the reform of the Mixed Court in Tangier, following upon the abrogation of Capitulations in 1923 and an Agreement of 1952, see Gutteridge in *B.Y.*, 30 (1953), pp. 498-506.

⁴ See below, §§ 320-322.

protection from his home State, although he may have such a right by Municipal Law. Often, for political reasons, States have in certain cases refused to exercise their right of protection over citizens abroad. Be that as it may, every State is entitled to exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time being, or by the officials or the citizens of such State, if it does not interfere for the purpose of making good the wrong done.¹ This right can be exercised in several ways. Thus, a State whose subjects are wronged abroad can insist, through diplomatic channels, upon the wrongdoers being punished according to the law of the land and upon damages, if necessary, being paid to its injured subjects.²

§ 320. In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien, provided he possesses some nationality, cannot be outlawed in foreign countries, but must be afforded protection for his person and property. The home State of the alien has, by its right of protection, a claim upon such State as allows him to enter its territory that such protection shall be afforded, and it is no excuse that such State does not provide any protection whatever

Protection
Afforded
to the
Persons
and Prop-
erty of
Aliens.

¹ See above, §§ 151-167; Anzilotti in *R.G.*, 13 (1906), pp. 5, 285; Hall, § 87; Westlake, i. pp. 327-337; Suarez, §§ 180-193; Moore, vi §§ 979-997. And see in particular Borchard, *Diplomatic Protection of Citizens Abroad* (1915), the same in *Annuaire*, 36 (1) (1931), pp. 256-454, and 37 (1932), pp. 235-262; Dunn, *The Protection of Nationals* (1932), and *Diplomatic Protection of Americans in Mexico* (1933); Crosswell, *Protection of International Interests Abroad* (1952); Sibert, pp. 500-573; Raestad in *R.I. (Paris)*, 11 (1933), pp. 493-514; Beckett in *Gratius Society*, 17 (1931), pp. 175-194; Reuter in *Revue Geographique Scelle* (1950), vol. ii, pp. 535-552. Schwarzenberger in *Current Legal Problems*, 5 (1952), pp. 295-323. On the protection of shareholders of companies registered abroad see Ch.

de Visser in *R.I.*, 3rd ser., 15 (1934), pp. 624-651, and Mervyn Jones in *B.Y.*, 26 (1949), pp. 224-258. On diplomatic protection of investments see Staley, *War and the Private Investor* (1935), and in *R.G.*, 42 (1935), pp. 541-558, 659-667. And see Rundstein in *Hague Recueil*, vol. 23 (1928) (iii), pp. 331-461, on arbitral settlement of claims of private organisations. For further literature see above § 289, with regard to the access of individuals to international tribunals. Concerning the right of protection of a State over its citizens with regard to public debts of foreign States see above, §§ 133 (6) and 155a. As to the protection of aliens against expropriation of property see above, § 155d.

² As to the effect of 'Calvo' clauses, see above, § 155a.

for its own subjects. In consequence thereof, every State is by the Law of Nations compelled to grant to aliens at least equality¹ before the law with its citizens, as far as safety of person and property is concerned.² An alien must in particular not be wronged in person or property by the officials or courts of a State.³ Thus, the police must not

¹ On the question whether equality of treatment of aliens and nationals is the test or whether aliens are entitled to be treated in accordance with the ordinary standards of civilisation, see above, § 155d, on the plea of non-discrimination. As to the question whether a State in granting compensation for damages sustained as the result of war is bound to treat its own subjects and aliens alike see the various opinions expressed in 1932 and the subsequent years in the course of the dispute between Switzerland and France before the Council of the League concerning the damage suffered by Swiss subjects in France during the First World War. See Lapradelle, *Les Suisses et les dommages de guerre* (Causés célèbres du droit des gens, 1931, with opinions of other writers); Nostitz-Wallwitz in *Z.S.V.*, 5 (1935), pp. 633-640; Lapradelle in *R.I. (Paris)*, 6 (1930), pp. 148-204; Maupas in 63 *Clunet* (1936), pp. 560-570; Kunz in *New York University Law Quarterly Review*, 14 (1937), pp. 289-318. *Off. J.*, 1935, pp. 127-133, 183-189, 620-626; for a series of French decisions see Rousseau in *R.G.*, 42 (1935), pp. 227-229; and see for a pronounced view on the matter the award of the British-American Claims Arbitral Tribunal in the case of *Eastern Extension, Australasia and China Telegraph Company Ltd.*: *Annual Digest*, 1923-1924, Case No. 225 (v.). In an Agreement of August 2, 1929, Great Britain and France each agreed to grant, with minor exceptions, to the nationals of the other party compensation for war damage suffered in their respective territories: Treaty Series, No. 28 (1929), Cmd. 3404. For an interpretation of a treaty providing for equality of treatment see the *Chinn* case decided in 1934 by the Permanent Court: *P.O.I.J.*, Series A/B, No. 63; *Annual Digest*, 1933-1934, Case No. 130. The 'Court of Racial Health'

in Berlin held in 1934 that an alien was liable to compulsory sterilisation in pursuance of a law for the prevention of hereditary diseases *Sterilisation (Germany) Case, Annual Digest*, 1933-1934, Case No. 128; see also *ibid.*, 1935-1937, Case No. 149.

² As to the plea of non-discrimination in relation to the treatment of property of aliens in case of nationalisation and expropriation see above, § 155d. In the *Oscar Chinn* case between Great Britain and Belgium decided on December 12, 1934 the Permanent Court of International Justice held in effect that respect due to the vested rights of an alien does not imply an obligation for the State to refrain from the granting of such special benefits to its subjects as may result incidentally in losses to the alien. Series A/B, No. 63, p. 88. And see generally on vested rights Kaerckenboeck in *Hague Recueil*, vol. 59 (1937), (1), pp. 354-415. On the clauses for protection of property of aliens in treaties concluded by the United States see Wilson in *A.J.*, 45 (1951), pp. 83-107. See also Sibert, pp. 513-527.

³ As regards the plea of 'Act of State' against an alien see above, § 148 (n. 1). The fundamental character of the alien's right to sue is expressed in the following emphatic passage in *Berger v. Sterens*, decided in 1929 by the Supreme Court of North Carolina: 'It is incompatible with a state of national friendship, and is a cause of war, if the citizens of another country are not allowed to sue for and obtain redress of wrongs in our courts': *Annual Digest*, 1929-1930, Case No. 169. It has been held by the Canadian Exchequer Court that an alien can maintain a petition of right against the Crown: *Mannin v. The King, Annual Digest*, 1938-1940, Case No. 124. While the Supreme Court of Wisconsin held in 1933 (*Coules v. Pharris*, 212 Wisc.

arrest him without just cause, custom-house officials must treat him civilly, courts of justice must treat him justly and in accordance with the law.

§ 321. Apart from protection of person and property, and apart from the equal protection before courts of the rights enjoyed by aliens by virtue of the law of the land, every State can treat aliens according to discretion, except in so far as its discretion is restricted through international treaties.¹ Thus, a State can exclude aliens from certain professions and trade²; it can exclude them from holding or inheriting³ real property; it can, as Great Britain did in former times⁴ and again during the First World War and since, compel them to register their names for the purpose of keeping them under control,⁵ and the like. Before the First World War there was a tendency to treat admitted aliens more and more on the same footing as citizens—political rights and duties, of course, excepted.⁶ Thus, for instance, with the exception that an alien could not be sole or part owner of a British ship, aliens who had taken up their domicile in Great Britain were for all practical purposes treated by the law of the land on the same footing as British subjects. But this

How far
Aliens
can be
treated
according
to Dis-
cretion.

558; *Annual Digest*, 1933 1934, Case No. 123) that an alien who has entered unlawfully cannot sue, the Supreme Judicial Court of Massachusetts gave, in the same year, a contrary decision *Janusis v. Long*, 248 Mass. 107, *Annual Digest*, 1933 1934, Case No. 124. The Court said: 'Such aliens unlawfully in the country must live. They must in the nature of things make the ordinary contracts incident to existence.' See also, to the same effect, *Martinez v. For Valley Bus Lines, Inc.* *ibid.*, 1935 1937, Case No. 151. As to treaty provisions relating to access to courts by aliens see Wilson in *A.J.*, 47 (1953), pp. 20 48.

¹ Some States discriminate amongst aliens of different races; see Garner in *J.C.L.*, 3rd ser., 6 (1924), pp. 212 214.

² As to the United States see Hackworth, ii, § 131. And see generally *The Legal Status of Aliens in Pacific Countries*, edited by Mac Kenzie (1937).

³ See *Mickson in A.J.*, 44 (1950), pp. 313 332.

⁴ See an Act for the Regulation of Aliens, 1836 (6 & 7 William 4, c. 11).

⁵ See the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920.

⁶ The Final Act of the Meeting of the Foreign Ministers of the American Republics of July 1940 declared, somewhat vaguely and with some exaggeration, that the generally recognised principle of the exclusion of foreigners from the enjoyment and exercise of strictly political rights implies the prohibition for foreigners to engage in political activities within the territory of the State in which they reside: *A.J.*, 35 (1941), Suppl., p. 10. The Uruguayan Constitution of 1934 contains the unusual provision that citizenship is not a prerequisite of suffrage and that all persons who have lived in Uruguay for 15 years shall have the right of suffrage.

is no longer the case. For example, the Aliens Restriction (Amendment) Act, 1919,¹ provides, among other disabilities, that no alien is to hold a pilotage certificate for any pilotage district in the United Kingdom² or act as master, chief officer, or chief engineer of a British merchant-ship registered in the United Kingdom, or as skipper or second hand of a British fishing-boat,³ or receive an appointment to the Civil Service. In practically all countries the restrictions are now, in a period of economic nationalism, much more severe.³

Departure
from the
Foreign
Country.

§ 322. Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, in any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as payment of rates and taxes, of fines, of private debts, and the like. An alien leaving a State can take his property away with him on the same conditions as a national, and a tax for leaving the country, or tax upon the property he takes away with him,⁴ cannot be levied. Since the beginning of the nineteenth century the so-called *droit d'aubaine* belongs to the past; this is the name of the right of a State, which was formerly frequently exercised, to confiscate the whole estate of an alien who dies on its territory.⁵ But if a State levies estate duties in the case of a citizen dying on its territory, as Great Britain does according to the Finance

¹ §§ 4-12.

² These general prohibitions are subject to certain exceptions.

³ Thus the Constitution of Afghanistan of October 1931 lays down that foreign subjects have 'absolutely no right' to own land in Afghanistan: *British and Foreign State Papers*, 134, p. 1204. On the position in France, and in particular on the régime of so-called identity cards, see Cassel in *Répertoire*, iii, pp. 103-121. On the overriding right of Congress to regulate the registration of aliens see *Hines (Pennsylvania) v. Davidowitz* (1941) 312 U.S. 52. And see above p. 676, n. 2. As to unemployment insurance see the Exchange of Notes of November 19, 1929, between Switzerland and Great Britain providing for the reciprocal granting of unemployment benefit to the nationals of the two countries: Treaty Series,

No. 8 (1930), Cmd 3489. On the position of aliens in colonies see Asbeck in *Haque Recueil*, vol. 61 (1937) (iii.), pp. 5-93.

⁴ So called *gabella emigratoria*. For an example of a conventional regulation of the general principles of treatment of aliens see the Convention on the Status of Aliens adopted in February 1928 by the Sixth American International Conference: *A.J.*, Suppl., 22 (1928), pp. 136-138.

⁵ See details in Wheaton, § 82. The *droit d'aubaine* was likewise named *jus albinagii*. A mitigation⁶ of the *droit d'aubaine* was the *droit de retraite*, or *droit de détraction* or *jus detractus*, according to which the estate of a deceased alien was not confiscated, but a tax was levied upon its removal by the foreign heir.

Act¹ of 1894 and subsequent legislation, such duties can likewise be levied in the case of an alien dying on its territory.

VIII

EXPULSION OF ALIENS

Hall, § 63 -Westlake, i. p. 217 Phillimore, i. § 364 Wharton, ii. § 206—Moore, iv. §§ 550-559 Hackworth, iii. § 201 -Hyde, i. §§ 61-64—Bluntschli §§ 383, 384 Fauchille, § 443 Sibert, pp. 620-628—Pradier-Fodéré, iii. §§ 1857-1859 -Rivier, i pp. 311-314 Nys, ii. pp. 284-289 -Calvo, vi. §§ 119-123—Piere, *Code*, §§ 257-264 Martens, i. § 79 -De Louter, i. pp. 292-294 Suarez, §§ 199-205 -Bleau, *De l'asile et de l'expulsion* (1886) -Féraud-Giraud, *Droit d'expulsion des étrangers* (1889) -Overbeck, *Niederlassungsfreiheit und Ausweisungsgesetz* (1906) -Martin, *L'expulsion des étrangers* (1909) Kobarg, *Ausweisung und Abweisung von Ausländern* (1930) Borchard, §§ 27-32 -Rolin-Jacquemyns in *R.I.*, 20 (1938), pp. 499-508 Gregory in *A.S. Proceedings* (1911), pp. 119-150—Blondel in *Repertoire*, viii. pp. 105-163 Boeck in *Hague Recueil*, vol. 18 (1927) (iii.), pp. 447-616 (an exhaustive study)—Puente in *A.J.*, 36 (1942), pp. 252-270 (as to Latin-America).

§ 323. The right of States to expel aliens is generally recognised.² It matters not whether the alien is only on a temporary visit, or has settled down for professional or business purposes on its territory, having taken his domicile thereon. Such States, of course, as have a high appreciation of individual liberty and abhor arbitrary powers of government will not readily expel aliens. Thus, the British Government had, until December 1919, no power to expel even the most dangerous alien without the recommendation of a court, or without an Act of Parliament making provision for such expulsion, except during war or on an occasion of imminent national danger or great emergency.

On the other hand, it cannot be denied that, especially in

¹ Estate duty is levied in Great Britain in the case also of such aliens dying abroad as leave movable property in the United Kingdom without having ever been resident there.

² See *Attorney-General for Canada v. Cain* [1906] A.C. 542. See now the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920. For an instance of deportation under a convention for the mutual deportation of persons liable

to military service see *Ex parte Duke of Chateau Thierry* [1917] 1 K.B. 922.

For an instance of conventional regulation of deportation see Agreement of July 29, 1933, between the British Government, the Government of India, and the French Government regarding deportations from certain eastern British and French territories: Treaty Series, No. 30 (1933), Cmd. 4409.

the case of expulsion of an alien who has been residing within the expelling State for some length of time, and has established a business there, the home State of the expelled individual is, by its right of protection over citizens abroad, justified in making diplomatic representations¹ to the expelling State, and asking for the reasons for the expulsion. Although a State may exercise its right of expulsion according to discretion, it must not abuse its right by proceeding in an arbitrary manner.²

¹ See Borchard, § 31. The Pan-American Convention on the Status of Aliens of February 20, 1928 (Hudson, *Legislation*, iv. p. 2377), provides that States may expel aliens for reasons of public order or safety (Article 6). This provision, however wide, seems to imply at the same time that expulsion must not be arbitrary. For an interesting decision of the Supreme Federal Tribunal of Brazil circumscribing the executive right of expulsion see *In re Manoel de Campos Moledo*: *Annual Digest*, 1929-1930, Case No. 164.

² See above, § 165aa. But see previous editions for a view different from that expressed in the text. And see *Boffolo* case and other cases cited by Lauterpacht, *The Function of Law*, p. 289. In the *Boffolo* case the arbitrator said: 'The country exercising the power of expulsion must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accept the consequences' (Ralston, *Venezuelan Arbitrations*, 1903, pp. 696, 705). When in December 1934 Yugoslavia expelled a great number of Hungarian subjects as a reprisal against alleged complicity of Hungarian authorities in the activities of terrorists, she explained that, in view of a large measure of unemployment in Yugoslavia, the persons in question lived in Yugoslavia under periodically renewable permits only: Toynbee, *Survey*, 1934, pp. 573-577. In the *Hochbaum* case, decided in 1934 by the Upper Silesian Arbitral Tribunal, it was held that when expulsion is based on grounds of public safety the Tribunal will not,

as a rule, review the decision of the competent State authorities: *Decisions of the Tribunal*, vol. 5, No. 1, pp. 20 *et seq.*; *Annual Digest*, 1935-1937, Case No. 559; *Z.N.V.*, 5 (1935), pp. 653-655. In January 1940 a United States Circuit Court of Appeals refused the request of the Government for the deportation of a Polish couple to Poland, then under German occupation, on the ground that, in the circumstances, the deportation would be 'inhuman and shocking to the senses': *The Times* newspaper, January 5, 1940. See also, to the same effect, *United States ex rel. Weinberg v. Schotfeldt*, *Annual Digest*, 1938-1940, Case No. 134. Nevertheless, recent legislation in that country authorises deportation of aliens, however long the period of their residence, on a wide variety of grounds such as failure to register or notify a change of address, possession of a hunting gun without a licence, divorcing an American spouse within two years of entry, and many others. Courts of some countries, including those of the United States, often show a reluctance to use the right of expulsion in relation to domiciled aliens. See the following observation of Judge Learned Hand in *United States ex rel. Klovie v. Davis*, 13 F. (2d) 630: 'however heinous his [the alien's] crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilised peoples. Such, indeed, it would be to anyone. . . . In Australia no deportation following upon a conviction for a criminal offence is permissible if the alien in question has resided in the country for three years or longer. See Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940), p. 134.

§ 324. In view of this the question is of importance what ^{Just} causes of expulsion of aliens there are. As International ^{Causes of} Law provides no detailed rules regarding expulsion, every- ^{Expulsion} thing depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of war and in time of peace. A belligerent may consider it convenient to expel all enemy subjects residing, or temporarily staying, within his territory. And, although such a measure may be very hard and cruel, the opinion is general that such expulsion is justifiable.¹ As regards expulsion in time of peace, on the other hand, the opinions of writers, as well as the practice of States, differ substantially.² A State which expels an alien will hardly admit not having had a just cause. The fact cannot be denied that an alien is more or less a guest in the foreign land, and the question under what conditions a guest makes himself objectionable to his host cannot be answered once and for all by the establishment of a body of rules. But the border line between discretion and arbitrariness, although elastic, is a real one, and in case of doubt it is for an impartial organ to determine whether it has been overstepped. With the gradual disappearance of despotic views in the different States, and with the advance of true constitutionalism guaranteeing individual liberty and freedom of opinion and speech, expulsion of aliens, especially for political reasons, will become less frequent.³ In the legislation and judicial practice of many countries there has been an increased reluctance to sanction the expulsion of political refugees to countries where they might be exposed to persecution.⁴ Such right of expulsion of political refugees may also be limited by treaty.⁵

¹ See below, ii. § 100.

² The Institute of International Law at its meeting at Geneva in 1892 adopted a body of forty-one articles concerning the admission and expulsion of aliens, and in Article 28 thereof enumerated nine just causes for expulsion in time of peace; see *Annuaire*, 12, p. 223. Many of these causes, such as conviction for crimes, for instance, are certainly just causes,

but others are doubtful.

³ On the question whether membership of the communist party justifies the expulsion of an alien see *Kessler v. Serecker* (1939) 59 Sup. Ct. 694, and comment in *Oregon Law Review*, 18 (1939), pp. 335-337.

⁴ See Reale in *Hague Recueil*, vol. 63 (1938) (i.), pp. 556-561 and Morgens-tern in *B.Y.*, 26 (1949), pp. 345-352.

⁵ See above, § 313a.

How Expulsion is effected.

§ 325. Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country. Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand, especially when expulsion is decreed against a domiciled alien.¹ The home State of the expelled alien, by its right of protection over its citizens abroad, may well insist upon such forbearance and indulgence. But this applies only to the first expulsion. Should the expelled alien refuse to leave the territory voluntarily, or, after having left, returns without authorisation, he may be arrested, punished, and forcibly brought to the frontier.²

Reconduction in contradistinction to Expulsion.

§ 326. In some States destitute aliens, foreign vagabonds, suspicious aliens without papers of legitimation, alien criminals who have served their punishment, and the like, are, without any formalities, arrested by the police and reconducted to the frontier. But although such reconduction, often called *droit de renvoi*, is materially not much different from expulsion, it nevertheless differs much from it in form, since expulsion is an order to leave the country,

¹ See the award in *Ben Tillet's* case between Great Britain and Belgium on March 19, 1898: Cmd. 9235 (1899); Hudson, *Cases*, p. 1056.

² As to the procedure of expulsion in the British Empire see Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940). Deportation takes place normally to the country of origin. See *United States ex rel. Hudak v. Uhl*, where the Court held that the petitioner, a native of Poland, was not entitled to insist on being deported to Canada: *Annual Digest*, 1935-1937, Case No. 161. During the Second World War the courts in the United States in some cases ordered the delivery of deported persons, nationals of countries under belligerent occupation, to the authorities of their Governments-in exile. See, e.g., *Moraitis v. Delany* for an instance of deportation of a Greek subject from the United States to England on the ground that the latter

was the residence of the Greek Government in exile. *Annual Digest*, 1941-1942, Case No. 96. In *Stanssens v. Watkins*, an United States District Court held in 1948 that as the petitioner who was detained as an undesirable alien, was a stateless person and as no State could be found to receive him, he ought not to be deported. 80 F. Supp. 132, *Annual Digest*, 1948, Case No. 80. On the limitation of the right to deport aliens brought into the country against their will see two American decisions given in 1947: *Bradley v. Watkins and Kleczkowski v. Watkins*, *Annual Digest*, 1947, Cases Nos. 64 and 65. The United States Immigration and Naturalisation Act of 1952 authorises the Attorney General to suspend deportation if in his opinion (as distinguished from an opinion reached as the result of a semi-judicial inquiry provided for in a previous enactment) the alien would be subject to physical persecution (Section 242 (h)).

whereas reconduction is forcible conveying away of foreigners.¹ The home State of such reconducted aliens has the duty to receive them, since, as has been noted,² a State cannot refuse to receive such of its subjects as are expelled from abroad.³

IX

EXTRADITION

Hall, §§ 13, 63 Westlake, i. pp. 252-261 Phillimore, i. §§ 365-389d—Hackworth, iv. §§ 301-318 Hyde, i. §§ 310-314, 319-341 Fenwick, pp. 237-247—Walker, § 19 Moore, iv. §§ 579-622 Bluntschli, §§ 394-401 Heffter, § 63—Lammasch in *Holtendorff*, iii. pp. 454-566 Lenz, § 44—Fauchille, §§ 455-481 Sibert, pp. 628-635, 642-646 Travers, iv. §§ 1932-2211, and v *passim*—Despagnet, §§ 276-303 Pradier Fodéré, iii. §§ 1860-1893—Mérignhac, ii. pp. 732-778 Rivier, i. pp. 348-357—Nys, ii. pp. 290-303—Calvo, ii. §§ 949-1071 Fiore, *Code*, §§ 589-592—Martens, ii. §§ 91-98—De Loutch, i. pp. 299-307, 312-315 Cruchaga, §§ 386-397—Suarez, §§ 163-160, 162-166 Keith's Wheaton, pp. 211-228—Stowell, pp. 261-278—*Harvard Research* (1935), pp. 51-434 (the most comprehensive treatment of the subject) Lammasch *Auslieferungspflicht und Asylrecht* (1887)—Martitz, *Internationale Rechtshilfe in Strafsachen*, 2 vols. (1888 and 1897)—Bernard *Traité théorique et pratique de l'extradition*, 2 vols. (2nd ed., 1890) Moore, *Treatise on Extradition* (1891)—Clarke, *The Law of Extradition* (4th ed., 1903) Piggott, *Extradition* (1910)—Saint-Aubin, *L'extradition*, 2 vols. (1913) Robin in *Hague Recueil* 1923, pp. 181-227—Report by Briery and Charles de Visscher, for League Codification Committee in *A.J.*, 20 (1926) Special Suppl. pp. 243-251 and comment by Kuhn in *A.J.*, 20 (1926), pp. 754-757 *International Law Association's thirty-seventh Report*, 1912, pp. 139-161, and *Thirty-fourth Report*, 1927, pp. 441-448—Lammasch in *R.G.*, 3 (1896), pp. 5-14 Diena in *R.G.*, 12 (1905), pp. 516-544 Hyde in *A.J.*, 8 (1914), pp. 487-514 Puente in *Michigan Law Review*, 28 (1929-1930), pp. 605-722 (as to Latin America)—Mercier in *Hague Recueil*, vol. 33 (1930) (iii.), pp. 172-237 Baldassari in *Rivista*, 23 (1931), pp. 3-31 (as to Italy) Luck in *J.C.L.*, 3rd ser., 15 (1933), pp. 59-68 Hudson in *A.J.*, 28 (1934), pp. 274-306—Mervyn Jones in *Grotius Society* 27 (1942) pp. 113-142 Green in *Current Legal Problems*, 6 (1953), pp. 274-296.

¹ Rivier, i. p. 308, correctly distinguishes between reconduction and expulsion, but Phillimore, i. § 364, seems to confuse them. On the practice of deportation and reconduction in the United States see Clark, *Deportation of Aliens from the United States to Europe* (1931); Oppenheimer, *The Enforcement of the Deportation Laws of the United States* (1931); Van Vleet, *The Admini-*

strative Control of Aliens (1932); Hackworth, iii. §§ 293-302.

² See above, § 294.

³ On the expulsion of a State's own sub. sta see Leibholz in *Z.S.V.*, 1 (1929), pp. 95, 96. For a judicial affirmation of the right to deport a national to a foreign country see *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada* [1947] A.C. 87.

Absence
of Legal
Duty of
Extradition.

§ 327. Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of,¹ a crime, by the State on whose territory the alleged criminal happens for the time to be. Although Grotius² held that every State has the duty either to punish, or to surrender to the prosecuting State, such individuals within its boundaries as have committed a crime abroad, and although there is as regards the majority of such cases an important interest of civilised mankind that this should be done, no such rule has been adopted by the States. On the contrary, States have always upheld their right to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases excepted, of course, which fall under stipulations of special extradition treaties, if any. There is, therefore, no universal rule of customary International Law in existence which imposes the duty of extradition.

Rise
of Ex-
tradition
Treaties.

§ 328. Since, however, modern civilisation categorically demands extradition of criminals as a rule, numerous treaties have been concluded between the several States, stipulating the cases in which extradition shall take place. According to these treaties, individuals prosecuted for the more serious crimes, political crimes excepted, are in fact always surrendered to the prosecuting State, if not punished locally. But this solution of the problem of extradition is a product of the nineteenth century only. Before the eighteenth century, extradition of ordinary criminals hardly ever occurred, although many States used then frequently to surrender to each other political fugitives, heretics, and even immigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties. Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States frequently stipulated for extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like. Vattel (ii. § 76) was able to assert in 1758 that murderers, incendiaries, and

¹ Notice that §§ 10 and 26 of the British Extradition Act, 1870, expressly include convicted criminals.

² *ib.* c. 21, § 4.

thieves are regularly surrendered by neighbouring States to each other. But special treaties of extradition between States did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State. When, however, in the nineteenth century, with the appearance of railways and transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then, and in consequence of this, that the conviction was forced upon civilised States that it was in their common interest to surrender ordinary criminals regularly to each other. Special treaties of extradition became, therefore, a necessity and there is a widespread tendency towards the conclusion of general extradition treaties.¹

§ 329. Some States, however, were unwilling to depend entirely upon the discretion of their Governments as regards the conclusion of extradition treaties and the procedure in extradition cases.² They have therefore enacted special Municipal Laws, which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These Municipal Laws³ furnish the basis for the conclusion of extradition treaties. The first in the field

Municipal
Extradition
Laws.

¹ The Second Pan American Conference of 1902 produced a treaty of extradition which was signed by twelve States but was not ratified, see the text in *Annuaire de la vie internationale* (1908-1909), p. 461. Note also the inclusion of extradition in Bustamante's draft code of Private International Law as adopted by the Pan-American International Commission of Jurists in 1927 (see Scott in *A.J.*, 21 (1927), at p. 448). In December 1933 the States represented at the Seventh Pan-American Conference concluded a Convention on Extradition which was ratified by a number of signatories, including (subject to important reservations) the United States: Hudson, *Legislation*, vi. p. 597. But contrast the Report of Briery and Charlen de Vincher for

the League Codification Committee, *op. cit.*, which pronounced against the feasibility of a general international convention dealing with the whole subject of extradition.

- In the case of Great Britain the powerlessness of the Crown at common law to arrest a fugitive criminal and surrender him to another State for trial made legislation essential, see Clarke, *op. cit.*, pp. 126-128, for some early cases illustrating this rule. On the history of extradition in Great Britain before the Extradition Act, 1870, see Clarke, *op. cit.*, pp. 126-166.

² See Martitz, *Internationale Rechts-hilfe*, i. pp. 747-818, where the history of all these laws is sketched and their text is printed.

with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite exceptional. It was not until 1870 that Great Britain followed the example given by Belgium. British public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty and to the competence of every State to grant asylum to political refugees. Great Britain possessed, therefore, before 1870 a few extradition treaties only, and they were in many points inadequate. But in 1870 the British Government succeeded in getting Parliament to pass an Extradition Act. This Act, which was amended in 1873, in 1895, in 1906, and in 1932, has furnished the basis for extradition treaties between Great Britain and a very large number of other States.¹ Such States as possess no extradition laws, and whose written constitution does not mention the matter, leave it to their Governments to conclude extradition treaties according to their discretion. In these countries the Governments are usually competent to extradite an individual, even if no extradition treaty exists.²

Object of
Extradition.

§ 330. Since extradition is the delivery of an accused or convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime, by the State on whose territory he happens for the time to be, the object of extradition can be any individual, whether he is a subject of the prosecuting State, or of the State which is required to extradite him, or of a third³

¹ The full text of these treaties is printed by Clark, *op. cit.*, as well as Biron and Chalmers, *op. cit.* Not to be confused with extradition of criminals to foreign States is the return of a fugitive offender from one part of the British Empire to another, or the rendition of alleged criminals between the different member-States of the United States of America. The former is regulated by the Fugitive Offenders Act, 1881. For the extradition laws of other States see Travers, *op. cit.* As to extradition between Swiss Cantons see Lienhart, *Die interkantonale Auslieferung* (1933). See also Muddiman, *The Law of Extradition from and to*

British India (2nd ed. by Graham and Samuel, 1927). As to extradition from Australia see Castieau in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935) pp. 122-142.

² As to the extradition of 'war criminals' see Article 228 of the Treaty of Peace with Germany (1919), Article 112 of the German (Weimar) Constitution, and below, vol. ii. p. 569, n. 2. As to the extradition of persons accused of war crimes after the Second World War see vol. ii. § 257a* and Lauterpacht in *B.Y.*, 21 (1944), pp. 86-95.

³ *Reg. v. Ganz* (1882) 9 Q.B.D. 93.

State. Many States, however, such as France and Germany, have adopted the principle of never extraditing one of their own subjects to a foreign State, but themselves punishing their own subjects for grave crimes committed abroad.¹ Other States, e.g. Great Britain, have not adopted this principle, and, in the absence of treaty provisions to the contrary, make no distinction between their own subjects and other persons who are alleged to have committed extraditable crimes abroad. Thus in 1879 Great Britain surrendered to Austria, where he was convicted and hanged,² one

¹ For instance, Article 112 of the German (Weimar) Constitution. The Constitution of Yugoslavia of September 1931 provides expressly that the extradition of nationals is not permitted (Article 20): *British and Foreign State Papers*, 134, p. 1173. And see generally Satter in *Osterreichische Zeitschrift für öffentliches Recht*, 1 (1948), pp. 504-522.

² This case is all the more remarkable as (see 24 & 25 Vict. c. 100, § 9) the Criminal Law of England extends over murder and manslaughter committed abroad by British subjects. Although Great Britain is ready to extradite one of her own subjects for crimes committed abroad, she is in some cases prevented from doing so because the extradition treaties concerned comprise a clause stipulating that nationals *should not* be extradited. Thus the extradition of Alfred Thomas Wilson, who had committed a theft in Zurich in 1877, and whose surrender was claimed by Switzerland, had to be refused, because the Anglo-Swiss Treaty of 1874 comprised such a clause (see *Reg. v. Wilson* (1877) 3 Q.B.D. 42). To avoid such unsatisfactory result, subsequent extradition treaties between Great Britain and foreign States usually comprise a clause according to which no party is *compelled* to extradite nationals. As late as 1906, the extradition of a British subject had to be refused to France because Article 2 of the Anglo-French Extradition Treaty of 1876 precluded the surrender of nationals. However, by a convention of 1908 (Treaty Series (1909), No. 34), Article

2 of the Treaty of 1876 has been amended to make optional the refusal to extradite nationals. See *The King v. The Governor of Brixton Prison* [1912] 3 K.B. 568, where the Court, in reliance upon that Convention, granted the extradition of a British subject. In the case of *Valentine et al. v. United States, ex rel. Neidecker* (1936) 299 U.S. 5; *A.J.*, 31 (1937), p. 134; *Annual Digest*, 1935-1937, Case No. 167, the Supreme Court of the United States interpreted Article V of the Extradition Treaty of 1909 which provided that 'Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention' as meaning that the Government of the United States was without power to surrender citizens of the United States to France. For a criticism of this point of view see Garner in *A.J.*, 30 (1936), pp. 481-486 (with reference to the decision of the United States Circuit Court of Appeals in this case: 81 F. (2nd) 32); Manton in *Temple Law Quarterly*, 10 (1935-1936), pp. 12-34; Preuss in *R.I.F.*, 3 (1937), pp. 159-173, 244-254; Kuhn in *A.J.*, 31 (1937), pp. 476-480. And see Rafuse, *The Extradition Nationals* (1939). However, in the absence of treaty provisions the practice of the United States has been to surrender its nationals. See Hackworth, iv. § 318. See also *ibid.*, § 319, for an unsuccessful request of the German diplomatic representative in the United States in February 1940 that one Strakosch, a German national, should not be extradited to Great Britain on the ground that, even if acquitted, he would be liable to internment as an alien enemy.

Tourville, a British subject, who, after having murdered his wife in the Tyrol, had fled home to England. The object of extradition is an individual who is alleged to have committed a crime abroad, whether or not he was during the commission of the criminal act physically present on the territory of the State where the crime was committed.¹

A conflict between International and Municipal Law may arise if a certain individual must be extradited according to an extradition treaty, but cannot be extradited according to the Municipal Law of the State from which extradition is demanded.²

Extra-
ditable
Crimes.

§ 331. Unless a State is restricted by an extradition law, it can grant extradition for any crime it thinks fit.³ And unless a State is bound by an extradition treaty, it can refuse extradition for any crime. Such States as possess extradition laws frame their extradition treaties conformably therewith, and specify in those treaties all those crimes for which they are willing to grant extradition.⁴

¹ Thus, in 1884, Great Britain surrendered to Germany one Nillins, who, by sending from Southampton forged bills of exchange to a merchant in Germany as payment for goods ordered, was considered to have committed forgery, and to have obtained goods by false pretences, in Germany. See Clarke, *op. cit.* pp. 177 and 262. See the comments on this principle in the *Lotus* case, referred to above, § 147a. It has been held that no extradition can be granted unless it is proved that the offence in question was actually committed in the territory of the requesting State: *Kossechechanko and Others v. Attorney-General for Trinidad* [1932] A.C. 78.

² See e.g. the *Paladini* case as reported in Moore, iv. § 594, pp. 290-297. It is noteworthy that the United States, although they do not any longer press for extradition of Italian subjects who, after having committed a crime in the United States, have returned to Italy, nevertheless considered themselves bound by the Treaty of 1868 to extradite to Italy such American subjects as had committed crimes in Italy. Therefore,

when in 1910 the Italian Government demanded from the United States extradition of one Porter Charlton, an American citizen (see *A.J.*, 5 (1911), pp. 182-192; 7 (1913), pp. 580-582, 637-653), for having committed a murder in Italy, extradition was granted by the United States Government, and this action was upheld by the Supreme Court of the United States to which Charlton appealed (*Charlton v. Kelly*, 229 U.S. 447). See below, § 547 (n. 2). Hyde, I § 319, Hershey, p. 379, n. 74; *Harvard Research* (1935), pp. 123-137.

³ As to the policy adopted by certain States of extraditing persons accused of capital crimes on condition only that the death penalty is not inflicted see Reeves in *A.J.*, 18 (1924), pp. 298-300.

⁴ The Convention for the Suppression of Counterfeiting Currency of April 20, 1929, provides that the offences dealt with by the Convention shall be deemed to be included in the various extradition treaties concluded by the contracting parties: C. 153. M. 59. 1929 II.; *L.N.T.S.*, 112. p.

And no person is to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition.¹ However, it is not within the province of the courts of the requested State to try the case on its merits, but merely to ascertain whether the evidence sub-

371. See above, p. 333, n. 2. And see 25 and 26 Geo. 5, c. 25. For a Draft Convention on Extradition adopted in 1928 by the International Law Association see *Report of Thirty-fifth Conference* (1928), pp. 324-329, and *Grotius Society*, 14 (1928), pp. 108-112. And see a Model Draft prepared in 1931 by a Sub-Committee of the International Penal and Prison Commission and printed in *Harvard Research* (Extradition, 1935), pp. 309-315.

¹ In the case of *Factor v. Laubheimer and Haggard* the Supreme Court of the United States, in interpreting the Extradition Treaty with Great Britain, refused to follow this principle and found that the offence with which the plaintiff was charged was an extraditable crime even if it were not punishable by the law of the State of Illinois where the plaintiff was taken in custody: (1933) 290 U.S. 276, 54 S. Ct. 191; *A.J.*, 28 (1934), p. 149. For a criticism of the decision see Hudson, *ibid.*, pp. 274-306. But see Borchard, *ibid.*, pp. 742-746. See also *Z.S.V.*, 4 (1934), pp. 686-690. It is of some interest that in December 1932 the Greek Court of Appeals refused the extradition of the financier Samuel Insull, an alleged fugitive from justice from the State of Illinois, on the ground that the offence with which he was charged did not constitute a crime under Greek law: see *A.J.*, 28 (1934), p. 308, n. 4; *Annual Digest*, 1933-1934, Case No. 146. For the *Eisler* case, in which extradition to the United States for perjury was refused on the ground that the act—an alleged false statement in an application for permission to depart from the United States—was not perjury in English law, see *The Times* newspaper, May 28, 1949. See also Finch, in *A.J.*, 43 1949, pp. 487-491 and Jacob in *Yale*

Law Journal, 59 (1950), pp. 622-634. See also, on the principle of double criminality, Lapradelle, *Causes célèbres du droit des gens. Affaire Henry M. Blackmer, Extradition* (1929). As regards Great Britain, the extraditable crimes are specified in the Extradition Acts of 1870, 1873, 1906, and 1932, and include the following: murder and manslaughter; counterfeiting and uttering counterfeit money; forgery and uttering what is forged; embezzlement and larceny; obtaining goods or money by false pretences; crimes by bankrupts against bankruptcy laws; fraud by a bailee, banker, agent, factor, trustee, or by a director, or member, or public officer of any company; rape; abduction; child stealing; burglary and housebreaking; arson; robbery with violence; threats with intent to extort; piracy under the Law of Nations; offences relating to dangerous drugs; sinking or destroying a vessel at sea; assaults on board ship on the high seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy against the authority of the master on board a ship on the high seas; kidnapping, false imprisonment, perjury, subornation of perjury, and bribery. For the extradition statutes of the principal countries see *Harvard Research* (Extradition, 1935), Appendix VI. And see the Extradition Treaty of December 22, 1931, between Great Britain and the United States: Treaty Series, No. 18 (1935), Cmd. 4928. See also the so-called Bustamante Code, Articles 344-381, adopted at Habana on February 20, 1928: *L.N.T.S.*, 86, p. 744; Hudson, *Legislation*, iv, pp. 2233-2254; the Montevideo Convention on Extradition adopted on December 26, 1933, by the Seventh Pan-American Conference: *Harvard Research* (Extradition, 1935), pp.

mitted justifies *prima facie* judicial proceedings against the accused.¹

Political criminals are, as a rule, not extradited,² and according to many extradition treaties, military deserters and persons who have committed offences against religion are likewise excluded from extradition.

Condi-
tions of
Extra-
dition.

§ 332. Extradition is granted only if asked for,³ and after the formalities have taken place which are stipulated in the treaties of extradition and the extradition laws, if any. It is effected through the handing over of the criminal by the police of the extraditing State to the police of the prosecuting State. According to most extradition treaties, it is a condition of extradition that the surrendered individual shall be tried and punished for those crimes exclusively for which his extradition has been asked and granted, or for those, at least, which the extradition treaty concerned enumerates.⁴ If, nevertheless, an extradited individual is tried and punished for another crime, the extraditing State has a right to complain.⁵

¹ See the protest of the United States made in November 1935 against the refusal of Greece to extradite the financier Samuel Inaull following upon the decision of the Athens Court of Appeals which investigated the substance of the charge in respect of which extradition was sought. For an account of the case see Hyde in *A J.*, 28 (1934), pp. 307-312, and see *ibid.*, pp. 362-372, for the text of the decision; Ahmed Reclud in *R.G.*, 41 (1934), pp. 687-710.

² See below, §§ 333-337.

³ Many treaties make it a condition of extradition that reciprocity is granted. On the so-called reciprocity clause see Mettgenberg in *Archiv für öffentliches Recht*, 25 (1910), pp. 1-148.

⁴ See Mettgenberg in *Z.I.*, 18 (1908), pp. 125-430; and Becker in *A.V.*, 11 (1918-1920), pp. 230-240; and *United States v. Rauscher* (1886) 119 U.S. 407. This rule is often referred to as the principle of speciality. It received an interesting illustration in two decisions in *United States v. Milligan* (1934) 74 F. (2nd) 220 and

(1935) 76 F. (2nd) 511 - in the second of which it was held that the rationale of the principle is not any interest of the accused, but that of the extraditing State which can waive the benefit of it. See also *R. v. O'rrigan* (1930), 22 Cr. App. R. 106.

⁵ It was held in *United States ex rel. Donnelly v. Mulligan* that a person who has been acquitted of the charge for which he had been extradited may be extradited, on another charge, to a third State with the consent of the State which originally granted the extradition - 74 F. (2d) 220; *Annual Digest*, 1933-1934, Case No. 144, 76 F. (2d) 511. *Annual Digest*, 1935-1937, Case No. 169. It has been held by the Italian Court of Cassation that if the accused consents and the extradition treaty provides for such consent, he may be tried on charges other than those for which he has been extradited: *In re Arrighio*, *Annual Digest*, 1933-1934, Case No. 140. On the other hand, the same Court held that, in the absence of a treaty provision to the contrary, the extradited person cannot validly consent to a prosecu-

An interesting question is whether, in case a criminal, who has succeeded in escaping into the territory of another State, is erroneously handed over, without the formalities of extradition having been complied with, by the police of the local State to the police of the prosecuting State, such local State can demand that the prosecuting State shall send the criminal back, and ask for his formal extradition. This question was decided in the negative in February 1911 by the Permanent Court of Arbitration in the case of *France v. Great Britain* concerning Savarkar.¹

tion on such charges. *Vallerini v. Grandi*, *ibid.*, 1935-1937, Case No. 176. For an emphatic affirmation of the principle of identity of extradition and prosecution as being a principle of International Law see the decision of the Spanish Supreme Court in *Fiscal v. Casper* (*ibid.*, 1938-1940, Case No. 162). The Institute of International Law in 1880, at its meeting in Oxford (see *Annuaire*, v. p. 127), adopted a body of twenty-six rules concerning extradition. And see *Harvard Research* (Extradition, 1935), *passim*. As to the retroactive effect of extradition treaties, in connection with the *Insull* case (above, p. 701, n. 1), see Stowell in *A.J.*, 27 (1933), p. 130. See also Harness in *Indiana Law Review*, 11, pp. 351-363.

¹ This Indian, a British subject, who was prosecuted for high treason and abetment of murder, and was being conveyed in the P. and O. boat *Morea* to India for the purpose of standing his trial there, escaped to the shore on October 25, 1910, while the vessel was in the harbour of Marseilles. He was, however, seized by a French policeman, who, erroneously and without further formalities, reconducted him to the *Morea* with the assistance of individuals from the vessel who had raised a hue and cry. Since Savarkar was *prima facie* a political criminal, France demanded that Great Britain should give him up, and should request his extradition in a formal way; but Great Britain refused to comply with this demand, and the parties, therefore, agreed to have the conflict decided by the Court of Arbitration at The Hague. The award, while admitting

that an irregularity had been committed by the reconduction of Savarkar to the British vessel, decided in favour of Great Britain, asserting that there was no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has a prisoner in its custody to restore him on account of a mistake committed by the foreign agent who delivered him up to that Power. It should be mentioned that the French Government had been previously informed of the fact that Savarkar would be a prisoner on board the *Morea* while she was calling at Marseilles, and had agreed to this.

See Hamelin, *L'Affaire Savarkar* (Extrait du *Recueil général de Jurisprudence, de Doctrine, et de Législation coloniales*, 1911), who defends the French view. The award of the Court of Arbitration has been severely criticised by Baty in *Law Magazine and Review*, 36 (1911), pp. 326-330; Kohler in *Z.V.*, 5 (1911), pp. 202-211; Strupp, *Zwei praktische Fälle aus dem Völkerrecht* (1911), pp. 12-26; Robin in *R.G.*, 18 (1911), pp. 303-352; Hamel in *R.J.*, 2nd ser., 13 (1911), pp. 370-403. For a case having certain features in common with the case of *Savarkar* see *Charteris* in *J.C.L.*, 3rd ser., 8 (1926), pp. 246-249. And see the *Lamirand* case between Great Britain and France reported in the former edition of this treatise. And see above, § 128, as to jurisdiction in case of irregular apprehension.

The documents relating to the *Savarkar* case are printed on pp. 28-29 of the British counter-case in the *Savarkar Arbitration*.

X

PRINCIPLE OF NON-EXTRADITION OF
POLITICAL CRIMINALS

Westlake, i. pp. 256-258—Wharton, ii. § 272—Moore, iv. § 604—Hackworth, iv. § 316—Hyde, i. §§ 315-318—Bluntschli, § 306—Lammassch in *Holtzen dorff*, iii. pp. 485-510—Rivier, i. pp. 351-357—Nys, ii. pp. 300-303—Calvo, ii. §§ 1034-1036—Martens, ii. § 96—Fanchille, §§ 464-466—Sibert, pp. 635-642—Pradier Fodéré, iii. §§ 1871-1873—Mérignhac, ii. pp. 751-771—De Louter i. pp. 307-311—Cruchaga §§ 381-385—Martitz, *Internationale Rechtshilfe in Strafsachen*, ii. (1897) pp. 134-707—Lammassch, *Auslieferungspflicht und Asylrecht* (1887), pp. 203-355—Grivaz, *Nature et effets du principe de l'asile politique* (1895)—Piggott, *Extradition* (1910), pp. 42-60—Carlton Hall, *Political Crime* (1923)—Herbold, *Das Politische Asyl im Auslieferungsrecht* (1933)—*Harvard Research* (1935), pp. 107-119—Teichmann, Hornung, Martens, and Saripolos, in *R.I.*, 11 (1879), pp. 475-526—Scott in *A.J.*, 3 (1909), pp. 459-461—Hyde in *A.J.*, 8 (1914), pp. 489-495—Walker in *Z.O.*, 4 (1924-1925), pp. 335-349—Kraus in *R.I.*, 3rd ser., 8 (1927), pp. 161-181—Pondevin in *Répertoire*, viii. pp. 202-214—Mettgenberg in *Z.V.*, 16 (1931-1932), pp. 731-741—Deere in *A.J.*, 27 (1933), pp. 247-270—Mannheim in *Grotius Society*, 21 (1935), pp. 108-125—Reale in *Hague Recueil*, vol. 63 (1938) (i.), pp. 541-561—Hambrö in *Western Political Quarterly*, 5 (1952), pp. 1-19

How
Non-Ex-
tradition
of Political Crimi-
nals be-
came the
Rule.

§ 333. Before the French Revolution¹ the term 'political crime' was unknown in both the theory and the practice of the Law of Nations, and the principle of non-extradition of political criminals was likewise non-existent.² On the contrary, whereas extradition of ordinary criminals was, before the eighteenth century at least, hardly ever stipulated for, treaties very often stipulated for the extradition of individuals who had committed such deeds as are nowadays termed 'political crimes,' and such individuals were frequently extradited, even when no treaty stipulated for it.³ Moreover, writers in the sixteenth and seventeenth centuries did not at all object to such a practice on the part of the States; on the contrary, they frequently approved of it.⁴ It was indirectly due to the French Revolution that

¹ Note, however, an anticipation by Francis Hutcheson in *System of Moral Philosophy* (published in 1755), Book 3, ch. 10, § 9, p. 105, where he asserts the principle of the non-extradition of 'State criminals' as he describes them.

² This section is largely a summary

of the facts given by Martitz, *op. cit.* ii. pp. 134-184.

³ Martitz, *op. cit.* ii. p. 177, gives a list of important extraditions of political criminals which took place between 1648 and 1789.

⁴ So Grotius, *ii. c. 21, § 5, No. 5.*

matters gradually underwent a change, since this event was the starting-point for the revolt in the nineteenth century against despotism and absolutism throughout the western part of the European continent. It was then that the term 'political crime' arose, and Article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home country 'for the cause of liberty.' On the other hand, the French emigrants, who had fled from France to escape the Reign of Terror, found an asylum in foreign States. However, the modern principle of non-extradition of political criminals did not even then conquer the world. Until 1830, political criminals were frequently extradited. But public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent. The fact that several political fugitives were surrendered by the Governor of Gibraltar to Spain created a storm of indignation in Parliament in 1815, where Sir James Mackintosh proclaimed the principle that no nation ought to refuse asylum to political fugitives. In 1816 Lord Castlereagh¹ declared that there could be no greater abuse of the law than to allow it to be the instrument of inflicting punishment on foreigners who had committed political crimes only. The second in the field was Switzerland, the asylum for many political fugitives from neighbouring countries, when, after the final defeat of Napoleon, the reactionary continental monarchs refused the introduction of constitutional reforms which were demanded by their peoples. Although, in 1823, Switzerland was forced by threats of the reactionary leading Powers of the Holy Alliance to restrict somewhat the asylum afforded by her to individuals who had taken part in the unsuccessful political revolts in Naples and Piedmont, the principle of non-extradition continued to gain ground.¹

¹ Which country first prohibited the extradition of political criminals is a controversial question: see Mettgenberg in *Z.V.*, 14 (1927), pp. 237-247. In 1820 a celebrated dissertation by a Dutch jurist made its appearance,

in which the principle of non-extradition of political criminals was for the first time defended with juristic arguments, and on a juristic basis: H. Provo Kluit, *De Deditione Profugorum*.

On the other hand, in 1833 a reaction set in when Austria, Prussia, and Russia concluded treaties, which remained in force for a generation, and which stipulated that thenceforth individuals who had committed crimes of high treason and *lèse-majesté*, or had conspired against the safety of the throne and the legitimate Government, or had taken part in a revolt, should be surrendered to the State concerned. The same year, however, is epoch-making in favour of the principle of non-extradition of political criminals, for in 1833 Belgium enacted her celebrated Extradition Law, the first of its kind, being the very first Municipal Law which expressly interdicted the extradition of foreign political criminals. As Belgium, which had seceded from the Netherlands in 1830 and became recognised and neutralised by the Powers in 1831, owed her very existence to revolt, she felt it her duty to make it a principle of her Municipal Law to grant asylum to foreign political fugitives, a principle which was for the first time put into practice in the Treaty of Extradition concluded in 1834 between Belgium and France. The latter, which until 1927¹ had no municipal extradition law, has nevertheless since 1831, in her extradition treaties with other States, always stipulated the principle of non extradition of political criminals. The other States followed gradually. Even Russia had to give way, and after 1867 this principle is to be found in nearly all her extradition treaties.² It is due to the firm attitude of Great Britain, Switzerland, Belgium,

See Travers in 54 *Année* (1927), pp. 595-610, and Saint-Aubin in *R G.*, 35 (1928), pp. 10-31. The Law of March 10, 1927, forbids extradition when the offence is of a political character or it is reasonably suspected that extradition is requested for political purposes, and gives a liberal definition of 'political crime'.

¹ Article 12 of the Constitution of the Russian Socialist Federal Soviet Republic of May 11, 1925, grants the right of asylum to 'tous les étrangers persécutés pour leur activité politique ou leurs convictions religieuses'. And see above, § 316. For a rejection of the view that there exists a right of

political asylum see *Chandler v. United States*, where the Court affirmed a conviction for treason committed by an American citizen who broadcast in the German interest in Germany during the Second World War and was subsequently arrested in Germany by American military authorities and brought to the United States: (1948) 171 *F. (2d)* 921; *A.J.*, 43 (1949), p. 804. The Court held that even assuming that there was a valid extradition treaty between Germany and the United States, it applied only to fugitives who unlike the accused, had fled the country where the crime was committed.

France, and the United States that the principle has conquered the world.

§ 334. Although the principle became, and is, generally recognised that political criminals should not be extradited, serious difficulties exist concerning the conception of 'political crime.'¹ This conception is of great importance, as the extradition of a criminal may depend upon it. It is unnecessary here to discuss the numerous details of the controversy. It suffices to state that, whereas many writers consider a crime 'political' if committed from a political motive, others call 'political' any crime committed for a political purpose²; again, others recognise such a crime only as 'political' as was committed both from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as high treason, *lèse-majesté*, and the like.³ Up to the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will, probably, for ever

Difficulty concerning the Conception of Political Crime.

¹ On the question whether 'war crimes' (see below, vol. II. §§ 251-257) should be considered as political crimes or not, and on the refusal of Holland to surrender the ex-Kaiser William, see Fauchille, § 469 (1), and Travers in *R.F.*, 3rd ser., II. (1921), pp. 125-150. In *In re Colman* the Paris Court of Appeals in 1947 decided that a fugitive from Belgium accused of intelligence with the enemy and carrying arms against Belgium could be extradited on the ground that such offences were common and not political crimes: *Annual Digest*, 1947, Case No. 67. See also, to the same effect, the judgment of the Court of Appeal of Nancy in *In re Spiessens*: *Revue critique de droit internationale privé*, 40 (1931), p. 487. See, on the other hand, the contrary decision of the Supreme Court of Brazil in the *Denmark* (*Collaboration with the Enemy*), *Annual Digest*, 1947, Case No. 71. And see Morgenstern in *B.Y.*, 25 (1946), pp. 382-386, and Neumann in *A.J.*, 45 (1951), pp. 495-508.

is an interesting one. Two persons who were accused of having murdered the Spanish Prime Minister Dato in 1921, and had fled to Germany, were extradited, although the German-Spanish Treaty prohibited extradition for political offences, on the ground that the alleged murder was an act of revenge, possibly arising out of a political motive but not committed with a view to achieving a political object: see Mettgenberg in *Z.V.*, 12 (1923), pp. 200-221. See also the same writer in *Strapp, Werk.*, I. pp. 43, 44, and Diena in *R.G.*, 2 (1895), pp. 306-336.

² See Mettgenberg, *Die Attentats-klausel im deutschen Auslieferungsrecht* (1906), pp. 61-78, where a survey of the different opinions is given. On the refusal of the Court of Turin on November 23, 1934, to extradite to France the persons accused of participating in the assassination of the King of Yugoslavia see Philonenko in *61 Clunet* (1934), pp. 1157-1169.

³ The *Fort* case in Germany in 1921

exclude the possibility of finding a satisfactory definition.¹ The difficulty is caused through the so-called 'relative political crimes' or *délits complexes*—namely, those complex cases in which the political offence comprises at the same time² an ordinary crime, such as murder, arson, theft, and the like. Some deny categorically that such complex crimes are political; but this opinion is wrong and retrogressive, since indeed many honourable political criminals would have to be extradited in consequence thereof. On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political.³ Such cases have aroused the indignation of the world, and have indeed endangered the very value of the principle of non-extradition of political criminals. Three practical attempts have therefore been

¹ According to Stephen, *History of the Criminal Law in England*, ii. p. 71, political crimes are such as are incidental to, and form a part of, political disturbances.

² The problem came twice before the English courts; see *Ex parte Castioni* [1891] 1 Q.B. 149, and *In re Meunier* [1894] 2 Q.B. 415. In the case of Castioni, a Swiss who had taken part in a revolutionary movement in the canton of Ticino and had incidentally shot a member of the Government, the Court refused extradition because the crime was considered to be political. On the other hand, in the case of Meunier, a French anarchist who was prosecuted for having caused two explosions in France, one of which resulted in the death of two individuals, the extradition was granted because the crime was not considered to be political. (On the American practice, see Hyde in *A.J.*, 8 (1914), pp. 491-495. See also as to anarchists generally Poittevin in *Répertoire*, i. pp. 559-562. And see *In re Kaphengst* in which the Swiss Federal Court granted, in October 1930, extradition of a person accused of having committed bomb outrages of a purely terrorist character: *Annual Digest*, 1929-1930, Case No. 188. In the *Pagan* case the Swiss Federal Court

granted extradition (to France) of a person accused of killing an Italian fascist in France: *Annual Digest*, 1927-1928, Case No. 239. The same Court refused extradition for homicide in a case in which a member of the German Social-Democratic Party killed a member of the National-Socialist Party. The Court held that the alleged offence took place in the course of a political struggle approaching a civil war: *In re Ockert*, *Annual Digest*, 1933-1934, Case No. 157. In *In re Giovanni Gatti*, decided in 1947 by the Court of Appeal of Grenoble in France, it was held that a person accused of attempted homicide by firing at a communist must be extradited: *Annual Digest*, 1947, Case No. 70.

³ In *In re Government of India and Mubarak Ali Ahmed* [1952] 1 All E.R. 1060 it was held, with regard to a request for extradition for forgery, that the Court could not inquire into the allegation that the case had political implications; and that the accused would not receive a fair trial. This aspect of the decision probably had reference to the particular circumstances of the case. The possibility of a political prosecution being instigated under the colour of a common law crime cannot, in principle, be ruled out.

made to deal with such complex crimes without violating this principle.

§ 335. The first attempt was the enactment of the so-called *attentat* clause by Belgium in 1856, following the case of Jacquin¹ in 1854. A French manufacturer named Jules Jacquin, domiciled in Belgium, and a foreman of his factory named Célestin Jacquin, who was also a Frenchman, tried to cause an explosion on the railway line between Lille and Calais with the intention of murdering the Emperor Napoleon III. France requested the extradition of the two criminals, but the Belgian Court of Appeal had to refuse the surrender on account of the Belgian extradition law prohibiting the surrender of political criminals. To provide for such cases in the future, Belgium enacted in 1856 a Law amending her extradition law and stipulating that murder of the Head of a foreign Government, or of a member of his family, should not be considered a political crime. Many European States, not including Great Britain, have adopted that *attentat* clause.²

§ 336. Another attempt to deal with complex crimes, without detriment to the principle of non-extradition of political criminals, was made by Russia in 1881. Influenced by the murder of the Emperor Alexander II. in that year, Russia invited the Powers to hold an international conference at Brussels to consider the proposal that henceforth no murder, or attempt to murder, ought to be considered as a political crime. But the conference did not take place, since Great Britain, as well as France, declined to take part in it.³

§ 337. Eleven years later, in 1892, Switzerland attempted a solution of the problem on a new basis. In that year Switzerland enacted an extradition law Article 10 of which recognises the non-extradition of political criminals, but, at

¹ See details in Martitz, *op. cit.*, ii. p. 372.

² For a survey of the treaties and a criticism of the *attentat* clause see *Harvard Research* (Extradition, 1935), pp. 115-118, and Bourquin in *Hague Recueil* (1927) (i.), pp. 212, 213. See also Mottgenberg, *op. cit.*,

pp. 109-114. As to the United States of America, see Hyde, i. § 317. The French Law of 1927 (see above, § 333) seems to have rejected the *attentat* clause.

³ See details in Martitz, *op. cit.*, ii. p. 479.

the same time, lays down the rule that political criminals shall nevertheless be surrendered, in case the chief feature of the offence wears more the aspect of an ordinary than of a political crime, and that the decision concerning the extraditability of such criminals rests with the Bundesgericht, the highest Swiss court of justice.¹

The
Proposed
Conven-
tion
against
Terrorism.

§§ 338-340a.² After the assassination of King Alexander of Yugoslavia in France on October 9, 1934, the Council of the League of Nations, in pursuance of a proposal made by France, took steps to bring about an international convention for the prevention and punishment of crimes of a political character described as acts of political terrorism.³ In the Convention signed at Geneva on November 16, 1937, twenty-three States undertook to treat as criminal offences acts of terrorism—including conspiracy, incitement, and participation in such acts—and, in some cases, to grant extradition for such offences. In a supplementary Convention, signed on the same day, ten of the signatories of the principal Convention agreed to the creation of an International Criminal Court to which the parties would be entitled to hand over the accused if they decided not to extradite them or to try them before their own courts. Apart from India, no member of the British Commonwealth of Nations signed either Convention.⁴ The Conventions have not entered into force. It is doubtful whether States wedded by their law and tradition to the principle of non-extradition of political offenders will acquiesce in any conventional regulation impairing the asylum hitherto granted to political offenders. Such acquiescence on their part is unlikely at a time when the suppression of individual freedom and the ruthless persecution of opponents in many countries tend to provoke violent reactions of a treasonable character against the Governments concerned.⁵

¹ See Langhard, *Das schweizerische Auslieferungsgesetz* (1910) and Schultz, *Das schweizerische Auslieferungsgesetz* (1953).

The Institute of International Law at its meeting at Geneva in 1892 (see *Annuaire*, 12, p. 182) adopted four rules concerning the extradition of political criminals.

² §§ 339-340a of the earlier editions have been omitted.

³ See above, § 127a.

⁴ For an analysis see *B.Y.*, 19 (1938), pp. 214-217.

⁵ For the literature on the subject see above, p. 292, n. 6. See also Mettgenberg in *Völkerbund und Völkerrecht*, 2 (1935), pp. 18-23, and Saldaña

XI

THE PROTECTION OF MINORITIES

Fauchille, §§ 409 (9)-409 (14) Sibert, pp. 493-510—Scelle, ii. pp. 187-256—Vichniac, *La protection des droits des minorités* (1920)—Wolzenfordff, *Grundgedanken des Rechts der nationaler Minderheiten* (1921)—Duparc, *La protection des minorités de race, de langue, et de religion* (1922)—Rosting, *La protection des minorités par la Société des Nations* (1922)—Epstein, *Der nationale Minderheitenschutz* (1922)—Lucien-Brun, *Le problème des minorités* (1923)—Mandelstam in *Hague Recueil*, 1923, pp. 367-517—Ruyssen, *Les minorités nationales de l'Europe et la guerre mondiale* (1923)—Hobza in *Hague Recueil*, 1924, iv. (as to religion)—Kratich, *Les minorités, l'État et la communauté internationale* (1924)—Plettner, *Das Problem des Schutzes nationaler Minderheiten* (1927)—Robinson, *Das Minoritätenproblem und seine Literatur* (1927)—Muir, *The Protection of Minorities* (1928)—Bruns, *Minderheitsrecht als Völkerrecht* (printed as Suppl. to Z.V., 14 (1928))—Knubben, *Die Subjekte des Völkerrechts* (1928), pp. 438-457—Wintgens, *Der völkerrechtliche Schutz der . . . Minderheiten* (1930)—Ito, *La protection des minorités* (1931)—V. Truhart, *Völkerbund und Minderheitenpetitionen* (1931)—Stone, *International Guarantees of Minority Rights* (1932), and in B.Y., 12 (1931), pp. 76-94—Macartney, *National States and National Minorities* (1933) (a leading treatise)—Petroff, *Les Minorités nationales en Europe Centrale et Orientale* (1935)—Robinson and others, *Were the Minorities Treaties a Failure?* (1943)—Janoveky, *Nationalities and National Minorities* (1945)—Report by Mandelstam to the Institute of International Law, *Annuaire*, 32 (1925), pp. 246-302—Herking, in *Grotius Society*, 7 (1922), pp. 119-132, 10 (1925) pp. 143-157, 13 (1926), pp. 31-49, and in Z.I., 36 (1926), pp. 41-73—Evans in B.Y., 1923-1924, pp. 95-113—Duparc in R.I., 3rd ser., 4 (1923), pp. 100-420, and *ibid.*, 3rd ser., 7 (1926), pp. 509-524—Rosting in A.J., 17 (1923), pp. 641-660—Grand in R.G. 31 (1924), pp. 17-71—Laun in Z.I., 31 (1923-1924), pp. 252-258, and in *Supp. Wört.*, ii. pp. 82-108—Kunz in R.I. (*Genève*), 3 (1925), pp. 69-82—Dugdale in *Journal of British Institute of International Affairs*, 5 (1926), pp. 79-95—Hamburger in Z.I., 38 (1928), pp. 215-243—Mandelstam in *Annuaire*, 34

in *Revue internationale de droit pénale*, 13 (1936), pp. 26-37. For the final drafts of the Convention for the International Prevention and Punishment of Terrorism and of the Convention for the Creation of an International Criminal Court see the Report of the Committee of Jurists of April 26, 1937; Doc. C. 222. M. 162. 1937. V.; Hudson, *Legislation*, vii. pp. 862, 878. For the replies of Governments see Doc. A. 24. 1938. V. See also, for the discussion in the First Committee of the Seventeenth Assembly in 1936, *Off. J.*, Special Suppl., No. 156. And see above,

p. 677, n. 1, for the Resolution of the First Assembly of the United Nations as to so-called 'quislings and traitors.' In the various Peace Treaties concluded in 1946 provision is made for the apprehension and surrender, on the part of the defeated States, of nationals of any Allied Power accused of having violated their nations' law by treason or collaboration with the enemy during the war (see e.g., Art. 45 of the Treaty with Italy). These provisions must be regarded as a retrogressive step so far as the principle of non-extradition of political offenders is concerned.

(1928), pp. 276-316, and 36 (1) (1931), pp. 514-566—Akzin in *Z.S.R.*, 8 (1929), pp. 203-228—Philippe in *R.I.*, 3rd ser., 10 (1929), pp. 492-510—Sereni in *Rivista*, 21 (1929), pp. 461-500, and 22 (1930), pp. 45-61, 153-179—Ch. de Visscher in *R.I.*, 3rd ser., 11 (1930), pp. 326-360—Redalob in *Hague Recueil*, vol. 37 (1931) (iii.), pp. 5-80—Caldarwood in *General Special Studies*, ii., No. 9 (1931)—Kunz in *Z.o.R.*, 12 (1932), pp. 221-272—Hoor in *Z.I.*, 48 (1934), pp. 177-312—Guggenheim in *Friedenswarte* 44 (1944), pp. 201-221—Robinson in *Jerush Yearbook of International Law* 1948, pp. 115-151.

Until the
End of the
First
World
War.

§ 340b. The practice of making treaty stipulations for the purpose of ensuring certain rights to minorities begins in the sphere of religion as a means of settling the disputes arising out of the Reformation. In particular, the 'Treaty of Osnabrück of 1648 at the close of the Thirty Years' War may be mentioned, though there are earlier illustrations.¹ In the Treaty of Berlin of 1878 the Great Powers compelled Bulgaria, Montenegro, Serbia, Roumania, and Turkey to promise religious freedom to their nationals, and the nineteenth century witnessed a number of other scattered illustrations of treaty recognition of this principle.

After the
First
World
War.

§ 340c. After the First World War, when a number of new States had recently emerged out of the European melting-pot and large portions of territory were changing hands, the system of the protection of minorities received a new impetus. The Principal Allied and Associated Powers were able to stipulate by treaty² with Poland, Czecho-Slovakia, the Serb-Croat-Slovene State, Roumania, Greece, Austria, Bulgaria, Hungary, and Turkey, for the just and equal treatment of their racial, religious, and linguistic minorities. Subsequently, as a condition of their admission to the League of Nations, similar obligations were undertaken by Albania, Esthonia, Latvia, Lithuania,³ and Iraq,⁴ in the form of unilateral declarations accepted and rendered obligatory by various resolutions of the Council of the

¹ For the history see Fauchille, § 409 (9), and Temperley, *op. cit.*

² For a survey of the circumstances which led to the adoption of these provisions see Macartney, *op. cit.*, pp. 212-258. See also Feinberg, *La question des minorités à la Conférence de la Paix de 1919-1920 et l'action juive en faveur de la protection inter-*

nationale des minorités (1929); Janowsky, *The Jews and Minority Rights (1919-1920)* (1933); Stillschweig, *Die Juden Osteuropas in den Minderheitsverträgen* (1936).

³ As to the last three see Larsson in *Z.S.V.*, 2 (i.) (1931), pp. 401-429.

⁴ See Hudson, *Legislation*, vi. p. 39.

League.¹ The relevant clauses in the treaties are substantially the same, and the protection which they are designed to afford may be summarised as follows:

(i) For the *inhabitants*, protection of life and liberty and the free exercise of religion without distinction of birth, nationality, language, race, or religion.

(ii) In general, for *certain inhabitants*, automatic acquisition, or just facilities for the acquisition, of the nationality of the contracting State;

(iii) For the *nationals*, equality before the law and as to all civil and political rights, and as to the use of any language. (The Permanent Court of International Justice repeatedly laid down that the prohibition of non-discrimination must operate in fact as well as in law, and that a measure general in its application but in fact directed against members of a minority constitutes a violation of the Minorities Treaty²);

(iv) Freedom of organisation for religious and educational purposes; and

(v) State provision for the elementary instruction of their children through the medium of their own language in districts where a particular minority forms a considerable proportion of the population.

§ 340d. The method of ensuring the observance of the minority clauses was twofold: in the first place, constitutional; in the second, international. (1) The contracting State by the treaty recognised the principal clauses as 'fundamental laws,' and undertook that 'no law, regulation, or official

The
Sanctions
of the
Minority
Clauses.

¹ The principal treaties were as follows: with Poland, June 28, 1919, Treaty Series, No. 8 (1919); with Czechoslovakia, September 10, 1919, Treaty Series, No. 20 (1919); with the Serb-Croat-Slovene State, September 10, 1919, Treaty Series, No. 17 (1919); with Roumania, December 9, 1919, Treaty Series, No. 6 (1920), *L.N.T.S.*, 5, p. 336; with Greece, August 10, 1920, Treaty Series, No. 13 (1920), *L.N.T.S.*, 28, p. 244, and additional protocol of July 21, 1923, Treaty Series, No. 16 (1923), p. 225, *L.N.T.S.*, 28, p. 222; with Austria, Articles 64-69 of the Treaty of St. Germain; with Bulgaria, Articles 49-

57 of the Treaty of Neuilly; with Hungary, Articles 54-60 of the Treaty of Trianon; with Turkey, Articles 37-45 of the Treaty of Lausanne.

² Advisory Opinion No. 6 relating to *German Settlers in Poland*; Advisory Opinion on the *Treatment of Polish Nationals in Danzig*, Series A/B, No. 44, p. 28; Advisory Opinion on *Minority Schools in Albania*, Series A/B, No. 64, p. 18, where the Court, as in some former cases, laid stress on the principle that the equality of treatment postulated in the Treaty must be both in fact and in law (at pp. 18-20).

action shall conflict or interfere with ' them. (2) The clauses, ' so far as they affect persons belonging to racial, religious, or linguistic minorities, constitute obligations of international concern ' ; they were ' placed under the guarantee of the League of Nations ' and could not be modified ' without the assent of a majority of the Council of the League of Nations. ' Any member of the Council had the right to bring to the attention of the Council any infraction, or danger of infraction, and ' the Council may thereupon take such action and give such directions as it may deem proper and effective in the circumstances. ' Any difference of opinion as to questions of law or fact arising out of the clauses between the contracting State and any one of the Principal Allied and Associated Powers or any member of the Council was to be regarded as a dispute of an international character, and had, if the party other than the contracting State demanded, to be referred to the Permanent Court, whose decision was to be final and have the same force and effect as an award or judicial decision under Article 13 of the Covenant.¹ The League evolved a procedure for dealing with questions arising under the minority clauses. These questions were dealt with in the first instance by the Administrative Commissions and Minorities Section of the Secretariat. In particular, rules were prescribed by the Council to which petitions addressed to the League had to conform.²

¹ See Feinberg, *La juridiction de la Cour Permanente de la Justice Internationale dans le système de la protection internationale des minorités* (1931), and the same in *Hague Recueil*, vol. 59 (1937) (i.), pp. 596-607, 633-702.

² See Macartney, *op. cit.*, pp. 370-423; V. Truhart, *Völkerbund und Minderheitenpetitionen* (1931); Richard, *Le droit de pétition* (1932), pp. 503-614; Stone, *International Guarantees of Minority Rights* (1932); Jungmann, *Das Minderheitenschutzverfahren vor dem Völkerbund* (1934); Roussak in *A.J.*, 23 (1929), pp. 538-551; Feinberg in *Hague Recueil*, vol. 40 (1932) (ii.), pp. 598-627; Sibert in *R.G.*, 40 (1933), pp. 257-272;

Stone in *A.J.*, 26 (1932), pp. 502-513; Hasselblatt in *Zeitschrift für ost-europäisches Recht*, 1934, pp. 217-231. See also Miatz, *Die Nationale Autonomie im System des Minderheitenrechts* (1927); Dorge, *Der autonome Verband im geltenden Staats- und Völkerrecht* (1931).

For an instance of the adoption of a system of protection of minorities with regard to limited regions see the Convention of May 15, 1922, between Germany and Poland concerning Upper Silesia. That Convention expired in 1937. See Wanderholt, *Das Minderheitenrecht in Oberschlesien* (1930); Stone, *Regional Guarantees of Minority Rights* (1933); and in particular, Kaeckenbuech, *The Inter-*

§ 340e. The terms of the Minorities Treaties were not definite on the question whether the guarantee of the protection of minorities was to be in the nature of a general guarantee, implying a continuous responsibility of the Council and permanent organs charged with a regular duty of supervision, or merely in the nature of a duty of the Council to take cognisance of cases of infraction brought before it. The Council resolved the doubt by denying the theory of a general guarantee.¹ The reasons given in support of that interpretation of the minority clauses are controversial.² It is probable that in this, as well as in other matters, the implementation of the system of protection of minorities was affected by the progressive weakening of the political structure of the League. Thus, for instance, it did not inevitably follow from the terms of the Minorities Treaties that the petitions of minorities were to be regarded merely as a source of information without giving the interested parties a *locus standi* entitling them to be informed of the grounds of the rejection of their petitions.³ Nevertheless, the system of protection of minorities, however attenuated by the interpretation given to it in practice, must be regarded as having justified itself, in its cumulative effect,⁴ as an instru-

The Nature of the Guarantee of Protection of Minorities.

national Experiment of Upper Silesia (1942). The Upper Silesian Arbitral Tribunal established by the Convention has so far published, in German and Polish, six volumes of its decisions.

See also the Convention of May 8, 1924, concerning the Territory of Memel. See *British and Foreign State Papers*, 119, p. 502; Martens, *N.R.G.*, 3rd ser., 15, p. 106; Hudson, *Legislation*, ii, p. 1265. For the literature on the subject see 7th edition, p. 654.

In a Resolution adopted at Lima on December 23, 1938, the American States declared that the system of protection of linguistic or religious minorities has no application in America 'where the conditions which characterise the group known as minorities do not exist,' that aliens cannot claim collectively the condition of minorities, but that individually they continue to enjoy the rights to which they are entitled. At the same time the Conference declared

that, in accordance with the fundamental principle of equality before the law, persecution on account of racial or religious motives is contrary to the political and juridical systems of America: *A.J.*, 34 (1940), Suppl., p. 198.

¹ *Off. J.*, Special Suppl., No. 73, p. 62.

² In particular, from the fact that the second paragraph of Article 12 of the Treaty provided specifically for the right of members of the Council to bring before it any cases of infraction, it did not necessarily follow that the general guarantee envisaged by the first paragraph was to be interpreted restrictively.

³ For a critical account of the procedure adopted see Macartney, *op. cit.*, and Stone, *International Guarantees of Minority Rights* (1932).

⁴ See in particular Robinson and others, *Were the Minorities Treaties a Failure?* (1943).

ment of international supervision in the interest alike of the elementary rights of the individual and of international peace. So long as the general protection of fundamental human rights, through indisputably binding obligations under the aegis of the United Nations and otherwise, has not become part of the law, there seems to be a need for the protection of minorities through special treaties.¹

XII

THE INTERNATIONAL LABOUR ORGANISATION

Fauchille, § 409 (8)—Brierly, pp. 108-110—McNair, pp. 64-65, 88-92, 107-111 and 467-468—Bustamante, vol. 2, pp. 24-56 and 320-348—Rousseau, pp. 286-290—Schwarzenberger, pp. 478-496—Scelle, ii, pp. 513-525—Mahaïm, *Le droit international ouvrier* (1913), and in *Hague Recueil*, 1924 (iii.), pp. 69-223—Hetherington, *International Labour Legislation* (1920)—Johnston, *International Social Progress* (1924)—Barnes, *History of the International Labour Office* (1926)—Scelle, *Organisation Internationale du Travail* (1930)—*The International Labour Organisation: The First Decade* (1931)—*The Origins of the International Labour Organisation* (2 vols., 1934, ed. by Shotwell)—Wilson, *Labour in the League System* (1934)—Lowe, *The International Protection of Labour: International Labour Organisation. History and Law* (1935) Mahaïm in *R.I.*, 3rd ser., 10 (1929), pp. 699-734, and 11 (1930), pp. 123-146, and in *International Labour Review*, 20 (1929), pp. 765-796—Truclet, *Législation sociale internationale* (1932)—Morellet in *Répertoire*, xi, pp. 683-704, and in *R.G.*, 51 (1947), pp. 65-88—Jenks in *Grotius Society*, 22 (1936), pp. 45-86, in *Canadian Bar Review*, 13 (1935), pp. 448-462, 15 (1937), pp. 86-92, 464-477 and 574-578, in *R.I.*, 3rd ser., 18 (1937), pp. 156-183, 586-623, and in *B.Y.*, 14 (1933), pp. 43-64, 16 (1935), pp. 79-83, 17 (1936), pp. 178-183, 18 (1937), pp. 163-172, 19 (1938), pp. 226-230, 20 (1939), pp. 132-141, 23 (1946), pp. 303-317 and 28 (1951), pp. 348-359—Raeburn in *Grotius Society*, 35 (1949), pp. 57-72.

The International Labour Code, 1951 (2 vols.), contains a systematic arrangement of the Conventions and Recommendations adopted by the International Labour Conference, 1910-1951, with Appendices embodying other standards of social policy framed by or with the co-operation of the International Labour Organisation, 1919-1951.

Among other publications, the I.L.O. publishes the *International Labour Review* (monthly), the *Official Bulletin*, a *Legislative Series*, the Minutes of the Governing Body, the Record of Proceedings of the International Labour Conference, the Reports submitted to the International Labour Conference and to other I.L.O. meetings, including the particularly important Director-General's Reports, a *Summary of Reports on Ratified*

¹ On the sub-commission for protection of minorities, within the Commission of Human Rights of the

United Nations, see Claude in *International Organisation*, 5 (1951), pp. 300-312.

Conventions, a Summary of Reports on Unratified Conventions and on Recommendations, a Summary of Information Relating to the Submission to the Competent Authorities of Conventions and Recommendations adopted by the International Labour Conference, and, since 1947, an annual Report of the International Labour Organisation to the United Nations, which contains the most comprehensive survey of I.L.O. activities available for recent years. The following articles in the International Labour Review are of particular interest as surveys of the activities and methods of work of the Organisation: E. J. Phelan, 'The Contribution of the I.L.O. to Peace,' 59 (1949), pp. 607-632; Price, 'Industrial Committees of the I.L.O.,' 65 (1952), pp. 1-43; 'The International Labour Organisation and Technical Assistance,' 66 (1952), pp. 391-418; 'The International Labour Organisation Since the War,' 67 (1953), pp. 109-155; and Landy, 'The Effective Application of International Labour Standards,' 68 (1953), pp. 346-363.

§ 340f. The Constitution of the International Labour Organisation, which will be here referred to as the I.L.O.,^{of the I.L.O.} embodies features which in several ways signify a departure from traditional forms of international organisation and from accepted doctrines of International Law. For this reason it calls for separate treatment.

A number of conventions on the subject of the international protection of labour were in force before the First World War.¹ However, there was no international organisation charged with the duty of systematising and directing this movement until 1919² when the International Labour Organisation was created as an autonomous partner of the League of Nations by virtue of the provisions of a special Part of each of the Peace Treaties of 1919-1921.³ At the time

¹ See Macdonell in *B.I.* (1920-21), pp. 191-222. They covered such matters as the recruitment of indentured, 'contract,' or 'recruited' labour, the emigration of labourers, particularly those having a standard of life lower than that of the population of the immigration country, workmen's compensation for accidents and industrial diseases, and the equalisation and unification of labour laws and conditions. Full particulars are available in *The International Labour Code* (1951), vol. 2, Appendices 12 and 13, pp. 1105-1182. See also Gemma, *Il Diritto internazionale del Lavoro* (1913); Sinzot, *Traité international pour la Protection des Travailleurs* (1911); Mahaim, *Le droit international ouvrier* (1913), and in *R.J.*, 2nd ser.,

14 (1912), pp. 113-128, 388-410; Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 48-54, Pic in *R.G.* 11 (1904), p. 515, 12 (1905), p. 585, 14 (1907), p. 495, 20 (1913), p. 752; Saavedra Lamas, *Tratados internacionales de tipo social* (1922).

² See Follows, *Antecedents of the International Labour Organisation* (1951).

³ See Part XIII of the Treaty of Versailles (Articles 387-427) and the corresponding Parts of the other Treaties of Peace; an authoritative account of the creation of the Organisation by writers who played a leading part in the negotiations is contained in *The Origins of the International Labour Organisation* (2 vols., 1934, ed. by Shotwell).

of the dissolution of the League of Nations the I.L.O. amended its Constitution and was the first international organisation to enter into relationship with the United Nations as a specialised agency.¹

Objects
and
Compet-
ence of
the
I.L.O.

§ 340g. The aims and purposes of the I.L.O., originally set forth in the Preamble to its Constitution and in a statement of methods and principles contained in Article 427 of the Treaty of Versailles, were re-stated in 1944 in the Declaration of Philadelphia, which was embodied in the Constitution of the I.L.O. in 1946. The Declaration of Philadelphia gives expression to what it describes as the fundamental social objective in the field of international action, namely, the attainment of conditions in which 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.' The Declaration affirms the responsibility of the I.L.O. 'to examine and consider all international economic and financial policies and measures in the light of this fundamental objective.' After enumerating the specific objectives to be promoted by the I.L.O., it pledges the full co-operation of the Organisation with such international bodies as may be entrusted with a share of the responsibility for securing the fuller and broader utilisation of the productive resources of the world and the promotion of the health, education and well-being of all peoples. Prior to this re-statement of the aims and purposes of the I.L.O., the competence of the Organisation had already been clarified by a series of Advisory Opinions of the Permanent

¹ See above, § 168r. Concerning the revision of the Constitution of the Organisation subsequent to the Second World War, see International Labour Conference, 28th Session (1944), Report I, *Future Policy, Programme and Status of the International Labour Organisation*, 27th Session (1945), Report IV (1), *Relationship of the I.L.O. to Other International Bodies*; 29th Session (1946), Report II (1), *Constitutional Questions, Part I, Reports of the Conference Delegation on*

Constitutional Questions; 29th Session (1946), *Record of Proceedings*, pp. 351-419 and 542-596; Jenks, 'The Revision of the Constitution of the International Labour Organisation' in *B.Y.*, 23 (1946), pp. 303-317; Rice in *Wisconsin Law Review* (1947), pp. 514-545. Much of the earlier literature concerning the I.L.O. is now of primarily historical interest; fuller references to it will be found in the 7th edition of this treatise, vol. i., pp. 655-664.

Court of International Justice.¹ These Opinions laid down that the competence of the Organisation extends to the regulation of the conditions of employment of persons engaged in agriculture (and not merely in industry in the narrower sense of that term)²; that while the Organisation has no competence in respect of the organisation and development of means of agricultural production, it cannot be excluded from dealing with matters specifically entrusted to it on the ground that this may involve in some aspects 'the consideration of the means or methods of production, or of the effects which the proposed measures would have upon production'³; that the Organisation is competent to draw up and propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself⁴; and that the sphere of activity of the Organisation is not limited to workers performing manual work to the exclusion of other categories of workers and is not circumscribed 'so closely as to raise any presumption that a labour convention must be interpreted as being restricted in its operation to manual workers unless a contrary intention appears.'⁵

§ 340ga. The membership of the I.L.O. consists of States. Membership of the League of Nations involved membership of the I.L.O. but was not a condition of such membership. Various States, notably the United States of America, which were not members of the League, were admitted to membership by the International Labour Conference.⁶ The membership now consists of the States which were members on November 1, 1945, and such other States as have or may become members by either of two alternative procedures provided for in the Constitution.⁷ Any member of the United Nations may become a member of the I.L.O. by communicating to the Director-General its formal acceptance of the obligations

Membership of the I.L.O.

¹ See Hiltunen, *La compétence de l'Organisation internationale du Travail* (1920); Jenks in *R.I.*, 3rd ser., 18 (1937), pp. 156-183, 586-623; Fischer, *Les rapports entre l'Organisation internationale du Travail et la Cour Permanente de Justice Internationale* (1946).

² P.C.I.J., Series B, No. 2.

³ P.C.I.J., Series B, No. 3.

⁴ P.C.I.J., Series B, No. 13.

⁵ P.C.I.J., Series A/B, No. 50.

⁶ See Jenks in *B.Y.*, 16 (1935), pp. 70-83; Hudson in *A.J.* (1934), pp. 669-684; Phelan in *Political Science Quarterly*, 1935, pp. 107-121.

⁷ Article 1 (2) of the Constitution.

of the Constitution of the Organisation¹; membership of the United Nations does not, as in the case of the League of Nations, automatically involve membership of the I.L.O. but any member of the United Nations is entitled to become a member of the I.L.O. by accepting unconditionally the provisions of its Constitution.² Other States may be admitted to the Organisation by the Conference by a vote concurred in by two-thirds of the delegates attending the session, including two-thirds of the Government delegates present and voting.³ The reports on the basis of which new members have been admitted by the Conference have attached importance to the applicant Government possessing the international status necessary to enable it to discharge the obligations involved in membership of the Organisation.⁴ Members may withdraw from the Organisation on giving two years' notice. However, when a member has ratified any international labour Convention, such withdrawal does not affect the continued validity for the period provided for in the Convention of all obligations arising thereunder or relating thereto.⁵

§ 340gb. While the membership of the I.L.O. consists of States, the latter are not represented in the Organisation exclusively by their Governments.⁶

The Constitution of the I.L.O. provides for three main organs: a General Conference, a Governing Body, and an International Labour Office.

¹ Article 1 (3) of the Constitution.

² In November 1953, the Director-General of the I.L.O., who had received from the U.S.S.R. an acceptance of the obligations of the Constitution which contained a statement that the U.S.S.R. would not consider itself bound by the provisions of Article 37 of the Constitution relating to the International Court of Justice, replied that the Constitution makes no provision for membership on the basis of incomplete acceptance of its obligations.

³ Article 1 (2) of the Constitution.

⁴ International Labour Conference, 27th Session (1945), *Record of Proceedings*, pp. 325-326 (Iceland, Guatemala and Italy); 31st Session (1948), pp. 313-314 (Ceylon); 23rd Session

(1950), pp. 399-400 (Indonesia) and 402-404 (Viet Nam), 31st Session (1951), pp. 505-506 (Germany) and 508-510 (Japan); 35th Session (1952), pp. 443-445 (Lahya).

⁵ Article 1 (5) of the Constitution. See also *The International Labour Code* (1951), vol. I, pp. xcvi-xcvi. The introductory material to the Code also contains information on the effect of war on obligations under international labour Conventions, the conditions for entry into force of Conventions, denunciation, the inadmissibility of reservations, the interpretation of Conventions, the application of Conventions to non-metropolitan territories, and similar matters.

⁶ See below, p. 721.

The General Conference is not a diplomatic conference ; its composition is partly diplomatic and partly occupational. The distinctive feature of its composition, frequently referred to as its tripartite character, is that each Government nominates four persons, of whom two are the delegates of the Government and the other two represent the employers and the workers respectively, being chosen by the Government in consultation with the most representative industrial organisations. Each delegate may be accompanied by technical advisers. The credentials of delegates and their advisers are subject to scrutiny by the Conference, which may, by two-thirds of the votes cast by the delegates present, refuse to admit any delegate or adviser whom it deems not to have been nominated in accordance with these provisions. Questions have arisen in regard to the application of these provisions in respect of States in which workers are organised in a variety of unions,¹ State-controlled trade unions and socialised management.² The Constitution explicitly provides that every delegate shall be entitled to vote individually upon every matter which comes before the Conference.³ As a result, the delegates of Employers and Workers habitually act as groups which represent interests and which play a part in the proceedings of the Conference frequently not unlike that of parties in national legislatures. Delegates of all these groups are equal in status at the Conference, and the tripartite composition of the Conference has become its dominant characteristic.⁴

The Governing Body of the International Labour Office is likewise tripartite in character. It consists of thirty-two persons,⁵ of whom sixteen are Government representatives

¹ See P.C.I.J., Series B, No. 1.

² See Wilson, *Labour in the League System* (1934) ; Berenstein, *Les organisations ouvrières : Leurs Compétences et leur Rôle dans la Société des Nations et notamment dans l'Organisation internationale du Travail* (1936) ; International Labour Conference, 29th Session (1946), *Reports of the Conference Delegation on Constitutional Questions*, pp. 84-95, and *Record of Proceedings*, pp. 357-359.

³ Article 4 (1).

⁴ See Jenks, 'The Significance for International Law of the Tripartite Character of the International Labour Organisation,' in *Grotius Society*, 22 (1936), 1 45-86, and Hewes in *American Political Science Review*, 22 (1928), pp. 324-338.

⁵ An amendment adopted in 1953 to increase the size of the Governing Body to 40 was in process of ratification on January 1, 1954.

(of these, eight represent the Governments of the eight most important industrial States and eight represent Governments selected for three-year terms by the Government delegates at the Conference other than those of the States of chief industrial importance), eight are elected by the Employers' delegates to the General Conference, and eight by the Workers' delegates to the General Conference. The determination of the States of chief industrial importance was originally a matter for the Council of the League of Nations; it now rests with the Governing Body aided by an impartial Committee, subject to an appeal from the decision of the Governing Body to the Conference. The determination is based on statistical criteria. The Employers' and Workers' members of the Governing Body are regarded as being representative of the whole body of Employers' and Workers' delegates to the Conference; their expenses are borne by the budget of the International Labour Office. Under the Constitution and constitutional practice of the I.L.O., the Governing Body has the primary responsibility for fixing the formal agenda of the International Labour Conference, and is responsible for convening all other meetings held under the auspices of the I.L.O., fixing the date and duration of such meetings, determining their agenda, and deciding what action shall be taken on the basis of the reports or resolutions adopted by them.¹ The work of the Conference and the Governing Body is prepared and supplemented by that of Regional Conferences,² Industrial Committees³ and analogous bodies, Committees of Experts and Correspondence Committees, and such special conferences as may from time to time be thought necessary.

Functions of
the
International
Labour
Office.

§ 340gc. The functions assigned to the International Labour Office by the Constitution include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour; the examination of subjects which it is proposed to bring before

¹ *First Report of the I.L.O. to the United Nations* (1947), pp. 9-15; *Fifth Report of the I.L.O. to the United Nations* (1951), pp. 270-277.

² For which see *The International*

Labour Code, 1951, vol. I, pp. cxxviii-cxxxix, and vol. II, pp. 625-889.

³ For which see *The International Labour Code*, 1951, vol. I, pp. cxxi-cxxviii, and vol. II, pp. 421-824.

the Conference with a view to the conclusion of international conventions; the conduct of such special investigations as may be ordered by the Conference or by the Governing Body; putting at the disposal of Governments, at their request, all appropriate assistance in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection; carrying out certain duties in connection with the effective observance of Conventions; and, generally, such other powers and duties as may be assigned to it by the Conference or by the Governing Body.¹ Other functions which the Office has at various times discharged have included the following: giving assistance in connection with international and national inquiries into matters of a social and economic character; the conduct of negotiations concerning such matters between Governments and between international organisations of employers and international organisations of workers; arrangements for the determination of disputes concerning social or economic matters which are international in character; the development of mutual aid between Governments in the improvement and standardisation of administrative practices; and practical assistance to Governments in regard to questions such as vocational training, occupational classification and migration.²

340*gd*. While the General Conference, which meets once a year, has no legislative powers, it plays the main part in an organised international procedure of a legislative character. Proposals adopted by the Conference take the form of either (1) an international Convention, or (2) a Recommendation in cases where the subject, or some aspect of it, is not considered suitable or appropriate for a Convention.

¹ Article 10 of the Constitution. For an instructive sketch of the International Labour Office under its first Director see Phelan, Yee and Albert Thomas (1936).

² For illustrations of these various types of action see International Labour Conference, 26th Session

(1944), Report I, *Future Policy, Programme and Status of the International Labour Organisation*, pp. 127-130; *Fifth Report of the I.L.O. to the United Nations* (1951), pp. 142-162; *Sixth Report of the I.L.O. to the United Nations* (1952), pp. 54-96; *Seventh Report of the I.L.O. to the United Nations* (1953), pp. 56-87.

In either case a majority of two-thirds of the delegates present is required for the adoption of the proposal. Such adoption by the Conference replaces signature by plenipotentiaries as the first stage in bringing a Convention into effect. A labour Convention is not signed on behalf of prospective contracting parties, but simply authenticated by the President of the Conference and the Director-General of the I.L.O.¹ A Convention or Recommendation thus adopted is communicated to all members for ratification or, in the case of a Recommendation, for consideration with a view to effect being given to it by national legislation or otherwise. Each member is bound, whether its Government delegates voted for or against the proposal,² to bring the Convention or the Recommendation within one year, or at most 18 months, before the national authority or authorities within whose competence the matter lies, for the enactment of legislation or other action. It is now well settled that the competent authority in this connection is the body competent to give effect to the Convention by making any necessary change in the municipal law; that body is normally the legislature.³ When the consent of the competent authority is obtained, the member communicates the formal ratification of the Convention to the Director-General.⁴ It binds the members ratifying, but only them, and comes into force when the number of ratifications required by the Convention (frequently any two ratifications) have been registered.⁵ 'The use of the term 'ratification' in connection with this procedure is peculiar inasmuch as a member may ratify a Convention which it has not signed or

¹ Article 19 (4) of the Constitution. For a discussion of the legal character of labour conventions see Mahaim in *International Labour Review*, 20 (1929), pp. 765-796; Jenks in *Canadian Bar Review*, 33 (1935), pp. 448-462, and in *Grotius Society*, cited above at p. 716; and International Labour Conference, 29th Session (1946), *Reports of the Conference Delegation on Constitutional Questions*, pp. 43-45.

² P.C.I.J., Series B; No. 13, p. 17.

³ See International Labour Conference, 26th Session (1944), Report 1,

Future Policy, Programme and Status of the International Labour Organisation, Appendix, pp. 169-183 (memorandum by the Legal Adviser of the I.L.O.); 29th Session (1946), Report II (1), *Reports of the Conference Delegation on Constitutional Questions*, pp. 42-43, and 36th Session (1953), *Record of Proceedings*.

⁴ Article 19 (5) (d) of the Constitution.

⁵ See *The International Labour Code*, 1951, vol. I, pp. xcvi-xcix.

even against the adoption of which it has voted.¹ Reservations have always been regarded as inadmissible, but certain other types of limitations upon or explanations of the assent given to a Convention are allowed in virtue of the terms of particular Conventions or established practice.²

§ 340ge. The difficulties surrounding the assumption and fulfilment of international obligations by federal States have been noted above.³ Within the I.L.O. federal States are subject to the same obligations as unitary States in respect of submission for legislative and other action of Conventions and Recommendations which the federal Government regards as appropriate under its constitutional system for federal action; the test is not one of strict legal power but of constitutional propriety. In respect of Conventions and Recommendations which the federal Government regards as appropriate, in whole or in part, for action by the constituent States, provinces or cantons rather than for federal action, the federal Government is required (a) to make arrangements for the reference of such Conventions and Recommendations to the appropriate member of the federal State, provincial or cantonal authorities, and (b) to arrange, subject to the concurrence of the State, provincial or cantonal Governments concerned, for periodical consultations between the federal and the State, provincial or cantonal authorities with a view to promoting within the federal State co-ordinated action to give effect to the provisions of such

I.L.O.
Conventions
and
Federal
States.

¹ See below, §§ 510-512. And see McNair, pp. 88-89; Fauchille, § 821 (1); Eysinga in *R.I.*, 3rd ser., 1 (1920), p. 147; Maham in *R.I.*, 3rd ser., 10 (1929), pp. 699-734, and 11 (1930), pp. 123-148; Wilson in *A.J.*, 28 (1934), pp. 506-526; Janouloff in *Haag Recueil*, vol. 61 (1935) (1), pp. 487-573; Wilcox, *The Ratification of International Conventions* (1935), pp. 161-204. On the procedure for the revision of international labour Conventions see Jenks in *B.F.*, 14 (1933), pp. 43-64, and Ørsted in *Nordisk T.A.*, 2 (1931), pp. 3-20.

² See below, § 517a. See Memorandum by the Director of the International Labour Office League of

Nations Document C.212.1927.V., and Report of the Committee of Experts for the Progressive Codification of International Law adopted by the Council of the League (C.357.M. 130 1927.V.16); I.C.J., *Pleadings*, 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide', pp. 216-232; and International Law Commission, Report of the Third Session, in General Assembly, *Official Records*, 6th Session, Supplement No. 9 [A/1858], p. 4, and *The International Labour Code*, 1951, vol. 1, pp. xcix-civ. See also McNair, p. 107, and Jenks in *Grotius Society*, 22 (1936), pp. 59-62.

³ See above, § 89a.

Conventions and Recommendations.¹ These arrangements are designed as a procedure *alternative* to the ratification of such Conventions by the federal States concerned. They do not constitute a method of giving effect to such Conventions when ratified. For ratification, once it has taken place, entails the same obligations for federal as for unitary States. These provisions were introduced in 1946 in substitution for the provision which was adopted in 1919 and which entitled federal States to treat Conventions as Recommendations in certain circumstances.²

Obligations in respect of Un-ratified Conventions.

§ 340gf. While ratification remains within the discretion of each member, the Constitution, as amended in 1946, provides that even when no legislative consent has been obtained and when, therefore, no obligation rests upon a non-ratifying State to give effect to the Convention, it shall report to the Director-General of the International Labour Office, at appropriate intervals, as requested by the Governing Body, the position of its law and practice with regard to the matters dealt with in the Convention. Such information is to show the extent to which effect has been given or is proposed to be given to the provisions of the Convention. It is also to state the difficulties which prevent or delay the ratification of the Convention. A similar obligation rests upon members with regard to Recommendations.³ This important innovation imposes upon members a certain measure of obligation in the matter of international instru-

¹ International Labour Conference, 29th Session (1946), Report II (1), *Reports of the Conference Delegation on Constitutional Questions*, pp. 173-186.

² There is a considerable literature on the position of federal States in the text of 1919. See in particular Weinfeld, *Labour Treaties and Labour Compacts* (1937). As to Canada see Jenks in *J.C.L.*, 3rd ser., 16 (1934), pp. 201-215, 17 (1935), pp. 12-30, and in *Canadian Bar Review*, 15 (1937), pp. 86 *et seq.*, and 484 *et seq.*; see also 'The Rowell-Sirois Report' in *International Labour Review*, 42 (1940), pp. 347-376. As to Australia see Bailey in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp. 100-121,

and in *International Labour Review*, 54 (1946), pp. 285-308. As to the United States see Hudson in *A.J.*, 28 (1934), pp. 677-691, Riesenman in *International Labour Review*, 44 (1941), pp. 123-193. As to Switzerland: *Message of Federal Council, Feuille Fédérale Suisse*, vol. 72 (1920) (v.), pp. 455-461, and Secretan in *International Labour Review*, 56 (1947), pp. 1-21. As to India see Chatterjee in *International Labour Review*, 49 (1944), pp. 415-445. See also above, p. 40, n. 4, and § 89a.

³ For the information received see International Labour Conference, *Summary of Reports on Unratified Conventions and Recommendations*, published each year since 1950.

ments to which they have not become a party. The periodic rendering of information of the nature indicated above may prove an indirect, though not insignificant, means of securing a degree of compliance with the purpose of the instruments in question and, to some extent, an inducement to their eventual formal acceptance. These arrangements also suggest that the difference between international labour Conventions, which are designed as instruments creating obligations, and Recommendations, which are not intended to create formal obligations but merely to provide a standard of legislative or similar action, is less absolute in practice than in legal principle. For Conventions produce a substantial part of their practical effect as instruments defining standards rather than as creating obligations. In view of this, the controversy concerning the extent to which the progress made in the ratification of Conventions concluded within the framework of the I.L.O. can be regarded as satisfactory,¹ is perhaps less real than appears at first sight.²

By April 1, 1954, 103 Conventions had been adopted by the Conference; 79 of these were in force for numbers of members varying from 2 to 43, and 1450 ratifications distributed over 102 Conventions and 64 countries had been registered.³

¹ See *International Labour Code*, 1951, vol. I, pp. lxviii-lxxvi.

² See International Labour Conference, 20th Session (1946), Report II (1), *Reports of the Conference Delegation on Constitutional Questions*, pp. 38-53; *Seventh Report of the I.L.O. to the United Nations* (1953), pp. 97-107; Jenks in *Grotius Society*, 37 (1951), pp. 33-34, and Landy in *International Labour Review*, 68 (1953), pp. 346-363.

³ The following particulars indicate the Conventions adopted and the number of ratifications received. Where a Convention is not in force this is indicated by the words 'Not in force.'

No. 1—Hours of Work (Industry) (1919), 29.
No. 2—Unemployment (1919), 34.
No. 3—Maternity Protection (1919), 19.

No. 4—Night Work (Women) (1919), 36.*

No. 5—Minimum Age (Industry) (1919), 33.

No. 6—Night Work of Young Persons (Industry) (1919), 35.

No. 7—Minimum Age (Sea) (1920), 35.

No. 8—Unemployment Indemnity (Shipwreck) (1920), 30.

No. 9—Placing of Seamen (1920), 28.

No. 10—Minimum Age (Agriculture) (1921), 23.

No. 11—Right of Association (Agriculture) (1921), 38.

No. 12—Workmen's Compensation (Agriculture) (1921), 25.

* This Convention has been denounced in 7 cases on ratification of the Night Work (Women) Convention (Revised), 1934; Great Britain denounced it in 1937 on ratifying the 1934 Convention.

- No. 13—White Lead (Painting) (1921), 29.
 No. 14—Weekly Rest (Industry) (1921), 40.
 No. 15—Minimum Age (Trimmers and Stokers) (1921), 35.
 No. 16—Medical Examination of Young Persons (Sea) (1921), 36.
 No. 17—Workmen's Compensation (Accidents) (1925), 25.
 No. 18—Workmen's Compensation (Occupational Diseases) (1925), 33 †
 No. 19—Equality of Treatment (Accident Compensation) (1925), 43.
 No. 20—Night Work (Bakeries) (1925), 13.
 No. 21—Inspection of Emigrants (1926), 25 [Conditional ratification registered]
 No. 22—Seamen's Articles of Agreement (1926), 30
 No. 23—Repatriation of Seamen (1926), 10.
 No. 24—Sickness Insurance (Industry) (1927), 10
 No. 25—Sickness Insurance (Agriculture) (1927), 13
 No. 26—Minimum Wage Fixing Machinery (1926), 26
 No. 27—Marking of Weight (Packages Transported by Vessels) (1929), 40
 No. 28—Protection against Accidents (Dockers) (1929), 4 [Spain denounced this Convention in 1934]
 No. 29—Forced Labour (1930), 28
 No. 30—Hours of Work (Commerce and Offices) (1930), 13
 No. 31—Hours of Work (Coal Mines) (1931), 1 [Not in force]
 No. 32—Protection against Accidents (Dockers) (Revised) (1932), 16
 No. 33—Minimum Age (Non Industrial Employment) (1932), 8
 No. 34—Fee Charging Employment Agencies (1933), 10
 No. 35—Old Age Insurance (Industry, etc.) (1933), 8
 No. 36—Old Age Insurance (Agriculture) (1933), 7
 No. 37—Invalidity Insurance (Industry, etc.) (1933), 8
 No. 38—Invalidity Insurance (Agriculture) (1933), 7
 No. 39—Survivors' Insurance (Industry, etc.) (1933), 6
 No. 40—Survivors' Insurance (Agriculture) (1933), 5.
 No. 41—Night Work (Women) (Revised) (1934), 22 [Denounced].
 No. 42—Workmen's Compensation (Occupational Diseases) (Revised) (1934), 25.
 No. 43—Sheet Glass Works (1934), 8.
 No. 44—Unemployment Provision (1934), 8
 No. 45—Underground Work (Women) (1935), 36
 No. 46—Hours of Work (Coal Mines) (Revised) (1935), 2 [Not in force]
 No. 47—Forty Hour Week (1935), 1 [Not in force]
 No. 48—Maintenance of Migrants' Pension Rights (1935), 7
 No. 49—Reduction of Hours of Work (Glass Bottle Works) (1935), 7
 No. 50—Recruiting of Indigenous Workers (1936), 6
 No. 51—Reduction of Hours of Work (Public Works) (1936), 1 [Not in force]
 No. 52—Holidays with Pay (1936), 15
 No. 53—Officers' Competency Certificates (1936) 13
 No. 54—Holidays with Pay (Sea) (1936), 5 [Not in force]
 No. 55—Shipowners' Liability (Sick and Injured Seamen) (1936), 6
 No. 56—Sickness Insurance (Sea) (1936), 4
 No. 57—Hours of Work and Manning (Sea) (1936), 5
 No. 58—Minimum Age (Sea) (Revised) (1936) 14
 No. 59—Minimum Age (Industry) (Revised) (1937) 4
 No. 60—Minimum Age (Non Industrial Employment) (Revised) (1937), 3
 No. 61—Reduction of Hours of Work (Textiles) (1937), 1 [Not in force]
 No. 62—Safety Provisions (Buildings) (1937), 4
 No. 63—Statistics of Wages and Hours of Work (1934), 17
 No. 64—Contracts of Employment (Indigenous Workers) (1939), 3
 No. 65—Penal Sanctions (Indigenous Workers) (1939) 2
 No. 66—Migration for Employment (1939), 0 [Not in force]
 No. 67—Hours of Work and Rest Periods (Road Transport) (1939), 1 [Not in force]
 No. 68—Food and Catering (Ship's Crews) (1946), 6 [Not in force].

† Great Britain denounced this Convention in 1936 on ratifying the Workmen's Compensation (Occupational Diseases) Convention (Revised), 1924.

§§ 340gg. The Constitution of the Organisation provides for the investigation by a Commission of Enquiry of a complaint made by a member which has ratified a Convention¹ to the effect that another member which has also ratified is failing to secure its effective observance. Each Government concerned in the complaint has the right, if it does not accept the recommendations of the Commission, to refer the complaint to the International Court of Justice. In the event of default by a member in carrying out the recommendations of a Commission of Enquiry or a decision of the Court, the Governing Body may recommend such action as it may deem necessary to secure compliance.²

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| No. 69—Certification of Ships' Cooks (1946), 10. | Protection of the Right to Organise (1948), 15. |
| No. 70—Social Security (Seafarers) (1946), 2 [Not in force]. | No. 88—Employment Service (1948), 20. |
| No. 71—Seafarers' Pensions (1946), 3 [Not in force]. | No. 89—Night Work (Women) (Revised) (1948), 16. |
| No. 72—Paid Vacations (Seafarers) (1946), 3 [Not in force]. | No. 90—Night Work of Young Persons (Industry) (Revised) (1948), 8. |
| No. 73—Medical Examination (Seafarers) (1946), 6 [Not in force]. | No. 91—Paid Vacations (Seafarers) (Revised) (1949), 7 [Not in force]. |
| No. 74—Certification of Able Seamen (1946), 7. | No. 92—Accommodation of Crews (Revised) (1949), 9. |
| No. 75—Accommodation of Crews (1946), 5 [Not in force]. | No. 93—Wages, Hours of Work and Manning (Sea) (Revised) (1949), 2 [Not in force]. |
| No. 76—Wages, Hours of Work and Manning (sea) (1946), 1 [Not in force]. | No. 94—Labour Clauses (Public Contracts) (1949), 11. |
| No. 77—Medical Examination of Young Persons in Industry (1946), 7. | No. 95—Protection of Wages (1949), 9. |
| No. 78—Medical Examination of Young Persons (Non-Industrial Occupations) (1946), 6. | No. 96—Fee Charging Employment Agencies (Revised) (1949), 10. |
| No. 79—Night Work of Young Persons (Non-Industrial Occupations) (1946), 6. | No. 97—Migration for Employment (Revised) (1949), 8. |
| No. 80—Final Articles Revision (1946), 4. | No. 98—Right to Organise and Collective Bargaining (1949), 15. |
| No. 81—Labour Inspection (1947), 19. | No. 99—Minimum Wage-Fixing Machinery (Agriculture) (1951), 5. |
| No. 82—Social Policy (Non-Metropolitan Territories) (1947), 1 [Not in force]. | No. 100—Equal Remuneration (1951), 7. |
| No. 83—Labour Standards (Non-Metropolitan Territories) (1947), 1 [Not in force]. | No. 101—Holidays with Pay (Agriculture) (1952), 2 [Not in force]. |
| No. 84—Right of Association (Non-Metropolitan Territories) (1947), 2. | No. 102—Social Security (Minimum Standard) (1952), 1 [Not in force]. |
| No. 85—Labour Inspectorates (Non-Metropolitan Territories) (1947), 1 [Not in force]. | No. 103—Maternity Protection (Revised) (1952), 0 [Not in force]. |
| No. 86—Contracts of Employment (Indigenous Workers) (1947), 2. | |
| No. 87—Freedom of Association and | |

¹ Or i, a delegate to the General Conference or by the Governing Body itself.

² There has been only one case of a formal complaint. See Mr. Jannadas Mehta's complaint relating to the application of the Hours of Work

There is a parallel procedure whereby, if an industrial association of employees or workers makes a representation to the International Labour Office to the effect that a member has failed to secure the observance within its jurisdiction of a Convention which it has ratified, the Governing Body communicates the representation to the Government concerned for its observations; it may in due course publish the representation and the answer, if any.¹ In practice, these procedures have been far less important than the systematic examination year by year of the annual reports which Governments are required to make on the measures taken by them to give effect to Conventions which they have ratified; this examination is undertaken in the first instance by an independent committee of experts of high standing, and subsequently, on the basis of the report of the committee of experts, by a committee of the International Labour Conference in which Governments, employers and workers are represented.²

A special procedure for the examination of allegations concerning the infringement by Governments of trade union rights, which is not limited to cases relating to the application of ratified Conventions, was established in 1950 by

(Industry) Convention, 1919, to Indian railways: International Labour Office, *Official Bulletin*, 20 (1935), No. 1, p. 15; and Zarraa, *Le contrôle de l'application des conventions internationales du travail* (1937).

¹ See the representations of the Madras and Southern Mahratta Railway Employees Union concerning the application of certain Conventions in the French possessions in India: I.L.O., *Official Bulletin*, 21 (1936), No. 10, pp. 16-19; of the Madras Labour Union for Textile Workers; and of the Labour Party of Mauritius: *ibid.*, 22 (1937), pp. 61-69; of the Société de Bienfaisance des Travailleurs de l'île Maurice: *ibid.*, 23 (1938), pp. 117-120; of the agricultural workers of Esthonia: *International Labour Code*, 1951, vol. I, pp. 687-689; of the Japan Seamen's Union: *International Labour Code*, 1951, vol. I, pp. 761-762; of the Latvian Central Trade Union Bureau: *International Labour Code*, 1951, vol. I, p. 762; Jenks in *B.Y.*, 18 (1937),

pp. 163-165 and 19 (1939), pp. 228-230; and Zarraa, *Le contrôle de l'application des conventions internationales du travail* (1937).

² An inquiry made in 1954 covering a sample of 50 per cent. of the ratifications registered showed that in respect of 71 per cent. of the ratifications examined no intervention by these bodies was necessary to secure full legislative compliance and that in respect of a further 13 per cent. observations made had led to necessary action, giving a total of 84 per cent. in which there appears to be full legislative compliance and 16 per cent. in which discussions are still proceeding or the position is uncertain. See McNair in *B.Y.*, 14 (1933), pp. 143-145; Zarraa, *op. cit.*; *Fifth Report of the I.L.O. to the United Nations* (1951), pp. 192-190; *Seventh Report of the I.L.O. to the United Nations* (1953), pp. 97-107; and Landy in *International Labour Review*, 68 (1953), pp. 346-363.

agreement between the Governing Body and the Economic and Social Council of the United Nations.¹ By April 1, 1954, this procedure had been invoked in 96 cases, and the Governing Body had adopted 12 reports containing the findings of a tripartite committee on 83 of these cases. In a number of cases the Governing Body transmitted important recommendations by the committee to the Governments concerned. The findings of the committee represent increasingly a substantial body of case law on questions relating to freedom of association.² Other international inquiries, some of them relating to the social aspects of highly political issues, have been undertaken from time to time.³

§ 340gh. Among the special features of the International Labour Organisation the provisions securing to the delegates of employers and employees representation and participation in the work of the Organisation as well as in the process of elaboration of international labour Conventions are of particular importance. While the United Nations is according to its Charter an organisation of States, the International Labour Organisation is, to some extent, based on a different principle. Although the representatives of employers and employees are appointed by the various States, the latter are under a duty to appoint them in accordance with the provisions of the Constitution of the I.L.O. and to leave them full freedom of action at the Conference. In the matter of adoption of Conventions as well as with regard to amendments of the Constitution, the final decision rests with the Governments. However, any action on their part in this

The Essential Character of the I.L.O.

¹ The validity of the action taken by the Governing Body was upheld by the International Labour Conference when questioned by South Africa. See Jenks in B.Y., 28 (1951), pp. 348-359.

² The text governing the procedure and reports adopted are published in full in: *Fourth Report of the I.L.O. to the United Nations* (1950), pp. 322-328; *Fifth Report of the I.L.O. to the United Nations* (1951), pp. 253-264; *Sixth Report of the I.L.O. to the United Nations* (1952), pp. 169-237; *Seventh Report of the I.L.O. to the United Nations* (1953), pp. 173-306.

³ See, for instance, the following

reports of I.L.O. missions and committees of enquiry: *Trade Union Conditions in Hungary* (1921); *Seafarers' Conditions in India and Pakistan* (1949); *Labour Conditions in the Oil Industry in Iran* (1950); *Conditions in Ships Flying the Panama Flag* (1950); *Freedom of Association and Conditions of Work in Venezuela* (1950); *Report on Enquiry by the Representative of the Director-General into Conditions in the Suez Canal Area*, in the Minutes of the 118th Session of the Governing Body (1952); *Report of the Ad Hoc Committee on Forced Labour* (1953).

direction depends on the initiative of the Conference, in which State representatives constitute only one-half of the total number of delegates. The Constitution of the Organisation thus signifies a limited but important departure from the principle generally obtaining in International Law, namely, that States only may take part in the process of creating new rules of International Law and that only the interests of States as such are entitled to direct representation in the international sphere.¹ Secondly, the Constitution of the Organisation introduces an exception to the principle of unanimity inasmuch as it lays down that a majority of two-thirds is sufficient for the adoption of a Convention or Recommendation, which the Governments are then bound to submit to their competent legislative authorities regardless of whether they voted for it or not. Thirdly, the obligation to communicate information concerning the actual implementation of provisions of Conventions and Recommendations not accepted by and therefore not binding upon the members is expressive of the novel principle that mere membership of the Organisation implies certain obligations which are not of a purely formal character. In all these respects, the Constitution of the I.L.O. represents a significant landmark in the development of international organisation.

XIII

SLAVERY, SLAVE TRAFFIC, AND FORCED LABOUR

Phillimore, i. §§ 296 313 Gidel, i. pp. 389-414 - Lawrence, § 103 - Lindley, pp. 354-366 Dana & Wheaton, §§ 125 133 Moore, ii. § 310 Fauchille §§ 398-408 (2) (with bibliography) - Keith's Wheaton, pp. 284-295 Higgins and Colombos, §§ 383 387 Merignhac iii. pp. 512-523 Calvo, v. §§ 2997-3003 Lutz, § 49 Queneuil *De la traite des Noirs et de l'esclavage* (1907) - Lady Simon, *Slavery* (2nd ed., 1930) - Barclay in *R.L.*, 22 (1890) pp. 317-335, 454-472 - Engelhardt, *ibid.*, pp. 603 618 Nye, *ibid.*, pp. 57-59, 138-151 - Rolin, *ibid.*, 23 (1891), pp. 560 576 Goudal in *R.G.*, 35 (1928), pp. 591-625 - Geneva Special Studies, ii No. 4 (1931) - Fischer in *I.L.Q.*, 3 (1950), pp. 28-51, 503-522 *The Suppression of Slavery* Memorandum submitted by the Secretary-General of the United Nations (1951).

¹ See § 107 above for a similar development embodied in the establishment of the Vatican City as a normal person of International Law.

§ 340h. It is difficult to say that customary International Law condemns two of the greatest curses which man has ever imposed upon his fellow-man, the institution of slavery and the traffic in slaves.¹ But Great Britain, who had abolished the slave traffic throughout her colonies in 1807,² induced France to agree in the Treaty of Paris of 1814 to co-operate with her in the furtherance of this policy, and at the Congress of Vienna in 1815 succeeded in obtaining from the Powers a solemn condemnation of the slave trade in principle.³ But this was not enough to make the traffic in slaves a crime *jure gentium*,⁴ as piracy is, and therefore repressible by any State regardless of the nationality of the offender or of the flag flown by his ship. Accordingly, a number of treaties have been entered into for the purpose of ensuring international co-operation and (in some cases) of conferring mutual rights of visit and search. The following general treaties may be mentioned: (1) the Treaty of London, 1841, between Great Britain, Austria, France, Prussia, and Russia; (2) the General Act of the Congo Conference of Berlin, 1885, which in Article 9 dealt with the

Slavery and the
Slave
Traffic.

¹ Bonfilis' assertion (see Fauchille, § 398) that International Law condemns slavery seems to rest on his further statement that slaves become free when they set foot in a country which rejects slavery; but the absence of any duty imposed by customary International Law to extradite criminals does not mean that International Law condones crime.

² For an interesting account see Coupland, *Wilberforce* (1945).

³ See Matheson, *Great Britain and the Slave Trade, 1830-1865* (1929); Soulaby, *The Right of Search and the Slave Trade in Anglo-American Relations, 1813-1862* (1933); Ecarus, *Das Schiffsdurchsuchungsrecht zur Bekämpfung des Negerhandels im Völkerrecht* (1934); Goudal in *R.G.*, 35 (1928), pp. 591-625; Wilson in *A.J.*, 44 (1950), pp. 505-526.

⁴ See *Le Louis* (1817) 2 Doda, 210; *Madrazo v. Willes* (1820) 3 Barn. and Ald. 353. For a summary of the history see Pitt Cobbett, *Leading Cases on International Law*, 4th ed., I. (1922), pp. 303-304. As

to the position of escaping slaves who reach British territory or public ships see Westlake, I. p. 269, and, as to private ships, p. 272; Lorimer, I. pp. 256-260 (where the celebrated Slave Circular of 1876 is printed); Charteris in *B.Y.*, 1920-1921, pp. 85, 86; Hershey, § 255. While concluding on May 20, 1927, a Treaty of Friendship with Hejaz, Nejd, and Dependencies, Great Britain refused to renounce the right of manumitting slaves 'which has long been practised by H.M.'s consular services, and which enables them to liberate any slave who presents himself of his own free choice with a request for liberation and repatriation to his country of origin.' Great Britain gave the assurance that her insistence on this right did not mean any interference in the affairs of Hejaz, but was due to the resolve of the British Government 'to carry out a duty which they owed to humanity': Treaty Series, No. 25 (1927), Cmd. 2951; *British and Foreign State Papers*, 134, p. 276.

slave trade ; (3) the General Act of the Anti-Slavery Conference of Brussels, 1890, which established an organisation having an International Maritime Office at Zanzibar, and a *Bureau Spécial* attached to the Belgian Foreign Office in Brussels ; (4) the Convention of St. Germain of September 10, 1919,¹ which abrogates, as between the signatories, the General Act of Brussels of 1890 and under which the signatories undertake to endeavour to secure the complete suppression of slavery and of the slave trade by land and by sea, and (5) the Slavery Convention of 1926, negotiated at Geneva under the auspices of the League and opened for signature on September 25, 1926,² by which the signatories undertake to suppress and prevent the slave trade and to bring about, progressively and as soon as possible, the entire suppression of slavery in all its forms.³ However, notwithstanding the almost universal acceptance of the Convention, a Committee appointed in 1950 by the Economic and Social Council of the United Nations expressed the unanimous conclusion that slavery, even in its crudest form, still exists in the world and that it

¹ Signed by the United States of America, Belgium, the British Empire, France, Italy, Japan, and Portugal, and accepted in advance by Germany, Austria, Bulgaria, and Hungary in the Treaties of Peace.

With regard to the question of slavery in Abyssinia upon her admission to the League in 1923 see Toynbee, *op. cit.* For a collection of documents with regard to slavery in Liberia see *R.I. (Geneva)*, 8 (1930), pp. 289-347.

² Hudson, *Legislation*, iii. p. 2010 ; *L.N.T.S.*, 60, p. 253. Up to 1953, ratified or finally acceded to by over fifty States (including Great Britain and the other countries of the Commonwealth, the United States and France). It appears that slavery as a legal institution is now recognised only in minor Islamic countries such as some of the Arabian States. For a survey of the existing position in the matter of slavery see *Report of the Committee of Experts on Slavery in Pursuance of the Resolution of the Assembly of the League of September*

25, 1931 · Doc C 618. 1932 VI., and *The Suppression of Slavery. Memorandum submitted by the Secretary General of the United Nations* (1951).

³ In this connection reference may be made to the Convention of September 30, 1921, for the Suppression of the Traffic in Women and Children (*L.N.T.S.*, 9, p. 415 ; Treaty Series, No. 26 (1923) Cmd. 1986), and the Convention of October 11, 1933, for the Suppression of the Traffic in Women of Full Age (*L.N.T.S.* 150, p. 431). As to the former see Hepburn in *New York University Law Quarterly Review*, 9 (1931-1932), pp. 202-215, and Vitta in *Haute Recueil*, 45 (1933) (iii.), pp. 552-663. See also Protocol of November 12, 1947, amending the two Conventions : *L.N.T.S.*, 53, pp. 13 and 59. On March 21, 1950 there was opened for signature the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others : *Official Records of the General Assembly*, Fourth Session, Resolution 17 (IV).

must continue to be a concern of the international community.¹

. § 340i. Forced labour, especially as practised in the past by some colonial Powers, tends, in the words of the Slavery Convention of 1926, to develop 'into conditions analogous to slavery.'² In Article 5 of that Convention the parties agreed that in territories in which compulsory or forced labour for other than public purposes still survives they shall endeavour 'progressively and as soon as possible to put an end to this practice.' In the Convention of June 28, 1930, concerning forced or compulsory labour, the signatory States undertook 'to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.'³ While economic and social conditions in some parts of the world render difficult the total abolition of forced labour, it is believed that the paramount principle of the freedom and dignity of human personality is superior to such considerations and that it requires the absolute prohibition of forced labour except in the form of public service equally incumbent upon all, or as part of punishment duly pronounced by a court of law.⁴

Abolition
of Forced
Labour.

¹ For details see *United Nations Year Book*, 1951, pp 502-505. The Committee considered that existing forms of slavery cannot be abolished by legislation alone, but that positive measures of international assistance are necessary to eliminate the underlying economic and social causes of slavery. It recommended that, in connection with any future efforts in this matter, the following definition of slavery as formulated in the Convention of 1926 be adopted: 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

² In the United States courts have interpreted the prohibition of slavery and of involuntary servitude, laid down in the Thirteenth Amendment to the Constitution, as including peonage, the Chinese coolie trade, compulsory labour as punishment for breach of contract, and even specific performance of contracts of personal service. The latter principle is

rigidly followed by English courts

³ Hudson, *Legislation*, v. p. 609. The Convention has been ratified by a considerable number of States, including Great Britain.

⁴ This would render unlawful the regimentation, for political or other reasons and by executive decree, of large sections of the population for forced labour in concentration camps and otherwise. It is in this form that the question of forced labour has occupied on repeated occasions, the Economic and Social Council of the United Nations and bodies appointed by it. See *United Nations Year Book* 1951, p. 501. For a detailed treatment of the subject see Goudal in *R G.*, 36 (1920), pp. 266-301; the same, *ibid.*, 35 (1928) (with regard to mandates); the same in *International Labour Review*, 19 (1929), pp. 621-638; Bastet, *Le travail forcé et l'organisation internationale* (1932); Bülck, *Die Zwangsarbeit im Friedens-völkerrecht* (1933).

XIV

INTERNATIONAL PROTECTION OF HUMAN RIGHTS

The Bases
of the
Inter-
national
 Protec-
tion of
the Rights
of Man.

§ 340k. As stated elsewhere in this treatise,¹ prior to the Charter of the United Nations International Law did not, notwithstanding various developments pointing in that direction, recognise what are often described as the fundamental, inalienable, or natural rights of man. Since the Virginian Declaration of Rights of 1776, the American Declaration of Independence and the Bill of Rights in the form of the first ten Amendments to the Constitution, and the Declaration of the Rights of Man and the Citizen adopted in 1789 by the French National Assembly, the express recognition and the special protection of fundamental rights of man in the constitutions of various States² have become a general principle of the constitutional law of civilised States. In Great Britain, where the system of a written constitution superior to the ordinary law of the land is unknown, the same result was achieved in a different way.³ At the same time the view was gaining ground that as the national constitution itself was liable to change through prescribed, though more exacting, processes of the law, the rights of man, unless grounded in and safeguarded by effective recognition on the part of international society, were not sufficiently protected against violent encroachment by the State.

In the gradual recognition of the rights of man International Law played an indirect but important part. The conception of the inherent rights of man derived much of

¹ See above, § 202.

² See *Constitutional Provisions concerning Social and Economic Policy*, published in 1944 by the International Labour Office. See also Aulard and Mirkine-Guetzévitch, *Les déclarations des droits de l'homme* (1929).

³ "This was accomplished, to some extent, by the great constitutional enactments such as the Magna Charta in 1215, the Petition of Right in 1628, and the Bill of Rights and Act of Settlement in 1689, which, with-

standing the doctrine of the paramount supremacy of Parliament, had acquired by the time of Blackstone the character of fundamental laws of the kingdom and enabled him to say that the 'absolute rights of every Englishman as they are founded on nature and reason, so they are coeval with our form of government': *Commentaries*, I. i. And see Lauterpacht, *An International Bill of the Rights of Man* (1945) (Chapter V, 'Natural Rights in British Constitutional Law and Political Theory').

its strength from the doctrines of the law of nature which, through Grotius and others, contributed powerfully to the creation of the modern law of nations. In turn, the very idea of the law of nature received a weighty accession of strength from the fact that it proved to be of assistance in the accomplishment of the imperative task of building a system of law between the territorial States which arose upon the ruins of the temporal unity of Christendom. There were other significant points of contact between the idea of natural rights of man and International Law. In the first instance, both are possible only on the assumption of a limitation of the absolute sovereignty of the State. Secondly, both have seemed to many to be intimately connected by the fact that the final object of the State is to achieve, through freedom, the fullest development of human personality, and that the purpose of International Law is to make possible the accomplishment of that end by securing the State from external aggression. Finally, experience has shown that the denial of the fundamental right of man to freedom, to equality before the law and to government by consent tends to constitute a danger to international peace inasmuch as régimes based on the denial of these rights often tend to seek in foreign domination and aggrandisement a substitute for the organic cohesion of a nation under the free rule of law.

For these reasons, the rise, in the period following the First World War, of various forms of authoritarian dictatorships gave a renewed impetus to the claim for an international recognition and protection of fundamental human rights. In 1929 the Institute of International Law adopted a Declaration of the International Rights of Man¹ and

¹ *Annuaire*, 35 (2) (1929), pp. 298-300 ; *A.J.*, 24 (1930), p. 590, and 35 (1941), p. 663. The Declaration, after recalling in the Preamble that 'the juridical conscience of the civilized world demands the recognition for the individual of rights preserved from all infringement on the part of the State' and that 'the declarations of rights, written into a large number of constitutions and especially into the

American and French constitutions at the end of the eighteenth century, are ordained not only for the citizen, but for man,' states, in Article 1, that 'it is the duty of every State to recognize the equal right of every individual to life, liberty and property, and to accord to all within its territory the full and entire protection of this right, without distinction as to nationality, sex, race, language or religion.'

writers devoted increasing attention¹ to the subject. The outbreak of the Second World War, provoked by a State which coupled the aggressive will for the domination of the world with a ruthless denial of fundamental human rights, strengthened the conviction that the international recognition and protection of the rights of man was in accordance not only with an enlightened conception of the objects of International Law but also with an essential requirement of international peace. That conviction was repeatedly given expression in various declarations of war aims such as the so-called Atlantic Charter of August 14, 1941,² and the Declaration of the United Nations of January 1, 1942, in which they put on record that 'complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands'³

The
Charter
of the
United
Nations
and the
Rights of
Man.

§ 340l. The Charter of the United Nations indicates, in numerous provisions, the wide possibilities of the international recognition of human rights. In the Preamble to the Charter the United Nations have expressed, among other things, their determination 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.' The Charter lays down, as one of the Purposes of the United Nations, the achievement of international co-operation 'in promoting and encouraging respect for human rights and for funda-

On this Declaration see Mandelstam in *R.I. (Paris)*, 5 (1930), pp. 59-78, 12 (1933), pp. 469-510, and 13 (1934), pp. 61-104; Scott, *ibid.*, 5 (1930), pp. 79-99. See also the writers referred to in the following note.

¹ See Scelle, ii. pp. 42-135; Wehberg in *Friedenswarte*, 20 (1920), pp. 354-357, and 33 (1933), pp. 263-266; Steichele, *ibid.*, 29 (1929), pp. 41-44, Mirkine-Guetzévitch, *ibid.*, p. 214, Mandelstam in *R.I.*, 3rd ser., 11 (1930), pp. 297-325, in *Z.b.V.*, 2 (1) (1930), pp. 333-337, and in *Hague Recueil*, 38 (1931) (iv.), pp. 129-230; Cosentini in *R.I. (Geneva)*, 13 (1935), pp. 167-189; Dumas in *Hague Recueil*, 59 (1937) (1), pp. 7-93; H. Friedmann in *Grotius Society*, 24

(1938), pp. 133-146, Idelson, *ibid.*, 30 (1945), pp. 50-66. As to the rights of man according to Islam see Ostrogorsky in *R.I. (Paris)*, 5 (1930), pp. 100-114.

² *A.J.*, 35 (1941), Suppl., p. 191 (a Joint Declaration of the President of the United States and of the Prime Minister of Great Britain). See also the 'Four Freedoms' Message of President Roosevelt to Congress of January 6, 1941 (*H. Doc.*, No. 1, 77th Congress, 1st Session). These 'freedoms' included: (1) freedom of speech and expression; (2) freedom of religion; (3) freedom from fear; (4) freedom from want. See Finch in *A.J.*, 35 (1941), pp. 642-665.

³ *A.J.*, 36 (1942), Suppl., p. 191.

mental freedoms for all without distinction as to race, sex, language, or religion.’¹ The General Assembly is enjoined to initiate studies and make recommendations for the purpose of assisting in the realisation of human rights and fundamental freedoms.² The promotion of ‘universal respect for and observance of’ these rights and freedoms is declared to be one of the objects of the United Nations in the sphere of international economic and social co-operation as a prerequisite for the creation of ‘conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.’³ With this object in view, the Economic and Social Council of the United Nations is authorised to make recommendations for the purpose of ‘promoting respect for, and observance of, human rights and fundamental freedoms for all.’⁴ In particular, the Economic and Social Council is enjoined to set up a commission for the promotion of human rights.⁵ Finally, the encouragement of ‘respect for human rights and for fundamental freedoms for all’ is declared to be one of the principal objectives of the International Trusteeship System established by the Charter. Article 55 of the Charter lays down that the United Nations ‘shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.’ In Article 56 ‘all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.’ There is no provision in the Charter laying down *expressis verbis* that there is a legal obligation resting upon nations to observe human rights and fundamental freedom. However, constitutional instruments of a general character do not require— or permit the narrow verbal interpretation congenial to documents which create or transfer property rights among private persons. There is, in basic constitutional instruments such as the Charter, probably no room for reasoning on the lines of the contention that although one of the objects of the United Nations is to

¹ Article 1 (3).

² Article 13

³ Article 55.

Article 62 (2).

Article 68. See above, § 168m.

promote respect for human rights and fundamental freedoms, its members are not under a duty to respect and observe them; or that the pledge—the undertaking—of Article 56 can, as a matter of good faith, have any other meaning. The absence of a definition of these rights and of provisions for their enforcement, far from detracting from the obligatory nature of these Articles, imposes upon the members a moral—and, however imperfect, probably a legal—duty to use their best efforts, either by agreement or, whenever possible, by enlightened action of their own judicial and other authorities, to act in support of a crucial purpose of the Charter.

As stated, it cannot be said that the provisions of the Charter on the subject signify a full and effective guarantee of the inalienable rights of man on the part of international society. In particular, there are absent from the Charter clauses embodying either a more precise definition of these rights or a clear acknowledgment of the principle of the enforcement of their observance. On the other hand, the Articles enumerated above, in particular the mandatory provision¹ for setting up a commission for human rights, one of the tasks of which is the drafting of an International Bill of the Rights of Man,² leave room for further developments in that direction. Whatever these may be, the observance of fundamental human rights has, in so far as it is the subject-matter of legal obligations, ceased to be one of exclusive domestic jurisdiction of States and has become a matter of legitimate concern for the United Nations and its members.³ Though imperfect from the point of view of enforcement, the relevant provisions of the Charter constitute legal obligations of the members of the United Nations⁴ and of the Organisation as a whole. The

¹ See British Commentary on the many See, e.g., Kelapp, *The Law of the Charter*, Cmd. 6866 (1945), §§ 49 and 91. *the United Nations* (1950), pp. 29-32; Oh de Visser, *Théories et Réalités en Droit International Public* (1953), p. 158. Hudson in *A.J.*, 42 (1948), pp. 105-108; Preuss, *Ibid.*, 46 (1952), p. 295. For an attempt to substantiate the view propounded in the text see, in addition to most writers

² See below, § 340m.

³ See above, § 168f. And see above, § 94f, as to the International Trusteeship System.

⁴ The above view is disputed by text see, in addition to most writers

referred to below in this note, Lauterpacht, *International Law and Human Rights* (1950), pp. 145-154. * See also Jessup, *A Modern Law of Nations* (1948), pp. 87-93: 'It is already the law, at least for the members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties. The expansion of this duty, its translation into specific rules, requires further steps of a legislative character' (p. 91). The lack of definition and the absence of provisions for enforcement may impair the effectiveness—without affecting the legal nature—of the provisions in question. The efforts subsequently made to supply the absent measure of effectiveness by way of a definition of human rights and provisions for their enforcement cannot properly be interpreted as evidence of the absence of binding obligation in what is clearly a fundamental purpose of the Charter. The decisions of municipal courts on the subject have shown a marked degree of divergence: (1) some have affirmed the binding nature and direct enforceability of the provisions of the Charter; (2) some have denied it; (3) others, while considering them as binding, have declined to enforce them on the ground that they had not been formally incorporated as part of the law of the land; (4) others still, while denying to them the character of rules binding directly in the sphere of Municipal Law, have treated them, directly or indirectly, as relevant in the sense that they form part of the public policy of the State as a signatory of the Charter. As to (1) see *In re Drummond Wren*, 4 Ontario Reports, 778; *Annual Digest*, 1943-1945, Case No. 50; *Oyama v. California* (1948) 332 U.S. 633 (Concurring Opinions of Justices Rutledge and Black); as to (2) see *Kemp v. Rubin* (1947) 69 N.S.Y. 2d 680; *Annual Digest*, 1947, Case No. 37; *Fujii v. State of California* (1952) 242 Pac. (2d) 617; *A.J.*, 46 (1952) pp. 559-573, where the Supreme Court of California, in rejecting the reasoning (though not the substance) of the decision of the Court below, declined to treat the relevant provisions of the Charter as being binding obligations. See on this case Wright in *A.J.* (1951),

pp. 62-82; Preuss, *ibid.* 46 (1952), pp. 289-296; and Fairman, *ibid.*, pp. 682-690; as to (3) see *Re Noble and Wolf*, where both the High Court of Ontario and the Ontario Court of Appeal declined to follow *In re Drummond Wren* on the ground that 'the obligations [sic] set out in the United Nations' Charter' on the subject had not been made part of the law of Canada; [1949] 4 D.L.R. 375; *Annual Digest*, 1948, Case No. 100; as to (4) see *Sipes v. McGhee* (1948) Sup. Ct. 836; *Annual Digest*, 1947, Case No. 35; *Hurd v. Hodge* (1948) 334 U.S. 24; *Annual Digest*, 1947, Case No. 36. That the absence of definition is in no way indicative of an absence of legal obligation is shown by the provisions of the Peace Treaties concluded in 1947 with Italy, Roumania, Bulgaria, Hungary and Finland. In these treaties each of the above-mentioned countries undertook 'to take all measures necessary to secure to all persons under its jurisdiction, without distinction as to race, language, or religion, the enjoyment of human rights and fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.' (For an analysis of these provisions see Martin in *B.Y.*, 24 (1947), pp. 392-398.) Neither was the binding nature of these obligations affected by the defectiveness of the machinery provided for their enforcement. In the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania* the International Court of Justice held that although the Governments of these countries were legally bound to carry out the provisions of those Treaties relating to the settlement of disputes, including the appointment of their representatives to the Commissions provided for by the Treaties, the Secretary-General of the United Nations was not authorised to make such appointments after the parties had refused to do so: *I.C.J. Report*, 1950, p. 221. The following is a selection from the vast literature bearing both on the question discussed in this note and on the question of human rights under the Charter of the United Nations in general. Brunet, *La garantie internationale des droits de l'homme* (1947); Lauterpacht in

fundamental human rights and freedoms acknowledged by the Charter must henceforth be regarded as legal rights recognised by International Law. Their realisation, subject to the limitations of the Charter,¹ must be regarded as a paramount object of the United Nations. There was general agreement in the initial stages of the United Nations that the effective protection of fundamental human rights and freedoms on the part of international society organised through it would provide a decisive accession of strength to the authority of the United Nations. At the same time it is apparent that the degree to which that task can be fulfilled is in itself dependent to a large extent upon the moral and

Hague Recueil, 70 (1947), pp. 13-105, and the same, *International Law and Human Rights* (1950); Holcombe, *Human Rights in the Modern World* (1948); Schwarzenberger, *Power Politics* (2nd ed., 1951), pp. 613-617, and the same in *Current Legal Problems*, 1 (1948), pp. 152-169 (on British intercessions for human rights); Drost, *Human Rights as Legal Rights* (1951); *Annals of the American Academy of Political and Social Science (Symposium on Human Rights)*, 1947, McDougal and Leighton in *Yale Law Journal*, 59 (1949), pp. 60-115; Cassin in *Études Georges Scelle* (1950), vol. 1, pp. 67-92; Rix in *A.S. Proceedings*, 1949, pp. 46-59; Sandifer, *ibid.*, pp. 59-65; Kunz, *ibid.*, 1951, pp. 109-120; Freeman, *ibid.*, pp. 120-130; Green in *Current Legal Problems*, 3 (1950), pp. 230-262; Martin in *Year Book of World Affairs* 1951, pp. 37-80; Schachter in *Vanderbilt Law Review*, 4 (1951), pp. 643-659 (a scholarly analysis of the question of the binding nature of the provisions of the Charter on the subject); Mirkin-Guetzévitch in *R.G.*, 55 (1951), pp. 169-198; 56 (1952), pp. 34-60; Scupin in 'Gegenwartsprobleme,' *Laun Festschrift* (1953), pp. 173-200; Hula in 'Law and Politics in the World Community' (*Hans Kelsen Essays*, 1953), pp. 162-190. And see also Cassin in *Hague Recueil*, 79 (1951) (n.), pp. 241-365.

¹ These limitations do not preclude the organs of the United Nations from taking action, short of intervention (see above, § 168 f(b)), on petitions and complaints alleging violations of fundamental human rights. Such

action may include investigation and recommendations addressed either to the Economic and Social Council or to the State concerned. The Commission on Human Rights, which is composed of representatives of Governments, has taken a more limited view of its powers in this respect. It adopted a series of resolutions subsequently confirmed by the Economic and Social Council, that it had no power to take any action in regard to any complaints concerning human rights. There is no compelling reason for assuming that that view represents an accurate interpretation either of the Charter or of the Resolution of the Economic and Social Council on this question. The examination of complaints and petitions is essential to the proper fulfilment of the task of the Commission and must be considered as inherent in the object of the United Nations to encourage and promote the observance of human rights and freedom. See, however, for a different view the Report of the Working Group on Implementation prepared in December 1947 in the course of the meeting of the Commission on Human Rights: Doc E/800, p. 51. And see, for an analysis and criticism of this aspect of the activities of the Human Rights Commission, Lauterpacht, *International Law and Human Rights* (1950), pp. 221-269. The *Year Book of Human Rights*, published since June 1946 by the Secretariat of the United Nations, is a valuable source of material on various questions relating to human rights.

political authority wielded by the United Nations at any given period.

§ 340m. While no direct reference is made in the Charter of the United Nations to an International Bill or Covenant —of Human Rights, the eventual adoption of an instrument of this nature, imposing (unlike the Universal Declaration of Human Rights¹) binding and enforceable obligations upon the Contracting Parties, has been considered as implicit in the Charter.² It has been so regarded by the General Assembly and the Economic and Social Council, which have repeatedly issued to the Commission on Human Rights directions in that sense.³ Although such binding legal force as is inherent in the Charter in the matter of human rights and fundamental freedoms⁴ is, in principle, independent of the detailed formulation of these rights and of the means for ensuring their observance, it is clear that such formulation would add substantially to the legal efficacy of what is now an imperfect and controversial legal obligation. In the first decade of the existence of the United Nations the efforts to formulate and to induce the members of the United Nations to accept an International Bill of Human Rights did not prove successful.⁵ It is probable that so long as various members of the United Nations are wedded to fundamentally divergent political and economic systems in particular to radically opposed notions of the relation of human

The Proposed International Bill of Human Rights.

¹ See below, § 340n

² For projects, prior to the Charter, of an International Bill of Human Rights see: Quincy Wright, *Human Rights and World Order* (in the *Third Report of the Commission to Study the Organization of Peace*, 1943); Fourth Report of the same Commission, in *International Conciliation*, 1944, Pamphlet No. 403; the drafts of the American Law Institute of 1943 and 1944; Lauterpacht, *An International Bill of Human Rights* (1945).

³ In 1946 the Economic and Social Council formally endorsed the view that the purpose of the United Nations with regard to the promotion and observance of human rights can be fulfilled only if provision is made for an international bill of rights and for its

implementation (*Journal of the Economic and Social Council*, 1946, No. 11, p. 162). See also Report of the Preparatory Commission of the United Nations: Cmd. 6734, p. 54.

⁴ See above, p. 740

⁵ Detailed accounts of these attempts will be found in the successive issues of the *United Nations Year Book* and in the *Year Book of Human Rights*. See also Martin, *Year Book of World Affairs*, 1951 pp. 37-51; Simsarian in *J.J.* 42 (1948), pp. 879-883; *ibid.*, 45 (1951), pp. 170-178, and 46 (1952), pp. 710-718; Lauterpacht in *International Law Association Report*, 43 (1948), pp. 104-116; Neal in *International Conciliation*, Pamphlet No. 489 (1953); and the literature referred to above, p. 742.

personality to the State¹—progress in this sphere can be achieved in two ways: (a) by limiting the participation in an effective system of protection of human rights to the majority of the members of the United Nations whose political tradition, economic structure and constitutional system enable them to do so; and (b) by way of regional systems of international protection of the rights of man such as the European Convention on Human Rights, the provisions of which are outlined in the Section which follows.

The Universal Declaration of Human Rights.

§ 340n. Pending the adoption of an International Bill—or Covenant—of Human Rights embodying defined and enforceable legal obligations, the General Assembly of the

¹ The problems, in addition to the main difficulty referred to in the text confronting the adoption of an International Bill of Rights have been as follows:

(a) While there is general agreement that a Bill of Rights ought to safeguard personal rights such as freedom of human personality, freedom of religion, speech, assembly and association, equality before the law and the like, there is less agreement with regard to so-called political rights, in particular, the right to be governed by persons freely elected and accountable to electors. There is even more acute controversy with regard to economic and social rights such as the right to employment under proper conditions, to social security, to education, and the like. For this reason the Commission on Human Rights decided to prepare two 'Covenants'—one covering personal and political, the other economic and social, rights. It is probable that an international guarantee of any category of these rights without taking into account the others must prove illusory in the long run. On the other hand, there is room for the view that the indisputable difficulties of a comprehensive bill of rights may be solved by adopting different methods of implementation for various categories of rights.

(b) The second problem arises out of the difficulties of enforcement. In particular there has been reluctance on the part of Governments to acquiesce in the international judicial or administrative enforcement of

human rights at the instance of the individual. While that method of enforcement must be regarded as proper and practicable subject to adequate safeguards against abuse, in the case of personal rights of freedom, it is probable that different methods not amounting to direct enforcement may be appropriate or possible with regard to political, economic and social rights. On the problem of enforcement in particular with regard to the right of petition on the part of individuals, see the writers referred to above, p. 742. See also Bruegel in *I.C.L.Q.* 2 (1953) pp. 542-563.

(c) There is, thirdly, the difficulty arising out of the fact of the federal structure of various States (see above, § 89a) and the so-called federal clause the effect of which might be to render somewhat nominal the obligations undertaken in this respect by Federal States. See Sørensen in *A.J.*, 46 (1952), pp. 195-218.

(d) Fourthly there has been a tendency, which is conducive to the completeness and symmetry of the international recognition of human rights and which is not capable of easy logical refutation, to give effect, in an international bill of rights, to that aspect of the right to self-government which consists in freedom from government by an alien race or nation. The insistence on the inclusion, otherwise than by way of declaration of principle (whether in national constitutions or otherwise), of that category of rights is likely to retard the acceptance of an international bill of the rights of man.

United Nations deemed it desirable to adopt, in 1948, a declaration of principles and standards in the form of a Universal Declaration of Human Rights. As stated by most of the Governments which voted for its adoption,¹ the Declaration is not an instrument which is legally binding either directly or indirectly. In particular, there is no warrant for assuming that it can properly be resorted to for the interpretation of the provisions of the Charter in the matter of human rights and fundamental freedoms. This absence of the element of binding obligation probably explains the willingness of Governments to subscribe to the wide terms of the Declaration. It provides that 'everyone' has the right to life, liberty and security of person; to recognition as a person before the law; to equality before the law; to specified judicial safeguards in criminal trials such as fair and public hearing, presumption of innocence, and prohibition of retroactive punishment; to freedom of movement within the country and the right to leave it; to a right to asylum²; to a right to nationality³; to the right of property; to freedom of thought, conscience, religion, opinion and expression, peaceful assembly and association; to the right to social security; to the right to work under just and favourable conditions and the right to join trade unions for the protection of his interests; to the right to an adequate standard of living and education; and 'the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'

There is room for the view that the Declaration, inasmuch as it may have created an unwarranted appearance of achievement in the sphere of the effective protection of human rights, has retarded progress in that direction. On the other hand, the opinion cannot be dismissed that it may be of considerable value as supplying a standard of action and of moral obligation. It has been frequently referred to in official drafts and pronouncements,⁴ in national constitu-

¹ See Lauterpacht in *B.Y.*, 25 (1948), pp. 358-365.

² See above, § 310.

³ See above, § 313a.

⁴ Thus it has been frequently referred to in the Resolutions of the General Assembly as in the case of treatment of Indians in South Africa

tions and legislation,¹ and occasionally—with differing results²—in judicial decisions. These consequences of the Declaration may be of significance so long as restraint is exercised in describing it as a legally binding instrument.³

The
European
Conven-
tion on
Human
Rights.

§ 340o. While the difficulties, outlined above,⁴ have prevented the adoption both of a more precise definition and of machinery for implementing the legal obligations of the Charter in the matter of human rights and fundamental freedoms, the European Convention on Human Rights, signed on November 4, 1950, by the members of the Council

(Second Session), the position of wives of Russian nationality married to foreign nationals (Third Session), the future status of Eritrea (Fourth Session), the Draft Convention on the Status of Refugees (Fifth Session). The Draft Convention on Elimination of Statelessness, formulated by the International Law Commission in 1953, refers to the Declaration in the matter of a right to nationality. The Trusteeship Agreement relating to Somaliland (see above, p. 229) lays down that the 'administering authority accepts as a standard of achievement for the Territory the Universal Declaration of Human Rights.' The Preamble to the Peace Treaty with Japan of 1951 states that one of the purposes of the Treaty is to enable Japan 'to strive to realise the objectives of the Universal Declaration of Human Rights.' The Preamble of the European Convention on Human Rights (see below, § 340o) refers to its provisions as constituting one of 'the first steps for the collective enforcement of certain rights stated in the Declaration.'

¹ While various recent constitutions, without referring to the Declaration, follow closely its language, express reference to it is made occasionally in national legislation such as the Fair Employment Practices Act passed in Ontario in 1951 and Article 3 of the Law of the Federal Republic of Germany on the legal status of displaced persons. Reference was made to the Declaration when the French National Assembly revoked in 1950 the Law exiling the heads of former reigning families in France.

² See, for instance, the Judgment

in *Auditeur Militaire v. Krumsamp* of the Belgian Military Court of Brabant which, in answer to the contention of the accused that torture of the inhabitants of occupied territory was not contrary to any law of war, relied, *inter alia*, on Article 5 of the Declaration prohibiting torture: *Pascrie Belge*, 1950 III, p. 35. See, on the other hand, the Judgment of the Netherlands Special Court of Cassation in *In re Beck* where the Court, in answer to the plea based on prohibition of retroactivity of punishment as formulated in the Declaration, pointed out that the Declaration was not intended as a binding instrument: *Nederlandse Jurisprudentie*, 1949, No. 437.

³ See *The Impact of the Universal Declaration of Human Rights* (C.N. Publication (1951)). See also Sibert, *l.*, pp. 446-455; Kunz in *A.J.*, 43 (1949); Lauterpacht, *International Law and Human Rights* (1950), pp. 394-428; Cassin in *Etudes Georges Scelle* (1950), vol. I, pp. 75-82; Sperduti in *Annuario dell' Università di Sassari*, 1949-1950; Dront, *Human Rights as Legal Rights* (1951), pp. 32-38. For the text of the Declaration see Dront and Lauterpacht, *op. cit.*; *Documents*, 1947-1948, p. 885; *A.J.*, 43 (1949), Suppl. p. 127. See also *ibid.*, p. 133, for the American Declaration of the Rights of Man adopted in 1948 by the Ninth International Conference of American States, and *Annuaire*, 41 (1947), for a discussion and Resolution of the Institute of International Law on fundamental human rights.

⁴ Above, § 340m.

of Europe,¹ fulfils both purposes to a pronounced degree. It refers in its Preamble to the resolve of the signatories, 'the Governments of European countries, which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain Rights stated in the Universal Declaration [of Human Rights²].' The Convention imposes upon the Parties the obligation to secure within their jurisdiction the rights and freedoms defined in Section 1. That Section contains a detailed enumeration and definitions of personal and political rights recognised and protected by it. These include the right to life; the prohibition of torture or inhuman or degrading treatment or punishment; prohibition of slavery, servitude, or forced or compulsory labour; the right to liberty and security of person, to fair and public hearing and other safeguards in civil and criminal trials, respect of private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of peaceful assembly and association, the right to marry and found a family according to the national laws governing the exercise of that right, and the right to an effective remedy before a national authority in respect of violation of the rights protected by the Convention 'notwithstanding that the violation has been committed by persons acting in an official capacity.' It is provided that the enjoyment of the rights protected by the Convention shall be free from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, property, 'birth or other status. The Convention permits the Parties, in case of war or public emergency threatening the life of the nation, to take measures derogating from the obligations of the Convention

¹ See above, § 89b. For the text of the Convention see Treaty Series, No. 71 (1953), Cmd. 8909; *A.J.*, 45 (1951), Suppl., p. 24. See also Sibert, *l.*, pp. 455-460; Lauterpacht in *Grotius Society*, 35 (1940); and Robertson in *B.Y.*, 27 (1950), pp. 145-163, and 28 (1951), pp. 359-365. The Convention was signed by Denmark, the German

Federal Republic, Greece, Iceland, Ireland, Luxembourg, Norway, the Saar, Sweden, the United Kingdom, Belgium, France, Italy, the Netherlands and Turkey. It entered into force in 1953 after ratification by the ten first-named countries.

² See above, § 340a.

provided that the Council of Europe is informed of the beginning and cessation of the measures thus taken. A conspicuous feature of the Convention is the detailed definition of the rights prohibited by it and of the exceptions thereto.¹

Section II of the Convention is devoted to measures aiming at securing compliance with its provisions. For that purpose the Convention provides for two organs, namely, the European Commission on Human Rights and the European Court of Human Rights. The Commission is elected by the Committee of Ministers of the Council of Europe on the proposal of the national delegations to the Consultative Assembly. The jurisdiction of the Commission is obligatory or optional. It is obligatory in all cases in which one of the Parties refers to it a case of an alleged breach of the Convention by another Party. The Com-

¹ Thus Article 5 of the Convention provides as follows :

(1) Everyone has the right to liberty and security of person

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law :

(a) the lawful detention of a person after conviction by a competent court ;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law ;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority ;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug

addicts or vagrants ;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

mission is to investigate the complaint and, failing a friendly settlement, is to make a report to the Council of Ministers which determines, by a majority of two-thirds, whether a violation of the Convention has taken place and, if so, what remedial measures shall be taken. The Parties are bound to act on the decision thus reached. The jurisdiction of the Commission is optional if a complaint is brought before it by any person, non-governmental organisation or group of persons; it is optional in the sense that parties to the Convention may or may not make a declaration accepting in advance that aspect of its jurisdiction.¹ Similarly optional are the provisions of the Convention relating to the creation of an European Court of Human Rights² possessing jurisdiction in the matter of all complaints not settled by the Commission.³ The Court is to come into existence after eight States have recognised its jurisdiction as compulsory. Another optional provision makes it possible for the Parties to extend the Articles of the Convention to oversea dependencies or territories for whose international relations they are responsible. Thus Denmark has made a declaration to that effect with regard to Greenland and Great Britain with regard to forty-two oversea territories.⁴

§ 340p. The extermination by Germany, under the National-Socialist régime, of eight millions of her own

The Genocide Convention.

¹ Denmark, Eire and Sweden have made declarations to that effect. The first European Commission on Human Rights was elected in 1954.

² See Bärna in *Österreichische Zeitung für öffentliches Recht*, 1 (1952), pp. 186-191, and Schapiro in *University of Western Australia Annual Law Review*, 2 (1952), pp. 65-79.

³ So far Denmark and Eire have accepted the compulsory jurisdiction of the Court. Only the Commission or a party to the Convention may bring a case before the Court.

⁴ The territories are: Aden, the Bahamas, Barbados, Basutoland, Bechuanaland, Bermuda, British Guiana, British Honduras, British Solomon Islands, the Channel Islands, Jersey and Guernsey, Cyprus, the Falkland Islands, the Fiji Islands, Gambia, the Gilbert and Ellice Islands,

the Gold Coast, Jamaica, Kenya, Gibraltar, the Leeward Islands, the Federation of Malaya, the Isle of Man, Malta, Mauritius, Nigeria, Northern Rhodesia, North Borneo, Nyasaland, St Helena, Sarawak, Seychelles, Sierra Leone, Singapore, Somaliland, Swaziland, Tanganyika, Trinidad, Uganda, the Windward Islands and Zanzibar. The Convention will also be extended to the Kingdom of Tonga, at its own request. The Declaration made by Great Britain in this connection does not extend to the additional Protocol of 1950, ratified by Great Britain, which gives individuals the right to free and secret elections and to ownership of property, and provides for the right to education and the right of parents to choose the type of education to be received by their children.

nationals and persons of foreign nationality, as well as the practices of some other States both in time of war and peace, gave the impetus to the adoption by the General Assembly, on December 9, 1948, of the Convention on the Prevention and Punishment of the Crime of Genocide.¹ The Convention defines as genocide acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group such as killing or causing serious bodily or mental harm² to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its total or partial destruction: imposing measures intended to prevent births within the group; forcibly transferring children of the group to another. The Convention declares as punishable, as a crime under International Law,³ genocide itself as well as acts of conspiracy, incitement, attempt and complicity. It is laid down that not only private persons are punishable for the crime of genocide but also rulers and public officials. While the main sanction of the Convention is the undertaking of the Parties to enact legislation for giving effect to the Convention and the punishment of the guilty individuals by national tribunals of the State within the territory of which the crime of genocide has been committed, the possibility is left open for the eventual jurisdiction of an international penal tribunal agreed to by the Parties.⁴ It is laid down that genocide shall not be considered as a political crime for the purposes of extradition. The Parties to the Convention are given the right to call upon the competent organs of the United Nations to take appropriate action, under the Charter, for the prevention and suppression of genocide. The International

¹ For text see *A.J.*, 45 (1951), Suppl. p. 11; *Documents*, 1947-1948, p. 851; *U.N.T.S.*, 78, p. 278.

² This part of the definition seems to have been due to the allegation that some States had adopted in the past a deliberate policy of spreading the use of narcotics among other nations.

³ See below, n. 4.

⁴ Article 6 of the Convention refers to trial of persons charged with genocide 'by a competent tribunal of the State in the territory of which the act

was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' It must be assumed that the law administered by such a tribunal would be the law of the Convention, in which the parties confirm that genocide is a crime under International Law, as distinguished from any Municipal Law. To that extent, at least, the Convention imposes duties directly upon individuals.

Court of Justice is given jurisdiction with regard to disputes relating to the interpretation, application, and fulfilment of the Convention, including the responsibility of the Parties for acts of genocide.

It is apparent that, to a considerable extent, the Convention amounts to a registration of protest against past misdeeds of individual or collective savagery rather than to an effective instrument of their prevention or repression. Thus as the punishment of acts of genocide is entrusted primarily to the municipal courts of the countries concerned, it is clear that such acts, if perpetrated in obedience to national legislation, must remain unpunished unless penalised by way of retroactive laws. On the other hand, the Convention obliges the parties to enact and keep in force legislation intended to prevent and suppress such acts, and any failure to measure up to that obligation is made subject to the jurisdiction of the International Court of Justice¹ and of the United Nations. With regard to the latter the result of the provision in question is that acts of commission or omission in respect of genocide are no longer, on any interpretation of the Charter,² considered to be a matter exclusively within the domestic jurisdiction of the States concerned. For the Parties expressly concede to the United Nations the right of intervention in this sphere. This aspect of the situation constitutes a conspicuous feature of the Genocide Convention - a feature which probably outweighs, in its legal and moral significance, the gaps, artificialities and possible dangers³ of the Convention.

¹ Soviet Russia, Poland, Bulgaria, Roumania and Hungary entered a reservation with regard to that particular provision. In this connection the question of the admissibility of reservations to the Genocide Convention formed the subject matter of an Advisory Opinion of the International Court of Justice (see below, § 517a). It is believed that, in relation to a Convention of this kind, the compulsory jurisdiction of the International Court of Justice is essential to the fulfilment of the purpose of the treaty and that a reservation excluding such jurisdiction may properly be

considered as incompatible with the object of the treaty.

² According to the view expressed elsewhere in this treatise (see above, § 340), this being a matter directly affecting human rights and fundamental freedoms, the question is in any case outside the sphere of exclusive domestic jurisdiction. However, that view is not unchallenged.

³ Thus it may be said that by giving the complexion of conventional law, of limited scope and conditioned by municipal legislation, to recognised international obligations and principles of International Law, the Con-

Crimes
against
Human-
ity.

§ 340q. There is an implied recognition of the protection, by International Law, of the fundamental rights of the individual in so far as it prohibits and penalises crimes against humanity, conceived as offences of the gravest character against the life and liberty of the individual, irrespective of whether acts of that nature have been perpetrated in obedience to the law of the State. While the Charter of the International Military Tribunal of August 8, 1945, seems to have circumscribed, somewhat artificially, crimes against humanity by connecting them with other crimes with regard to which it had jurisdiction (namely, war crimes and crimes against the peace¹), no such limitation appears in the principles underlying this aspect of the Charter² or in some subsequent enactments. Thus the Law promulgated in Germany by the Allied Control Council in the same year defined as crimes against humanity 'atrocities and offences, including but not limited to murder, extermination, enslavement,

vention constitutes a recession from developments already accomplished. Such considerations seem to be germane, in particular, to the provisions of the Charter of the United Nations in the matter of human rights and fundamental freedoms and to those of the Charter of the International Military Tribunal, the principles of which were re-affirmed by the General Assembly of the United Nations with regard to crimes against humanity. However, it is clear that as a matter of law the Genocide Convention cannot impair the effectiveness of existing international obligations—quite apart from the circumstance that no such intention can be reasonably attributed to it. In addition, the legal effect of both Charters referred to above is, in this respect, not free from controversy. There may be some justification for the reluctance to give encouragement to instruments which are considered to be of doubtful achievement and which exhibit a disquieting incongruity between the enormity of the crime and the sanction provided for its suppression. Considerations of this nature have influenced the attitude of some Governments (see, e.g., the observations of Sir Hartley Shawcross noting that 'the only real

sanction against genocide was war': *Official Records*, General Assembly, 1947, 6th Committee (2nd Session), p. 35). Yet it may be difficult, in the long run, to withhold support from an express condemnation of a crime of tremendous magnitude and from a treaty embodying some additional safeguards against a renewed eruption of criminal malevolence perpetrated under the aegis of the State and threatening large masses of human beings. This is so in particular in relation to a treaty which has been widely signed and which has entered into force on ratification by twenty signatories. By the end of 1952 the Convention had been ratified by forty Governments. For comments on the Convention see Sibert, pp. 435-446; Finch in *A.J.L.*, 43 (1949), pp. 732-739; Kunz, *ibid.*, pp. 738-746; McDougal and Arens in *Vanderbilt Law Review* 3 (1950), p. 693; Craven in *Hague Record*, 76 (1950) (L.), pp. 490-522.

¹ See vol. II., § 247.

² The International Law Commission, which was charged with the formulation of the principles of the Charter, limited itself, in this and other respects, to reproducing its wording: Report of the Commission, 1950, p. 14.

deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated.' While no general rule of positive International Law can as yet be asserted which gives to States the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of International Law to that effect.¹ That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the sovereign State when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind.

§ 340r. In pursuance of the principle of the Charter bearing Rights of Women. upon non-discrimination on account of sex, the Economic and Social Council has set up a Commission on the Status of Women, the work of which covers the various aspects of equality of the sexes such as political rights of women, the nationality of married women,² the status of women in public and private law, educational opportunities for women, and equal pay for men and women workers. In 1952 the General Assembly adopted a Convention on the Political Rights of Women. The Convention, which by the end of 1953 was signed by thirty States, provides that women shall be entitled to vote in all elections on equal terms with men; that women shall be eligible, on terms of equality with men, for election to public bodies established by national law; and that they shall be entitled to hold public office and to exercise public functions established by national law.³

¹ See Aroncau in *Revue de droit pénal et de criminologie*, 1948, No. 10, p. 876; (Graven in *Hague Recueil*, 76 (1950) (1), pp. 433-601; Tesar in *Laun Festschrift* (1953), pp. 423-446. See also *History of the United Nations*

War Crimes Commission (1949), pp. 191-220.

² See above, p. 654, n. 3.

³ For the text of the Convention see *International Organisation*, 7 (1953), p. 173.

PART III

ORGANS OF THE STATES FOR THEIR INTERNATIONAL RELATIONS

CHAPTER I

HEADS OF STATES, AND FOREIGN OFFICES

I

POSITION OF HEADS OF STATES ACCORDING TO INTERNATIONAL LAW

Hall, § 97—Phillimore, ii. §§ 101, 102—Bluntschli, §§ 115-123—Holtzendorff, ii. pp. 77-81—Rivier, i. § 32—Nys, ii. pp. 378-382—Fiore, ii. § 1097—Mérignhac, ii. pp. 294-305—Fauchille, §§ 632-647 (5)—De Louter, ii. pp. 1, 2, 9-14—Anzilotti, pp. 137-143, 257-361—Cavaglieri, pp. 217-223—Suarez, §§ 227-231—Bykershoek, *De foro legatorum* (1721), c. iii. § 13—Satow, §§ 6-16.

§ 341. As a State is an abstraction from the fact that a ^{Necessity} multitude of individuals live in a country under a sovereign ^{of a Head} Government, every State must have a Head as its highest ^{for every} State. organ, which represents it, within and without its borders, in the totality of its relations. Such Head is the monarch in a monarchy, and a president or a body of individuals, such as the Bundesrath of Switzerland, in a republic. The Law of Nations prescribes no rules as regards the kind of Head a State may have.

§ 342. The recognition of new Heads of States has already ^{Recognition} been discussed above in §§ 75-75f. ^{of}

§ 343. The Head of a State, as its chief organ and re- ^{Heads of} States. presentative in the totality of its international relations, ^{Compe-} acts for his State in its international intercourse, with the ^{tence of} consequence that all his legally relevant international acts ^{Heads of} States. are considered to be acts of his State. His competence to perform such acts is termed *jus repræsentationis omnimodæ*. It comprises in substance chiefly : reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace. But it is a question in each case how far this competence is independent of Municipal Law. For Heads of States exercise this competence for their States, and as representing them,

and not in their own right. If a Head of a State should, for instance, ratify a treaty without the necessary approval of his Parliament, he would go beyond his powers, and therefore such a treaty would not be binding upon his State.¹

Heads of States as Objects of the Law of Nations.

§ 344. The position which a Head of a State has according to International Law is due to him not as an individual, but as the Head of his State. His position is derived from international rights and duties belonging to his State, and not from international rights of his own.

Honours and Privileges of Heads of States.

§ 345. All honours and privileges due to Heads of States from foreign States are derived from the fact that dignity is a recognised quality of States as members of the international community and International Persons.² Concerning such honours and privileges, International Law distinguishes between monarchs and Heads of republics.³ However, the practical consequences of that distinction are not always clear or substantial. The rules in which traditional International Law sanctioned the pre-eminence of monarchs, in matters of ceremonial or otherwise, are to a large extent obsolete.

II

MONARCHS

Vattel, i. §§ 38-45, iv. § 108—Hall, § 49—Lawrence, § 105—Phillimore, ii. §§ 103-113—Moore, ii. § 250—Bluntschli, §§ 126-153—Heffter, §§ 48-57—Rivier i. § 33—Nys, ii. pp. 331-348—Calvo, iii. §§ 1454-1479—Fiore, ii. §§ 1098-1102—Fauchille, §§ 632-617 (5)—Merignhac, ii. pp. 294-314—Pradier Fodéré, iii. §§ 1561-1591—Praag, §§ 191-202—De Louter, ii. pp. 2-5, 7-8—Satow, i. §§ 6-12—Frisch, *Der völkerrechtliche Begriff der Exterritorialität* (1917), pp. 38-44—Strisower in *Hague Recueil* 1823, pp. 263-269—Heyking, *L'exterritorialité* (1926), pp. 121-133—Strupp in *International Law Association's Thirty fourth Report*, 1927, pp. 126-140—*Harvard Research (Competence of Courts* 1932), pp. 476-479

Sovereignty of Monarchs.

§ 346. In every monarchy the monarch appears as the representative of the sovereignty of the State, and thereby becomes a sovereign himself; and this fact is recognised by International Law. The difference between the Municipal Law of the various States regarding this point is of

¹ See below, § 497.

² See above, § 121.

³ See below, §§ 353, 356

no importance. Consequently, International Law recognises all monarchs as equally sovereign, although the differences between the constitutional positions of monarchs may be considerable, if looked upon in the light of the rules laid down by the constitutional law of the different States.

§ 347. Not much need be said as regards the consideration due to a monarch from other States when within the boundaries of his own State. Foreign States have to give him his usual and recognised predicates¹ in all official communications. Every monarch must be treated as a peer of other monarchs, whatever differences in title and actual power there may be between them.

§ 348. However, as regards the consideration due to a monarch, when abroad, from the State on whose territory he is staying, in time of peace, and with the knowledge and the consent of the Government, the following may be noted:

(1) In consequence of his character of sovereign, his home State has the right to demand that certain ceremonial honours shall be rendered to him, to the members of his family, and to the members of his retinue.

(2) As his person is sacrosanct, his home State has a right to insist that he shall be afforded special protection as regards personal safety, the maintenance of personal dignity, and unrestrained intercourse with his Government at home. Every offence against him must be visited with specially severe penalties. On the other hand, he must be exempt from every kind of criminal jurisdiction. The consort of a sovereign must be accorded the same protection and exemption.

(3) He must be granted so-called exterritoriality conformably with the principle *par in parem non habet imperium*, according to which one sovereign cannot have any power over another sovereign. He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff.² The house in which he has taken

¹ Details as regards the predicates of monarchs are given above, § 119.

² *Hullet v. King of Spain* (1828) 2 Bligh, N.S. 310. See also above,

§ 115, and the cases there quoted; Phillimore, ii. § 113a; Loening, *Die Gerichtsbarkeit über fremde Staaten und Souveräne* (1903); and the *Projet*

up residence must enjoy the same extritoriality as the official residence of an ambassador; no policeman, or other official, must be allowed to enter it without his permission. Even if a criminal takes refuge there, the police must be prevented from entering it, although, if the surrender of the criminal is deliberately refused, the Government may request the recalcitrant sovereign to leave the country, and then arrest the criminal. If a foreign sovereign has immovable property in a country, such property is under the jurisdiction of that country. But as soon as such sovereign takes up his residence on the property, it becomes extritorial for the time being.¹ The wife of a sovereign must likewise be granted extritoriality, but not other members of a sovereign's family.²

The
Retinue of
Monarchs
Abroad.

§ 349. The position of individuals who accompany a monarch during his stay abroad is a matter of some dispute. Several maintain that the home State can claim the privilege of extritoriality for members of his suite as well as for the sovereign himself; but others deny this.³ The opinion of the former is probably correct, since it is difficult to see why a sovereign abroad should, as regards the members of his suite, be in an inferior position to a diplomatic envoy.⁴

Monarchs
travelling
Incognito.

§ 350. Hitherto only the case where a monarch is staying in a foreign country with the official knowledge of the Government of the latter has been discussed. Such knowledge may be possessed in the case of a monarch travelling

de règlement international sur la compétence des tribunaux dans les procès contre les États souverains ou chefs d'État étrangers, adopted by the Institute of International Law in 1891 (*Annuaire*, 11 (1892), p. 436). It appears that French and Italian courts do not recognise immunity from civil jurisdiction in case of obligations incurred in the sovereign's private capacity. See *Tribunal Civil de la Seine* in *Wiercinaki v. Seyyid Ali Ben Hamond*, July 25, 1916, 44 *Clunet* (1917), p. 1465, and the Italian *Cassazione* in *Nobili v. Charles I. of Austria*, March 11, 1921, 48 *Clunet* (1921), p. 626; *Annual Digest*, 1919-

1922, Case No. 80.

¹ A celebrated case occurred on November 10, 1657, in France, when Christina, Queen of Sweden, although she had already abdicated, sentenced her grand equerry, Monaldeschi, to death, and had him executed by her bodyguard.

² See Rivier, *l.c.* p. 421, and Bluntschli, § 154, but, according to Bluntschli, extritoriality need not in strict law be granted even to the wife of a sovereign.

³ See Bluntschli, § 154, and Hall, § 49, in contradistinction to Martens, i. § 83.

⁴ See below, §§ 401-405.

incognito, and then he enjoys the same privileges as if travelling not *incognito*. The only difference is that many ceremonial observances which are due to a monarch are not rendered to him when travelling *incognito*. But it may happen that a monarch is travelling in a foreign country *incognito* without the Government of the latter having the slightest knowledge thereof. He cannot then, of course, be treated otherwise than as any other foreign individual; but he can at any time make known his real character, whereupon he assumes the privileges¹ due to him. Thus King William of Holland, when travelling *incognito* in Switzerland in 1873, was condemned to a fine for some slight offence, but the sentence was not carried out as he gave up his *incognito*.²

§ 351. All privileges mentioned must be granted to a Deposed and Abdicated Monarch only as long as he is really the Head of a State. As soon as he is deposed or has abdicated, he is no longer a sovereign. Therefore in 1870 and 1872 the French courts permitted, because she was deposed, civil actions against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs. Nothing, of course, prevents the Municipal Law of a State from granting the same privileges to a foreign deposed or abdicated monarch as to a foreign sovereign, but the Law of Nations does not exact any such courtesy.³

§ 352. All privileges due to a monarch are also due to a Regent. regent, at home or abroad, whilst he governs on behalf of an infant or of a king who, through illness, is incapable of exercising his powers. And it matters not whether the regent is a member of the king's family and a prince of royal blood or not.

§ 353. When a monarch accepts any office in a foreign State—when, for instance, he serves in a foreign army, as did formerly many monarchs of the small German States—

Monarchs in the Service of Foreign Powers.

¹ See *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149.

² See Lawrence, *Commentaire sur Wheaton*, iii. p. 428; Pradier-Fodéré, iii. § 1582, and in *R.J.*, 5 (1873), p. 246.

³ See Travert, ii. § 877. As to

the legal position of the former German Emperor in Holland and the Dutch refusal to surrender him see below, vol. ii. § 253. For some opinions of Law Officers on the subject of abdicated monarchs see McNair in *B.F.*, 26 (1949), pp. 15-21.

he submits to the jurisdiction of such State as far as the duties of the office are concerned, and his home State cannot claim for him any privileges that would otherwise be due to him.¹

III

PRESIDENTS OF REPUBLICS

Bluntschli, § 134—Stoerk in *Holtzendorff*, n. p. 661 Rivier i § 33 Martens, i. § 80—Walther, *Das Staatshaupt in den Republiken* (1907) pp. 190-204
Praeg, § 192—Satow, § 11.

Presi-
dents not
Sove-
reigns.

§ 354. In contradistinction to monarchies, in republics the people itself, and not a single individual, appears as the representative of the sovereignty of the State, and, accordingly, the people styles itself the sovereign of the State. Moreover, the Head of a republic may consist of a body of individuals, such as the Bundesrath in Switzerland. But in case the Head is a president, as in France and the United States of America,² the president represents the State, at any rate in the totality of its international relations. He is, however, not a sovereign, but a citizen and a subject of the very State of which, as president, he is Head.

Position
of Presi-
dents in
general.

§ 355. Consequently, his position at home and abroad cannot be compared with that of monarchs, and International Law does not empower his home State to claim for him the same, but only similar, consideration as that due to a monarch. Neither at home nor abroad, therefore, does a president of a republic appear as a peer of monarchs. Whereas all monarchs are, in the style of court phraseology, considered as though they were members of the same family, and therefore address each other in letters as 'my brother,' a president of a republic is usually addressed in letters from monarchs as 'my friend.' His home State can certainly claim for him such honours as are due to its dignity, but no such honours as must be granted to a sovereign monarch.

¹ As to responsibility for his acts when a monarch is at the same time the subject of another State see the third edition of this volume, § 353,

and '*Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1; 2 H.L.C. 1; and Phillimore, ii. § 109.

² See Hyde, i. § 408.

§ 356. As to the position of a president when abroad, ^{Position of Presidents Abroad.} writers on the Law of Nations do not agree. Some¹ maintain that, since a president is not a sovereign, his home State can never claim for him the same privileges as for a monarch, and especially that of extritoriality. Others² distinguish between a president staying abroad in his official capacity as Head of a State and one who is abroad for his private purposes, and they maintain that his home State can only in the first case claim extritoriality for him. Others³ again will not admit any difference in the position of a president abroad from that of a monarch abroad. When the President of the United States visited England in December 1918 he received such ceremonial honours as are due to a monarch. As regards extritoriality, there seems to be no good reason for distinguishing between the position of a monarch and that of presidents or other Heads of States

IV

FOREIGN OFFICES

Heffter, § 201—Ravier, i. § 34—Fauchille, §§ 648-651—Nys, ii. pp. 383-387
 Tillery and Gascolee, *The Foreign Office* (1933)—Hyde, i. § 410—Satow,
 §§ 17-28—Genet, i. pp. 43-74; ii. pp. 77-189—Malkin in *Q.R.*, 49 (1933),
 pp. 480-510.

§ 357. As a rule, nowadays no Head of a State, be he a ^{Position of the Secretary for Foreign Affairs.} monarch or a president, negotiates directly, and in person, with a foreign Power, although this happens occasionally. The necessary negotiations are regularly conducted by the Foreign Office, an office which, since the Westphalian Peace, has, in one form or another, been in existence in practically every civilised State. The chief of this office, the Secretary for Foreign Affairs, who is a Cabinet Minister, directs the foreign affairs of the State in the name of the Head and with his consent; he is the middleman between the

¹ Ravier, i. p. 423; Stoerk in *Holtendorff*, ii. p. 658.

² Martens, i. § 80; Bluntchli, § 134; Hall, § 97.

³ Fauchille, § 639; Nys, ii. p. 338; Mérignac, ii. p. 298; Liast, § 22 (ii.); Walther, *op. cit.*, p. 195.

Head of the State and other States.¹ And although many a Head of a State in fact directs all the foreign affairs himself, the Secretary for Foreign Affairs is nevertheless the person through whose hands all transactions must pass. His position at home is regulated by Municipal Law. But International Law defines his position regarding international intercourse with other States. He is the chief over all the ambassadors of the State, over its consuls, and over its other agents in international matters. It is he who, either in person or through the envoys of his State, approaches foreign States for the purpose of negotiating international matters. And, again, it is he whom foreign States, through their Foreign Secretaries or their envoys, approach for the like purpose. As representing his State he may, in proper cases, make binding declarations. Thus in the case concerning the *Legal Status of Eastern Greenland*, decided on April 5, 1933, by the Permanent Court of International Justice it was held, in effect unanimously, that a declaration by the Norwegian Foreign Minister recorded by him in a minute and informing the Danish Minister that the Norwegian Government would not make any difficulties in the settlement of the recognition of Danish sovereignty over Eastern Greenland, was binding upon Norway. The Court attached importance to the fact that the declaration was made on behalf of the Government in regard to a question falling within the province of the Foreign Minister in reply to a request of the diplomatic representative of Denmark.²

The Foreign Minister is present when ministers hand in their credentials to the Head of the State. All documents of importance regarding foreign matters are signed by him or his substitute, the Under-Secretary for Foreign Affairs. It is, therefore, usual to notify the appointment

¹ On the question how far an undertaking by a Foreign Minister binds his successors see a Danish complaint against Norway in the matter of Greenland, mentioned by Canberg in *R.I.* 3rd ser, 5 (1924), pp. 261-263.

² P.C.I.J., Series A/B, No. 53, p. 73. And see p. 91 for the observa-

tions of Judge Anslotti. In *State of Russia v. National City Bank of New York* the United States Circuit Court of Appeals held that the minister for foreign affairs of a State has the right to alienate State property by the execution of an assignment in his name: (1934) 69 F. (2d) 44. For comment see *Z.S.V.*, 4 (1934), p. 695.

of a new Foreign Secretary of a State to such foreign States as are represented by diplomatic envoys; the new Foreign Secretary himself makes this notification.¹ With the increased facilities for travel ministers of foreign affairs have tended to take a more direct part in the joint conduct of international affairs. Thus since 1939 the Foreign Ministers of the American Republics have held meetings for the purpose of framing common policies expressed in formal declarations and resolutions (whose legal character is not quite clear) and in conventions.² By a decision of the Great Powers taken at Potsdam in August 1945 a permanent Council of their Foreign Ministers was set up in London—an innovation which, owing to political conditions, has not been fully exploited.³

§ 357a. It is the practice of British Courts to accept as conclusive statements of the Foreign Office relating to certain categories of questions of fact in the field of international affairs. These include: (a) the question whether a foreign State or Government has been recognised by the United Kingdom either *de facto* or *de jure*⁴; (b) the question

Conclusiveness of Statements of Foreign Offices before Municipal Courts.

¹ As to the organisation of the British Foreign Office see Tilley and Haslece, *The Foreign Office* (1933), and Ashton-Gwatkin, *The British Foreign Service* (1950). See also Foreign Service Act 1943 (6 & 7 Geo. 6 c. 36) giving effect to the proposals of the White Paper Cmd 6420. As to the United States of America see Stuart, *American Diplomatic and Consular Practice* (1936), pp. 41-181, and the same, *The Department of State* (1949); Hulen, *Inside the Department of State* (1939). Leaves and Wilcox in *American Political Science Review*, 38 (1944), pp. 289-301; Stowell in *A.J.*, 25 (1931), pp. 516-520; Miller, *ibid.*, 33 (1939), pp. 500-515. See also Wriston, *Executive Agents in American Foreign Relations* (1929). For the United States Act of 1945 concerning the Foreign Service see *A.J.*, 39 (1945), Suppl., p. 159; Atwater in *A.J.*, 39 (1945), pp. 559-565, and 41 (1947), pp. 73-102. As to Japan see Colegrove in *A.J.*, 30 (1936), pp. 585-613. As to Germany see Kraus, *Der auswärtige Dienst des Deutschen*

Reiches (1931). And see generally Genet, *ii*, pp. 77-188, for a useful survey of the organisation of the Foreign Offices of the principal countries. See also Calet, *Memento à l'usage des chancelleries diplomatiques et consulaires* (1933) (a practical handbook of diplomatic practice published under the auspices of the French Foreign Office). Allard, *Le Quai-d'Orsay* (1938). On parliamentary control of foreign relations see Mirkine-Guetzévitch in *Hague Recueil*, 56 (1936) (ii), pp. 219-297.

² For the Final Act of the Meeting at Panama in 1939 see *A.J.*, 34 (1940), Suppl., pp. 1-20; for the Final Act and Convention adopted at the meeting in July 1940 see *ibid.*, 35 (1941), Suppl., pp. 1-32.

³ Cmd. 6689 (1945).

⁴ *T. Annette*; *The Dora* [1919] P. 105; *The Ogara* [1919] P. 35; *Luther v. Sagor* [1921] 1 K.B. 456; [1921] 3 K.B. 532. And see, generally, Lyons in *B.Y.*, 23 (1946), pp. 240-281, for a valuable survey of English practice, 21 (1947), pp. 116-

whether recognition has been granted to conquest by another State or to other changes of territorial title,¹ and, generally, whether certain territory is under the sovereignty of one foreign State or another²; (c) the sovereign status of a foreign State or its monarch³; (d) the commencement and termination of a state of war against another country⁴; (e) the question whether a state of war exists with a foreign country⁵ or between two foreign countries⁶; (f) the existence of a case for reprisals in maritime war⁷; (g) the question whether a person is entitled to diplomatic status⁸; and (h) the existence or extent of British jurisdiction in a foreign country.⁹

That practice does not seem to be open to objection. It is clear that, with regard to the various questions coming within the scope of its functions, the executive organ charged with the conduct of foreign relations is in a position to

147 (as to the United States), and 25 (1948), pp. 180-210 (as to Latin-American and Continental countries). And see the same, *ibid.*, 29 (1952), pp. 227-264, on the 'temporising' certificate of the Foreign Office. As to the position in the United States see also U. B. R. in *Pennsylvania Law Review*, 97 (1948), pp. 79-94. And see Payot, *Les instructions du gouvernement lors de l'interprétation judiciaire du droit international* (1950).

¹ *Bank of Ethiopia v. National Bank of Egypt and Liquors* [1937] Ch. 513.

² *Foster v. Globe Venture Syndicate* [1900] 1 Ch. D. 811. According to § 15 (2) of the Trading with the Enemy Act, 1939, the certificate of a Secretary of State was made decisive, for the purpose of the Act, on the question whether any area is or was under the sovereignty or in the occupation of any State as well as on the question of the time at which any such area became or ceased to be under the sovereignty or occupation of a State. In *The Fagernes* [1927] P. 311, the Court of Appeal considered itself bound by the statement of the Attorney-General that a particular spot in the Bristol Channel was not within the territorial jurisdiction of the Crown. The majority of the Court considered that this was a statement

of fact upon a matter particularly within the cognisance of the Crown. See also *Price v. Griffin* - reported and commented upon by Lyons in *B Y*, 26 (1949) pp. 433-437 - for an unusual instance of a communication to the Court by the Foreign Office *proprio motu* as the subject of diplomatic immunity.

³ *Moghell v. Sultan of Johore* [1894] 1 Q.B. 149; *Duff Development Co. v. Government of Kelantan* [1924] A.C. 797. In the former case Lord Esher disapproved of Lord Phillimore's judgment in *The Charkieh* (L.R. 4 A.E. 59) in so far as the latter undertook an independent examination of the status of the Khedive of Egypt.

⁴ *Janson v. Drifontaine Consolidated Mines* [1902] 2 A.C. at p. 500.

⁵ See *R. v. Bothwell*, [1947] K.B. 41.

⁶ *Kawasaki Kisen Kaisha v. Kawasaki of Kobe v. Bantam S S Co* [1938] 3 All E.R. 80 (King's Bench Division) and, with some hesitation, [1939] 2 K.B. 544 (Court of Appeal).

⁷ *The Zamora* [1916] 2 A.C. at p. 98; *The Stigstad* [1919] A.C. 279.

⁸ *Musmann v. Engelke* [1928] A.C. 433. See below, § 401 (n.).

⁹ *North Chartered Exploration Company (1910) Limited v. The King* [1931], 1 Ch. 169; and Note in *Annual Digest*, 1929-1930, Case No. 13.

supply authoritative¹ information as to facts of which courts, in consequence, take judicial notice. Yet, notwithstanding their reliance on the statements of the executive as to these questions of fact, courts are free to draw the proper conclusions of law from the position as ascertained by the executive.² Although, for instance, the statement of the Foreign Office is conclusive on the question whether a foreign authority is or is not a recognised sovereign State or Government, it is for the court to draw the appropriate legal conclusions from the information thus supplied to it.³ On the other hand in the United States courts have tended to accept as binding the conclusions of the State Department on substantive questions of law, such as whether a claim to immunity put forward by a foreign State or Government is well founded.⁴ French courts have gone even further in

¹ This circumstance, as distinguished from any necessity of avoiding embarrassment to the executive, supplies an adequate explanation of the existing practice. It is convenient, when the question arises whether a foreign authority possesses the necessary requirements of statehood or governmental capacity, that the answer to that question be given by the executive in the form of a statement relating to the recognition or otherwise of such foreign authority as fulfilling the requisite conditions of fact. Requirements of international intercourse demand that the judicial and executive organs of the State should not speak with two voices on questions of fact of interest to other States. See also above, § 75, in connection with recognition.

² When, as occasionally happens, the statement of the Foreign Office lacks clarity on account of the novelty or the complexity of the facts which it is requested to certify, the Court is presumed to have the power - and the duty - to interpret the certificate in accordance with the principles of International Law applicable to the situation. See, on the form of Foreign Office certificates, Lauterpacht in *H.Y.*, 20 (1939), pp. 125-128. See also the same in *Modern Law Review*, 3 (1939), pp. 1-20. And see the observations of Greene M.R. in *Kawasaki Kisen, etc. v. Bantham S.S.*

Co. [1939] 2 K.B. 544 (at pp. 552-556).

³ Thus it is for the courts to determine to what extent recognition necessitates giving effect to the legislation of the recognised authority, to what extent it is retroactive, what are the effects of *de facto* recognition, and the like. The Foreign Office does not consider itself to be under a duty to supply information on all relevant questions of fact. Thus, for instance, in *White, Child & Beney Ltd. v. Simmons* (1922) 38 T.L.R. 367, the Foreign Office declined to answer the question as to the date from which the recognition of the Soviet Government should be considered to be retroactive.

⁴ In *Ex parte Republic of Peru* (1943) 318 U.S. 578, the Supreme Court expressly laid down the rule that a foreign Government may present its claim to immunity either before the Court or before the Department of State, in which latter case the Court is bound by the 'recognition and allowance of the claim [to immunity] by the State Department and certification of its action presented to the court by the Attorney General'. The same Court has held that on 'the State Department has certified a foreign public vessel to be immune from jurisdiction, courts may not assume jurisdiction so 'as to embarrass the executive arm of the Government in conducting foreign relations': *The Ucayali* (1943) 318

that direction and have often relied on the executive Department as the exclusive agency for the interpretation of treaties which they have been called upon to construe.¹

U.S. 578; *Annual Digest*, 1941-1942, Case No. 53. See also, as to the statements of the Executive with regard to a claim to jurisdictional immunity put forward by a foreign Government, *Banco de España v. Federal Reserve Bank of New York*, decided in 1940 by a United States Circuit Court of Appeals: 114 F. (2d) 478; *Annual Digest*, 1938-1940, Case No. 6. The position in the United States was reviewed with some clarity by the United States Circuit Court of Appeals (Second Circuit) in *Sullivan v. State of São Paulo* (1941) 122 F. (2d) 355; *Annual Digest*, 1941-1942, Case No. 50. It appears from this case that while courts will accept as accurate the recital of facts, submitted by the foreign State, underlying the claim to immunity and transmitted to the Court by the Executive, they will exercise discretion in applying the facts to the claim of immunity. For a somewhat drastic affirmation by the Supreme Court of the right of the executive department to determine the question of immunity see *Republic of Mexico v. Hoffmann* (1945), 324 U.S. 30; *A.J.*, 39 (1945), p. 585; and see for a trenchant criticism of that decision Jessup, *ibid.*, 40 (1946), pp. 168-172. However, see *Miller et Al. v. Ferrocarril del Pacífico de Nicaragua* where the Supreme Judicial

Court of Maine accepted as conclusive the 'suggestion' of the Attorney-General of the United States to the effect that the defendant corporation, being an agency of a foreign sovereign Government, was entitled to immunity and that it has in fact been treated as such by the Executive Department: (1941) 137 Maine, 251, *Annual Digest*, 1941-1942, Case No. 51. It has been held by the New York Court of Appeals that the mere transmission—as distinguished from an affirmative pronouncement—by the Executive of a claim to immunity does not preclude the Court from examining the truth of the allegations of fact on which the claim is based: *Lamont v. Travelers Insurance Company* (1939) 281 N.Y. 362; *A.J.*, 34 (1940), p. 349; *Annual Digest*, 1938-1940, Case No. 73. See also Deak in *Columbia Law Review*, 40 (1940), p. 453. As to the executive control of foreign relations in the United States see a memorandum in Hackworth N. § 421. And see above, § 89a.

¹ See the literature referred to in Lauterpacht, *Function of Law*, p. 389, n. 1, and, in particular, Rousseau, i. pp. 411-414, and 645-675. See also *La Compagnie des Services Contractuels v. Tito Landi*, *Annual Digest* 1935-1937, Case No. 216.

CHAPTER II

DIPLOMATIC ENVOYS

I

THE INSTITUTION OF LEGATION

Grotius, n. c. 18 -Philimore n. §§ 148-153 -Nys n. pp. 393-395 -Rivier, i. § 35 -Sibert, pp. 9-18--Gentili, *De legationibus libri III.* (1585)--Wicquefort, *L'ambassadeur et ses fonctions* (1690)--De Callere, *De la manière de négocier avec les souverains* (1716) (English translation by White, 1919)--Bynkershoek, *De foro legatorum* (1721)--Miruss, *Das europäische Gesandtschaftsrecht* (2 vols., 1847)--Charles de Martens, *Le guide diplomatique* (2 vols., 1832; 5th ed. by Geffcken, 1866)--Montague Bernard, *Four Lectures on Subjects connected with Diplomacy* (1868), pp. 111-162 (3rd Lecture)--Pradier-Fodéré, *Cours de droit diplomatique* (2 vols., 2nd ed., 1899)--Lohr, *Manuel théorique et pratique des agents diplomatiques* (1888)--Hill, *History of Diplomacy in the International Development of Europe*, i. (1905), ii. (1906), iii. (1914)--Foster, *The Practice of Diplomacy* (1906)--Genet, i. pp. 3-72, 75-98; ii. pp. 613-645--Satow, pp. 55-71, 87-117--Heatley, *Diplomacy and the Study of International Relations* (1919)--Wynen, *Die päpstliche Diplomatie* (1922), pp. 45-63--Adair, *The Extritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929)--Mowat, *Diplomacy and Peace* (1935)--Ogdon, *Juridical Basis of Diplomatic Immunity* (1936)--Vaughan Williams in *Hague Review*, 1924 (iii.), pp. 230-288 Dupuis, *ibid.*, i. pp. 287-321--Behrens in *English Historical Review*, 49 (1931), pp. 640-656--Stuart in *Hague Recueil*, vol. 48 (1934) (ii.), pp. 463-492.

§ 358. Legation, as an institution for the purpose of negotiating between different States, is as old as history, whose records are full of examples of legations sent and received by the oldest nations. It is remarkable that even in antiquity, where no such law as the modern International Law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct. Yet permanent legations were unknown till very late in the Middle Ages. The fact that the Popes had permanent representatives--so-called *apocrisarii* or *responsales*--at the court of the Frankish kings and at

Constantinople until the final separation of the Eastern from the Western Church, ought not to be considered as the first example of permanent legations, as the task of these papal representatives had nothing to do with international affairs, but with those of the Church only.¹ It was not until the thirteenth century that the first permanent legations made their appearance. The Italian republics, and Venice in particular, set the example² by keeping representatives stationed at one another's capitals for the better negotiation of their international affairs. And in the fifteenth century these republics began to keep permanent representatives in Spain, Germany, France, and England. Other States followed the example. Special treaties were often concluded stipulating for permanent legations, such as one in 1520, for instance, between the King of England and the Emperor of Germany. From the end of the fifteenth century England, France, Spain, and Germany kept up permanent legations at one another's courts. But it was not until the second half of the seventeenth century that permanent legations became a general institution, the Powers following the example of France under Louis XIV. and Richelieu. Grotius,³ it may be noted, thought permanent legations to be wholly unnecessary. However, although improved means of transport and communication tend in modern times to render their function somewhat less important than it was, they still constitute a most important channel of intercourse between States.

Diplo-
macy.

§ 359. The rise of permanent legations created the necessity for a new class of State officials, the so called diplomatists; yet it was not until the end of the eighteenth century that the terms 'diplomatist' and 'diplomacy' came into general use. And although the art of diplomacy is as old as official intercourse between States, such a special class of officials as are now called diplomatic envoys did not,

¹ See W'ynen, *op. cit.* And see Duflot, *Les envoyés du pape en France le nonce et le légat* (1937).

² See Nya, *Les origines du droit international* (1894), p. 295. See also on the origin of permanent diplomatic missions Weckman in *R.G.*, 56

(1952), pp. 161-183.

³ *De jure belli ac pacis*, II. c. 18, § 3. 'Optimo autem jure rejici possunt, quae nunc in usu sunt legationes assidue, quibus quam non sit opus docet mos antiquus, cui illae ignoratae.'

and could not, exist until permanent legations had become a general institution. In this, as in other cases, the office has created the class of men necessary for it. International Law has nothing to do with the education and general character of these officials. Every State is naturally competent to create its own rules,¹ if any, as regards these points. Nor has International Law anything to do with *diplomatic usages*, although these are more or less of importance, as they may occasionally grow into customary rules of International Law.

§ 359a. Of the diplomatic usages the one relating to the language of diplomatic intercourse requires special consideration. This language was formerly Latin, but through the political ascendancy of France under Louis XIV. it came to be French. However, this was a usage of diplomacy only, and not a rule of International Law.² Each State can use its own language in all official communications to other States, and States which have the same language regularly do so in their intercourse with each other. But between States of different tongues and, further, at conferences and congresses, it is convenient to make use of a language which is generally known. This was for a time almost exclusively French, but nothing could prevent diplomatists from dropping French at any moment and adopting another language instead. Article 120 of the General Treaty of the Vienna Congress of 1815 expressly observes that the fact of the French language having been exclusively employed

¹ As to these see *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, edited by Feller and Hudson, 2 vols (1933). See also Strupp in *Z. I.*, 25 (1915), pp. 55-120; Zorn, *Deutsches Gesandtschafts- und Konsularrecht*, in Stier-Somlo's *Handbuch* (1920); Lay, *Foreign Service of the United States* (1925), with special reference to the reorganization under the Rogers Act of 1924; Stuart, *American Diplomatic and Consular Practice* (1936). And see above, p. 765, n. 1.

² See Mirus, *Das europäische Gesandtschaftsrecht* (1847), I. §§ 266-268, and Scott, *Le Français, langue diplo-*

matique moderne (1924). For a translation of an interesting letter by Grotius on the training of an ambassador see *A.J.*, 23 (1929), pp. 619-625 (with an introduction by Reeves). And see Etienne Dolet on the Functions of the Ambassador, 1541, *ibid.*, 27 (1933), pp. 80-95 (with an introduction by Reeves), and Behrens in *English Historical Review*, 31 (1936), pp. 616-627, for a learned survey of treatises on the ambassador written in the fifteenth and early sixteenth centuries. See also Wilson, *The Education of a Diplomat* (1938), and Nicolson, *Diplomacy* (1939).

in all the copies of that treaty is not to be construed into a precedent for the future, and that every Power reserves to itself the right to adopt, in future negotiations and conventions, the language which it had previously employed in its diplomatic relations. At the Peace Conference at Paris in 1919 the English and French languages were treated on a footing of equality, and the English and French texts of the Treaty of Peace with Germany, which included the Covenant of the League of Nations, were both authentic.¹ At the Conference at San Francisco in 1945 English and French were the working languages. Other languages used at the Conference were translated into English and French. The text of the Charter of the United Nations adopted at San Francisco was drawn up in English, French, Russian, Chinese and Spanish. All five texts were declared to be equally authentic. The First General Assembly of the United Nations adopted detailed rules concerning languages.² According to these rules, in all organs of the United Nations other than the International Court of Justice, Chinese, French, English, Russian and Spanish are the official languages, and English and French the working languages.³

II

RIGHT OF LEGATION

Grotius, ii. c. 18—Vattel, iv. §§ 56-68—Hall, § 98—Phillimore, ii. §§ 115-139—Genet, ii. pp. 6-76—Bluntschli, §§ 159-165—Heffter, § 200—Gölpken

¹ For a useful synopsis of languages used in treaties see Hudson in *A.J.*, 26 (1932), pp. 369-372. See also Roumiguère, *Le Français dans les relations internationales* (1926); Weck in *Juristische Wochenschrift*, 57 (1928), p. 1862; Métall in *Z.o.R.*, 9 (1930), pp. 356-389. And see Sheriton, *Cosmopolitan Conversation. The Language Problems of International Conversation* (1933); Gaselee, *The Language of Diplomacy* (1939).

² *Journal of the General Assembly, First Session*, p. 600.

³ This means, in particular that: (1) speeches made in either of the

working languages must be interpreted into the other working language; (2) speeches made in any of the other three official languages must be interpreted into both working languages; (3) any delegate may make a speech in a language other than an official language, in which case he must himself provide for interpretation into one of the working languages; (4) *verbatim* records are to be drawn in both working languages; (5) summary records as well as all resolutions and other important documents must be made available in the official languages.

in *Holtendorff*, iii. pp. 620-631—Ullmann, § 45—Rivier, ¹i. § 35—Nys, ii. p. 392—Fauchille, §§ 658-667—Pradier-Fodéré, iii. §§ 1225-1256—Fiore, ²ii. §§ 1112-1117—Calvo, iii. §§ 1321-1325—Martens, ii. §§ 7, 8—Do Louter, ii. pp. 21-25—Oruchaga, §§ 593, 606, 607—Satow, §§ 184-211—*Preuss in New York University Law Quarterly Review*, 10 (1932-1933), pp. 170-187.

§ 360. The right of legation is the right of a State to send and receive diplomatic envoys. The right to send such envoys is termed *active* right of legation, in contradistinction to the *passive* right of legation, as the right to receive such envoys is termed. Some writers¹ on International Law assert that no right, but a mere competence, to send and receive diplomatic envoys exists according to International Law, maintaining that no State is bound by International Law to send or receive such envoys. But this is certainly wrong in its generality. Obviously a State is not bound to send diplomatic envoys or to receive *permanent* envoys. But, on the other hand, the very existence² of the community of States makes it necessary for the members, or some of the members, to negotiate occasionally on certain points. Such negotiation would be impossible in case one member could always, and in all circumstances, refuse to receive an envoy from the other members. The duty of every member to listen, in ordinary circumstances, to a message from another member brought by a diplomatic envoy is therefore, an outcome of its very membership of the international community, and this duty corresponds to the right of every member to send such envoys. But the exercise of the active right of legation is discretionary. No State need send diplomatic envoys at all, although practically all States do at least occasionally send such envoys, and most States send permanent envoys to many other States. The passive right of legation is discretionary as regards the reception of *permanent* envoys only.

The United Nations, being an International Person *sui generis*, possesses the right of legation, although it is not a State.³

¹ See, for instance, Wheaton, § 207; Heilborn, *System*, p. 182.

² See above, § 141.

³ As to the League see Corbett in *B.Y.*, 1924, pp. 122, 123; and see below, § 417a.

What
States
possess
the Right
of Lega-
tion.

§ 361. Not every State possesses the right of legation. This right belongs chiefly to full sovereign States,¹ for other States possess it under certain conditions only.

(1) Half sovereign States, such as States under the suzerainty or the protectorate of another State, can, as a rule, neither send nor receive diplomatic envoys. But there may be exceptions to this rule. Thus, according to the Peace Treaty of Kainardji of 1774 between Russia and Turkey, the two half sovereign principalities of Moldavia and Wallachia had the right of sending *chargés d'affaires* to foreign Powers. Thus, further, before the Boer War, the South African Republic, which was, in the opinion of Great Britain, a State under British suzerainty, used to keep permanent diplomatic envoys in several foreign States.

(2) Part sovereign member-States of a Federal State may, or may not, have the right of legation as well as the Federal State. It is the constitution of the Federal State which regulates this point. Thus, the member-States of Switzerland and of the United States of America have no right of legation, but those of the German Empire before the First World War certainly had. Bavaria, for example, used to send and receive diplomatic envoys.²

By whom
the Right
of Lega-
tion is
exercised

§ 362. As, according to International Law, a State is represented, in its international relations by its Head, its right of legation is exercised through him. But just as Municipal Law designates the person who is the Head of the State, so it may impose certain conditions and restrictions upon him as regards the exercise of this right. And the Head himself may, provided that that is sanctioned by the Municipal Law of his State, delegate³ the exercise of this right to any representative he chooses.

A revolutionary party which is recognised as a belligerent Power has nevertheless no right of legation, although foreign States may negotiate with it in an informal way through political agents without diplomatic character,⁴ to provide for the temporary security of the persons and property of

¹ As to the Holy See, see above, § 106.

² See above, § 89.

³ See Phillimore, ii. §§ 126-129.

⁴ Some information as to the quasi-

diplomatic character of such agents will be found in the literature upon the case of the *Trent* in 1861; see below, vol. ii. § 406.

§ 363] KINDS AND CLASSES OF DIPLOMATIC ENVOYS 775

their subjects within the territory under the actual sway of such a party. International practice abounds in instances of various forms of intercourse not intended as and not amounting to recognition as a Government or a State.¹

Neither an abdicated nor a deposed Head has a right to send or receive diplomatic envoys.²

§ 362a. No State is legally obliged to continue diplomatic relations with another when the latter is abusing the opportunities afforded thereby or when acute disagreement has arisen between the two States. In such circumstances a State may break off diplomatic relations by recalling its own envoy and either requesting the other State to do the same or presenting its envoy with his passport. It must be noted that, however prolonged, interruption of diplomatic relations is not tantamount to withdrawal of recognition or a refusal to grant recognition.³

The outbreak of war, if it has not already been preceded by the rupture of diplomatic relations, causes such rupture to occur.⁴

III

KINDS AND CLASSES OF DIPLOMATIC ENVOYS

Vattel, iv. §§ 69-75—Phillimore, ii. §§ 211-226—Moore iv § 62¹—Hackworth, iv. §§ 370, 371—Hyde, i. § 411—Heffter, § 208—Geffcken 1—Holtzendorff, iii. pp. 635-646—Calvo, iii. §§ 1326-1336—Fauchille, §§ 668-676—Pradier-Fodéré, iii. §§ 1277-1290—Rivier, i. pp. 443-453—Nys, ii. pp. 386-400—De Louter, ii. pp. 27-31—Suarez, §§ 237-244—Satow §§ 276-305—Keith's Wheaton, pp. 444-449—Genet, i. pp. 266-415—*B.Y.*, 1920-1921, pp. 97-108 (as to the British service)—Baty in *Gratius Society*, 8 (1923), pp. 21-38—Hill in *A.J.*, 21 (1927), pp. 737-742—Deak in *R.I.*, 3rd ser., 9 (1928), pp. 173-192—Behrens in *Transactions of the Royal Historical Society*, 1933, pp. 161-195.

§ 363. Two different kinds of diplomatic envoys are to be distinguished—namely, such as are sent for political negotiations, and such as are sent for the purpose of ceremonial and Political.

¹ See Lauterpacht in *B.Y.*, 21 (1944), pp. 131-141.

² See Phillimore, ii. §§ 124-125, on the case of Bishop Ross, ambassador of Mary Queen of Scots.

³ See *Princess Olga Paley v. Weiz*, [1929] 1 K.B. 718. On the effect of the severance of diplomatic relations on treaties see *Harvard Research* (1935, Part III.), pp. 1055-1066.

⁴ See below, vol. ii. § 98.

monial function* or notification of changes in the headship. For States very often send special envoys to one another on occasions such as coronations, weddings, funerals, jubilees, and the like ; and it is also usual to send envoys to announce a fresh accession to the throne. Such envoys ceremonial have the same standing as envoys political for actual State negotiations. Among the envoys political, again, two kinds are to be distinguished—namely, (1) such as are permanently or temporarily accredited to a State for the purpose of negotiating with such State, and (2) such as are sent to represent the sending State at a congress or conference. The latter are not, or need not be, accredited to the State on whose territory the congress or conference takes place but they are nevertheless diplomatic envoys, and enjoy all the privileges of such envoys as regards exterritoriality and the like which concern the inviolability and safety of their persons and the members of their suites

**Classes
of Diplo-
matic
Envoys.**

§ 364. Diplomatic envoys accredited to a State differ in class. These classes did not exist in the early stages of International Law. But during the sixteenth century a distinction between two classes of diplomatic envoys gradually arose, and by about the middle of the seventeenth century, after permanent legations had come into general vogue, two such classes became generally recognised namely, extraordinary envoys, called Ambassadors, and ordinary envoys, called Residents ; Ambassadors being received with higher honours and taking precedence of the other envoys. Disputes arose frequently regarding precedence, and the States tried in vain to avoid them by introducing during the eighteenth century another class namely, the so-called Ministers Plenipotentiary. At last the Powers assembled at the Vienna Congress came to the conclusion that the matter ought to be settled by an international understanding, and they agreed, therefore, on March 19, 1815, upon the establishment of three different classes—namely, first, Ambassadors ; second, Ministers Plenipotentiary and Envoys Extraordinary ; third, *Chargés d’Affaires*. The five Powers assembled at the Congress of Aix-la-Chapelle in 1818 agreed upon a fourth class—namely, Ministers Resident,

to rank between Ministers Plenipotentiary and *Chargés d'Affaires*. All the other States either expressly or tacitly accepted these arrangements, so that nowadays the four classes are an established order.¹ Although their privileges are materially the same, they differ in rank and honours, and they must therefore be treated separately.

§ 365. Previously only States enjoying royal honours² Ambassadors. were entitled to send and to receive Ambassadors, as was also the Holy See, whose first-class envoys are called *Nuncios*, or *Legati a latere* or *de latere*.³ Since the Second World War most other States, however small, have adopted the practice of appointing ambassadors—in particular to Great Powers.⁴ Ambassadors are considered to be personal representatives of the Heads of their States, and enjoy, for this reason, special honours. Their chief privilege—namely, that of negotiating with the Head of the State personally—has, however, little value nowadays, as all States have, to a certain extent, constitutional government, and this necessitates that all the important business should go through the hands of a Foreign Secretary. Ambassadors can also claim the title of 'Excellency,' and it is asserted that they can at all times ask for an audience from the Head of the State to whom they are accredited.

§ 366. The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal

Ministers Plenipotentiary and Envoys Extraordinary.

¹ The League Codification Committee considered the desirability and feasibility of a revision of this classification; see above, § 36 (n.). The Russian Soviet Government in June 1918 abolished the distinction as regards their own diplomatic envoys and substituted a single class of 'Plenipotentiary Representatives'; nevertheless, that Government in accrediting an envoy indicates in brackets his class in accordance with the 1815-1818 classification; see Sabinine in *Bulletin de l'Institut Intermédiaire International*, 8 (1923), pp. 214, 215. In December 1928, in view of the friendly relations between the Soviet Union and Afghanistan, the diplomatic representatives of the two countries were elevated to the rank of ambassador: see Taracouzio,

The Soviet Union and International Law (1935), p. 181.

² See above, § 117 (1).

³ There is no difference in rank between *Nuncios* and *Legati a latere* or *de latere*. A *legatus a latere* or *de latere* is a Papal envoy who is a Cardinal, whereas a *Nuncio* is not a Cardinal.

⁴ While in 1822 six States were represented in Great Britain by ambassadors (Austria, Russia, France, Spain, the Netherlands and Turkey), their number in 1954 was 46. In 1914 Great Britain was represented abroad by 9 Ambassadors and 26 Ministers; in 1936 by 16 Ambassadors and 36 Ministers; in 1945 by 27 Ambassadors and 25 Ministers; in 1954 by 46 Ambassadors and 26 Ministers.

Internuncios, are not considered to be personal representatives of the heads of their States. Therefore they do not enjoy all the special honours of the Ambassadors, have not the privilege of treating with the Head of the State personally, and cannot at all times ask for an audience with him. But otherwise there is no difference between these two classes, except that Ministers Plenipotentiary receive the title of 'Excellency' by courtesy only, and not by right.

Ministers
Resident.

§ 367. The third class, the Ministers Resident, enjoy fewer honours, and rank below the Ministers Plenipotentiary. But beyond the fact that Ministers Resident do not enjoy the title 'Excellency,' even by courtesy, there is no difference between them and the Ministers Plenipotentiary.

Chargés
d'Affaires.

§ 368. The fourth class, the Chargés d'Affaires, differ chiefly in one point from the first, second, and third classes--namely, in that they are accredited from Foreign Office to Foreign Office, whereas the other classes are accredited from Head of State to Head of State. Chargés d'Affaires do not enjoy, therefore, so many honours as other diplomatic envoys.

A distinction ought to be made between a Chargé d'Affaires who is the head of a legation and who, therefore, is accredited from Foreign Office to Foreign Office, and a Chargé d'Affaires *ad interim*. The latter is a member of a legation whom the head of the legation delegates for the purpose of taking his place during absence on leave. Such Chargé d'Affaires *ad interim*, who had better be called a Chargé *des Affaires*,¹ ranks below the regular Chargé d'Affaires; he is not accredited from Foreign Office to Foreign Office, but is simply a delegate of the absent head of the legation.

The Diplo-
matic
Corps.

§ 369. All the diplomatic envoys accredited to the same State form, according to a diplomatic usage, a body which is styled the 'Diplomatic Corps.' The head of this body, the so-called 'Doyen,' is the Papal Nuncio, or, in case there is no Nuncio accredited, the oldest Ambassador, or, failing Ambassadors, the oldest Minister Plenipotentiary, and so

¹ See Rivier, i. pp. 451-452.

on.¹ As the Diplomatic Corps is not a body legally constituted it performs no legal functions, but it is nevertheless of great importance, as it watches over the privileges and honours due to diplomatic envoys.²

IV

APPOINTMENT OF DIPLOMATIC ENVOYS

Vattel, iv. §§ 76, 77—Phillimore, ii. §§ 227-231—Calvo, iii §§ 1343-1345—Nys, ii. p. 402—Fauchille, §§ 677-680—Wheaton, §§ 217-220—Moore, iv. §§ 632-635—Hackworth, iv. §§ 381-383—De Louter, ii p. 25-27—Suarez, §§ 245-249—Satow, §§ 212-224—Genet, i pp. 149-265, ii. pp. 190-272—*Harvard Research* (1932), pp. 67-77

§ 370. International Law has no rules as regards the qualifications of the individuals whom a State can appoint as diplomatic envoys, States being naturally competent to act according to discretion, although of course there are many qualifications a diplomatic envoy must possess to fill his office successfully. The Municipal Laws of many States comprise, therefore, many details as regards the knowledge and training which a candidate for a permanent diplomatic post must possess, whereas, regarding envoys ceremonial, even the Municipal Laws have no provisions at all. In the past the question was occasionally discussed whether women³ might be appointed as envoys. Prior to the twentieth century history relates only few cases of women diplomatists. Thus, for example, Louis XIV. of France accredited in 1646 Madame de Guébriant as ambassador to the Court of Poland. During the eighteenth and nineteenth centuries no such cases have,

Person
and Quali-
fications
of the
Envoy.

¹ In a Note accompanying the Treaty of Alliance between Great Britain and Egypt of August 26, 1936, the latter undertook to consider the British Ambassador as senior to the other diplomatic representatives accredited to the King of Egypt: Treaty Series, No. 6 (1937), Cmd. 5360, p. 18. As to the rules of precedence observed in the United States see Hackworth, iv. § 419.

² With regard to the diplomatic status of certain non-diplomatic persons see below, § 417a.

³ See Mirus, *Das europäische Gesandtschaftsrecht*, i. §§ 127, 128; *Embassies and Foreign Courts* (Anon.), pp. 102-109; Phillimore, ii. § 134; and Focherini, *Le Signore Ambasciatrici dei secoli xvii. e xviii. e loro Posizioni nel Diritto diplomatico* (1909).

it appears, occurred. However, since the First World War women have been appointed in a number of cases.¹

Letters of
Credence,
Full
Powers,
Passports.

§ 371. The appointment of an individual as a diplomatic envoy is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the receiving State. *Letter of Credence* (*lettre de créance*) is the designation of the document in which the Head of the State accredits a permanent ambassador or minister to a foreign State. Every such envoy receives a sealed letter of credence, and an open copy. As soon as he arrives at his destination, he sends the copy to the Foreign Office in order to make his arrival known. The sealed original, however, is handed personally by the envoy to the Head of the State to whom he is accredited. *Chargés d'affaires* receive a letter of credence too, but as they are accredited from Foreign Office to Foreign Office, their letter of credence is signed, not by the Head of their home State, but by its Foreign Office. Now a permanent diplomatic envoy needs no other empowering document if he is not entrusted with any task outside the limits of the ordinary business of a permanent legation. But in case he is entrusted with such a task as, for instance, the negotiation of a special treaty or convention, he requires a special empowering document—namely, so-called *Full Powers* (*plénipouvoirs*). These are given in letters-patent signed by the Head of the State,² and they are either limited

¹ Thus Madame Kollontai was received successively by Mexico (see below, § 398 (n)), Norway (in 1926) and Sweden as the diplomatic representative of Russia. In 1921 Soviet Russia received a woman as the diplomatic representative of the Far Eastern Republic. In 1935 the United States appointed Mrs. Ruth Bryan Owen as Minister to Denmark. In 1940 it appointed women diplomatic representatives to Luxembourg and Denmark and in 1953 to Italy. India appointed, in 1949, a woman ambassador to Soviet Russia and the United States. On February 17 1928, the French Government announced in the *Journal Officiel* that women would be admitted to compete

in the entrance examinations for the Diplomatic Service on the same terms as men. Following upon a majority report of an Inter-Departmental Committee, the British Government announced in April 1936 that 'the general interest of the State' would not be better served if women were admitted to the Diplomatic and Consular Services. *Mem. No. 5* (1936), Cmd. 5166. This decision was reversed as the result of a report of a Government Committee in March 1946. A small number of women have since been appointed to senior posts in the diplomatic service.

² As to Full Powers issued to the representatives of the British Dominions see above, § 946.

or unlimited full powers, according to the requirements of the case.

§ 372. As a rule, a State appoints different individuals as permanent diplomatic envoys to different States; but occasionally, in particular for reasons of economy, a State appoints the same individual as permanent diplomatic envoy to several States. Combined Legations.

§ 373. In former times States used frequently ¹ to appoint more than one permanent diplomatic envoy as their representative in a foreign State. That practice is not altogether obsolete. Thus during the Second World War Great Britain was represented in the United States, in addition to the Ambassador, by one or more persons of the rank of minister. It happens frequently that States appoint several envoys for the purpose of representing them at congresses and conferences. In such cases one of the several envoys is appointed senior, and the others are subordinate to him. Appointment of Several Envoys.

V

RECEPTION OF DIPLOMATIC ENVOYS

Vattel, iv. §§ 65-67--Hall, § 98--Phillimore, ii. 133-139--Moore, iv. §§ 635, 637, 638--Hackworth, iv. §§ 383, 385, 386--Hyde, i. §§ 420, 422, 425--Martens, ii. § 8--Calvo, iii. §§ 1353-1356--Pradier-Fodéré, iii. §§ 1253-1260--Fiore, ii. §§ 1118-1120, 1124--Rivier, i. pp. 455-457--Nys, ii. pp. 400-402--Suarez, §§ 245-250--Genet, ii. pp. 273-312--Satow, §§ 225-274.

§ 374. Every State is, in ordinary circumstances, bound to receive diplomatic envoys accredited to itself from other States for the purpose of negotiation. But this duty extends neither to the reception of permanent envoys nor to the reception of temporary envoys in all circumstances. Duty to receive Diplomatic Envoys.

(1) As regards permanent envoys, it is generally recognised that a State is as little bound to receive them as it is to send them. In practice, however every full sovereign State which desires its voice to be heard among the States receives, and sends, permanent envoys, as without such it would, in present circumstances, be impossible for a State

¹ See Mirus, *op. cit.*, i. §§ 117-119.

to have any influence whatever in international affairs. It is for this reason that Switzerland, which in former times abstained entirely from sending permanent envoys, has abandoned her former practice, and nowadays sends, and receives, several.

(2) As regards temporary envoys, it is likewise generally recognised among those writers who assert the duty of a State to receive temporary envoys in ordinary circumstances that there are exceptions to that rule. Thus, for example, a State which knows beforehand the object of a mission, and does not wish to negotiate thereon, can refuse to receive the mission. Thus, further, a belligerent can refuse¹ to receive an envoy from the other belligerent, as war involves the rupture of all peaceable relations.

Refusal to
receive a
certain
Indi-
vidual.

§ 375. But the refusal to receive an envoy must not be confused with the refusal to receive a certain individual as envoy. A State may be ready to receive a permanent or temporary envoy, but may object to the individual selected for that purpose. International Law gives no right to a State to insist upon the reception of the individual appointed by it as diplomatic envoy. Every State can refuse to receive as envoy a person objectionable to itself. And a State refusing an individual envoy is neither compelled to specify what kind of objection it has, nor to justify its objection. Thus, for example, most States refuse to receive one of their own subjects as an envoy from a foreign State.² Italy refused in 1885 to receive Mr. Keiley as ambassador of the United States of America, because he had, in 1871, protested against the annexation of the Papal States. And when the United States sent the same gentleman as ambassador to Austria, the latter refused to re-

¹ But this is not generally recognised. See Vattel, iv. § 67. Phillimore, ii. § 138, and Pradier-Fodéré, iii. § 1255.

² In case a State receives one of its own subjects as diplomatic envoy of a foreign State, it must grant him all the privileges of such envoys, including extraterritoriality; see the case of *Macartney v. Garbutt* (1890) 24 Q.B.D. 348. See, however,

Article 15 of the 'Règlement sur les immunités diplomatiques,' adopted in 1895 by the Institute of International Law (*Annuaire*, 14, p. 244), which denies to such an individual exemption from jurisdiction. And see below, § 394, with regard to taxation. See also Phillimore, ii. § 135; Twiss, i. § 203; Praag, § 70; and Marmo in *Rivista*, 19 (1940), pp. 54 89.

ceive him on the ground that his wife was said to be a Jewess. Although, as is apparent from these examples, no State has a right to insist upon the reception of a certain individual as envoy, in practice States are often offended when reception is refused. Thus, in 1832, England did not cancel for three years the appointment of Sir Stratford Canning as ambassador to Russia, although the latter refused reception, and the post was practically vacant. In 1885, when, as mentioned above, Austria refused reception to Mr. Keiley as ambassador, the United States did not appoint another, although Mr. Keiley resigned, and the legation was for several years left to the care of a chargé d'affaires.¹ To avoid such conflicts, many States follow the good practice of never appointing an individual as envoy without having ascertained beforehand whether he is *persona grata*. It is a customary rule of International Law that a State which does not object to the appointment of a certain individual, when its opinion has been asked beforehand, is bound to receive such individual.² The acceptance of a proposal to appoint a certain individual as envoy is called *agrément*.

§ 376. When a State does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he has arrived at the place of his designation. But the mode of reception differs according to the class to which the envoy belongs. If he be one of the first, second, or third class, it is the duty of the Head of the State to receive him solemnly in an audience with all the usual ceremonies. For that purpose the envoy sends a copy of his credentials to the Foreign Office, which arranges for him a special audience with the Head of the State, when he delivers in person his sealed credentials.³ If the envoy be a chargé d'affaires only, he is received in audience by the Secretary for Foreign Affairs,

Mode and
Solemnity
of Recep-
tion

¹ See Moore, iv. § 638, p. 480. And see for a somewhat different account Satow, §§ 231, 232.

² The question is of interest whether the privileges due to envoys must be granted on his journey home to an individual to whom reception

as an envoy is refused. The question, it is believed, ought to be answered in the affirmative; see, however, Moore, iv. § 660, p. 668.

³ Details concerning reception of envoys are given by Twiss, i. § 215, and Rivier, i. p. 467.

to whom he hands his credentials. Through formal reception the envoy becomes officially recognised, and can officially commence to exercise his functions. It is occasionally maintained¹ that those of his privileges (extritoriality and the like) which concern the safety and inviolability of his person must be granted even before his official reception, as his character as diplomatic envoy is considered to date, not from the time of his official reception, but from the time when his credentials were handed to him on leaving his home State, his passports furnishing sufficient proof of his diplomatic character. It is difficult to assent to this view. A State cannot be expected to grant diplomatic privileges to a person in whose appointment it had not been asked to concur, by *agrément* or otherwise, and whom it has not formally accepted. This applies in particular to members of the diplomatic mission. Thus the Swiss Federal Tribunal rejected, in 1949, the claim to immunity put forward by a certain Vitianu who had been appointed economic counsellor of the Roumanian legation in Berne but was never received as such by the Swiss Government. He was accused of and convicted for certain crimes under Swiss law committed subsequent to his arrival in Switzerland.²

¹ See, e.g., § 376 of the previous editions of this treatise

² *In re Vitianu*, *Schweizerisches Jahrbuch für internationales Recht* 7 (1950), p. 146. While the judgment is believed to be fully in conformity with International Law, it may be observed that it is the duty of the receiving State to inform the sending State, within a reasonable period, that it is not prepared to accept the person in question. In principle, the diplomatic status and immunities of the official concerned result not from the unilateral act of the sending State but from his acceptance, express or implied, by the receiving State. According to English practice, which is in conformity with general practice, a subordinate member of a diplomatic mission is not included in the diplomatic list unless and until (a) his name has been submitted by the Head of his Mission, and (b) he has been recognised and accepted as such by the Government of the United

Kingdom. See *In re Cloete* (1891) 45 T.L.R. 102. See also the observations in *Engelke v. Musmann* [1928] A.C. at pp. 443, 450, 457. As to the United States see *In re Baiz* (1890) 135 U.S. 403. Similarly, it was held in *United States v. Coplon and Gubitcher* (1950) 88 F. Suppl. 915; *A.J.* 41 (1950), p. 586 that the mere fact that a person is a diplomatic officer in the possession of a diplomatic passport and visa does not entitle him to diplomatic immunity if he has not been formally received as a representative of a foreign State. And see Hackworth, vol. 4, pp. 406, 429, and Hyde vol. II, p. 1243. See also *Diplomatic Immunity* (German Foreign Office) (para. Annual Digest, 1925-1926, Case No. 244; *In re Serventi*, *ibid.*, 1919-1922, Case No. 21. For a view differing from that expressed in the text see Strupp and Gliese in *Z.V.* 13 (1926), pp. 3-17 and 18-30 respectively.

§ 377. It must be specially observed that all these details regarding the reception of diplomatic envoys accredited to a State do not apply to the reception of envoys sent to represent the several States at a congress or conference. such envoys are not accredited to the State on whose territory the congress or conference takes place, that State has no competence to refuse ¹ the reception of the appointed envoys, and no formal and official reception of the latter by the Head of the State need take place.

VI

FUNCTIONS OF DIPLOMATIC ENVOYS

Rivier, i. § 37—Fauchille, §§ 681 683 —Pradier Fodere, iii §§ 1346-1376—
 Hyde, i. §§ 444 453—Hackworth, iv. §§ 389 397 De Louter, ii pp 37-39—
 Suarez, §§ 262-265 —Genet, i pp 75-147, ii pp 358 430—Stuart, *American
 Diplomatic and Consular Practice* (1936), pp 236-284—Wolgast in *Hague
 Recueil*, vol. 60 (1937) (ii), pp 314 350.

§ 378. A distinction must be made between the functions of permanent envoys and those of envoys for temporary purposes. The functions of the latter, who are either envoys in ceremonial or envoys political only temporarily accredited for the purpose of some definite negotiations, or as representatives at congresses and conferences, are clearly demonstrated by the very purpose of their appointment. But the functions of the permanent envoys demand closer consideration. Their regular functions may be grouped together under the heads of negotiation,² observation, and protection. But besides these regular functions, a diplomatic envoy may be charged with other and more miscellaneous functions.

§ 379. A permanent ambassador or other envoy represents his home State in the totality of its international relations, not only with the State to which he is accredited but also with other States. He is the mouthpiece of the Head of his home State and its Foreign Secretary, as regards

¹ As to the attitude of the Swiss Government towards Russian 'observers' at League of Nations con-

ferences see Toynbee, *Survey*, 1924, p. 250.

² For the narrower sense of this term see below, § 477.

communications to be made to the State to which he is accredited. He likewise receives communications from the latter, and reports them to his home State.

Observa-
tion.

§ 380. But these are not all the functions of permanent diplomatic envoys. Their task is, further, to observe attentively every occurrence which might affect the interest of their home States, and to report such observations to their Governments.

Protec-
tion.

§ 381. A third task of diplomatic envoys is the protection of the persons, property, and interests of such subjects of their home States¹ as are within the boundaries of the State to which they are accredited. If such subjects are wronged without being able to find redress in the ordinary way of justice, and if they ask help of the diplomatic envoy of their home State, he must be allowed to afford them protection. It is, however, for the Municipal Law and regulations of his home State, and not for International Law, to prescribe the limits within which an envoy should afford protection to his compatriots.

Miscel-
laneous
Func-
tions.

§ 382. Negotiation, observation, and protection are tasks common to all diplomatic envoys of every State. But a State may order its permanent envoys to perform other tasks, such as the registration of deaths, births, and marriages of subjects of the home State, legalisation of their signatures, issue of passports for them, and the like. However, in doing this, a State must be careful not to order its envoys to perform tasks which are by the law of the receiving State exclusively reserved to its own officials. Thus, for instance, a State whose laws compel persons who intend marriage to conclude it in the presence of its registrars, need not allow a foreign envoy to perform a marriage of compatriots until after its registration by the official registrar. So, too, a State need not allow a foreign envoy to perform an act which is reserved for its jurisdiction, as, for instance, the examination of witnesses on oath.²

¹ And, sometimes, of the subjects of other States; see above, § 295.

² On these matters see Morelli in

Rivista, 3rd ser., 1 (1921-1922), pp. 315-341, 538-541.

§ 383. It is universally recognised that envoys must not^{Abstention from} interfere with the internal political life of the State to^{Interfer-} which they are accredited. It certainly belongs to their^{ence in} functions to watch political events and political parties^{Internal} with a vigilant eye, and to report their observations to their^{Politics.} home States. But they have no right whatever to take part in that political life, to encourage one political party,¹ or to threaten another. If they do so, they abuse their position. It matters not whether an envoy acts thus on his own account, or on instructions from his home State. No self-respecting State will allow a foreign envoy to exercise such interference, but will either request his home State to recall him and appoint another individual in his place, or, in case his interference is very flagrant, hand him his passport and therewith dismiss him. History records many instances of this kind,² although in many cases it is doubtful whether the envoy concerned really abused his office for the purpose of interfering with internal politics.

VII

POSITION OF DIPLOMATIC ENVOYS

§ 384. The privileges which, according to International^{Diplo-} Law, are possessed by diplomatic envoys are not rights given^{matio} to them by International Law, but rights given by the^{Envoys} Municipal Law of the receiving States in compliance with^{Objects} of International^{of Inter-} Law.

¹ See Grose in *English Historical Review*. 44 (1929), pp. 625-628, on the French Ambassadors' Reports on financial relations with members of the British Parliament, 1677-1681.

² See Hall (§ 98**), Taylor (§ 322), Moore (iv. § 640), Hackworth (iv. § 393), and Satow (p. 271), who discuss a number of cases, especially that of Lord Sackville who received his passport in 1888 from the United States of America for an alleged interference in the presidential election. In October 1927 the Russian Soviet Government was requested by the French Government to recall its ambassador,

Rakovsky, from Paris, on the ground of a political manifesto signed by him and did so: London *Times* newspaper, October 10, 1927. See also the case of Volhine, First Secretary to the Russian Soviet Embassy in Paris, reported in London *Times* newspaper, May 12, 1925. See above, § 127a. On propaganda by diplomats see Akzin in *International Law and Relations Digest* (Washington), v. (1936) No. 7. On the Chinese occupation of the Russian embassy buildings in Peking in April 1927, on account of alleged communist propaganda, see Yoshitomi in *R.G.*, 35 (1928), pp. 184-192.

an international right belonging to their home States.¹ However, as such rights are accorded to them by Municipal Law in accordance with an obligation prescribed by International Law, the distinction is without substantial significance.²

Privileges
due to
Diplo-
matic
Envoys.

§ 385. Privileges due to diplomatic envoys, apart from ceremonial honours, have reference to their inviolability and to their so-called extritoriality. The reasons why these privileges must be granted are that diplomatic envoys are representatives of States,³ and, further, that they could not exercise their functions perfectly unless they enjoyed such privileges. For it is obvious that, were they liable to ordinary legal and political interference like other individuals, and thus more or less dependent on the goodwill of the Government, they might be influenced by personal considerations of safety and comfort to a degree which would materially hamper them in the exercise of their functions. It is equally clear that if their full and free intercourse with their home States through letters, telegrams, and couriers were liable to interference, the objects of their mission could not be fulfilled. In this case it would be impossible for them to send independent and secret reports to, or receive similar instructions from, their home States. For these and various cognate reasons their privileges seem to be inseparable attributes of the diplomatic function.⁴

VIII

INVIOABILITY OF DIPLOMATIC ENVOYS

Grotius, ii. c. 18, § 4—Vattel, iv. §§ 80-107—Hall, §§ 50, 98*—Phillimore, ii. §§ 154-175—Moore, iv. §§ 657-659—Hackworth, iv. §§ 400-405—Rivier, i. § 38—Nys, ii. pp. 425-428—Fauchille, §§ 684-694 (1)—Sibert, pp. 19-35

¹ That diplomatic privilege is a right of the envoy's home State rather than of the envoy himself is recognised in a number of cases; for instance, *In re Suarez*, *Suarez v. Suarez* [1918] 1 Ch. 176.

² The amalgamation of the diplomatic and consular services into one combined service which has taken place in some countries makes the

questions which arise upon the right to diplomatic privileges more complex; see, for instance, *Muermann v. Engelke* [1928] 1 K.B. 90, in which the decision of the Court of Appeal was reversed by the House of Lords: [1928] A.C. 433. See below, § 419, n.

³ See above, § 121.

⁴ Note Grotius, ii. c. 18, § 9: 'omnis coactio abesse a legato debet.'

—Pradier Fodéré, iii. §§ 1382-1393—Mérynhae, ii. pp. 264-273—Fiore, ii. §§ 1127-1143—Calvo, iii. §§ 1480-1498—Martens, ii. § 11—De Louter, ii. pp. 44-49—Suarez, §§ 277-281—Travers, ii. 837-875, 1326-1342—Praag, § 205—Satow, §§ 312-322—Genet, i. pp. 417-426, 540-561—*Harvard Research* (1932), pp. 99-107, 122-133—Eagleton in *A.J.*, 19 (1925), pp. 293-314—Giese and Strupp in *Z V.*, 13 (1926), Suppl.—Report by Diena and Mastny for League Codification Committee in *A.J.*, 20 (1926), Special Suppl., pp. 151-175, and comment by Stowell in *A.J.*, 20 (1926), pp. 735-738—Hurst in *Hague Recueil*, 1926 (ii.), pp. 124-151.

§ 386. Diplomatic envoys¹ are just as sacrosanct as heads of States.² They must, therefore, be afforded special protection as regards the safety of their persons, and be exempted from every kind of criminal jurisdiction by the receiving States. The protection due to diplomatic envoys must find its expression not only in the necessary police measures for the prevention of offences, but also in specially severe punishments for offenders. Thus, according to English Criminal Law,³ everyone is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries; or who sues forth or prosecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country, or the person of a servant of any such representative, is arrested or imprisoned.⁴ The

Protection due to Diplomatic Envoys

¹ The agents of unrecognised Governments and the agents of Governments only recognised *de facto* are not, at any rate in Great Britain, entitled to diplomatic privileges and immunities: see *Fenton Textile Association v. Krassin* (1922) 38 T.L.R. 259, and Hurst, *op. cit.*, p. 160. An Italian Court declined to concede them to the agent of an unrecognised Government: see the action against Vorovsky, reported in 49 *Hurst* (1922) p. 189.

² As to attacks upon them in newspapers see Hurst, *op. cit.*, pp. 132, 133. For an affirmation of the duty of protection of foreign diplomatic representatives from intimidation see the decision of the United States Court of Appeals, District of Columbia, in 1938; in *Freund v. United States*: *Annual Digest*, 1938-1940, Case No. 161.

³ See Stephen's *Digest of Criminal Law*, Articles 96, 97.

⁴ 7 Anne, c. 12, § 3-6. This statute, which was passed in 1708 in consequence of the Russian ambassador in London having been arrested for a debt of £300, has always been considered as declaratory of the existing law in England, and not as creating new law. Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp. 237-242, criticises this view, but the evidence which he adduces cannot be regarded as proving his contention. The law of many States punishes infractions of the inviolability of diplomatic agents as 'infractions of the law of nations': *Respublica v. De Longchamps* (1784) 1 Dall. 111; Dickinson, *Cases*, p. 810; *United States v. Benner* (1830) Baldw. 234; Hudson, *Cases*, p. 780; Hackworth, iv. § 398; and Hurst, *op. cit.*, pp. 128-130.

protection of diplomatic envoys is not restricted to their own persons, but must be extended to the members of their family and suite, to their official residence,¹ their furniture, carriages, papers,² and likewise to their intercourse with their home States by letters, telegrams, and special messengers.³ Even after a diplomatic mission has come to an end, the archives of an embassy must not be touched, provided they have been put under seal and confided to the protection of another envoy.⁴

Exemption from Criminal Jurisdiction.

§ 387. As regards the exemption of diplomatic envoys from criminal jurisdiction, the doctrine and practice of International Law agree nowadays⁵ that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys.⁶ For a diplomatic envoy must in no respect be considered to be under the jurisdiction of the receiving State. But this does not mean that a diplomatic envoy must have a right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the Municipal Law as do

¹ On the protection of foreign diplomatic and consular premises against picketing see Preuss in *A.J.*, 31 (1937), pp. 706-713. In 1938 the United States Congress passed legislation prohibiting the display of banners and the commission of specified offensive or intimidating acts in the neighbourhood of foreign diplomatic or consular buildings within the District of Columbia: *A.J.*, 32 (1938), Suppl., p. 100. And see for comment thereon Stowell in *A.J.*, 32 (1938), pp. 344-346.

² See Traversa, iii. §§ 1337-1359.

³ On April 17, 1944, the British Government announced, as a precautionary measure prior to the invasion of the Continent, the suspension of certain diplomatic privileges and facilities such as transmission or receipt of telegrams in code, despatch and receipt of diplomatic bags unless censored, the departure of official couriers or consular or diplomatic representatives or of their staff. The

measure did not apply to the United States, Soviet Russia, and the fighting Dominions. It was removed on June 19, 1944. For comment thereon see Schwelb in *Modern Law Review*, 7 (1944), pp. 223-227.

⁴ See below, § 411.

⁵ In former times there was no unanimity amongst writers. See Phillimore, ii. § 156.

⁶ This is so although as pointed out in the Report, published in 1951, of an Interdepartmental Committee on Diplomatic and State Immunity, there is no English case directly substantiating that proposition. See Hurst, *Collected Papers* (1950), p. 226, and Holland in *Current Legal Problems*, 4 (1951), pp. 97, 98. The case of *R. v. Rose*, decided by the Canadian courts in 1947, was concerned with immunity of diplomatic archives in criminal proceedings: *Annual Digest*, 1946, Case No. 76, and, as *Rex v. Lunan*, *ibid.*, 1947, Case No. 72.

nô restrict him in the effective exercise of his functions.¹ In case he acts and behaves otherwise, and disturbs the internal order of the State, the latter will certainly request his recall, or send him back at once.

History records many cases of diplomatic envoys who conspired against the receiving States, but nevertheless were not prosecuted. Thus, in 1584 the Spanish ambassador in England, Mendoza, plotted to depose Queen Elizabeth; he was ordered to leave the country. In 1587 the French ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth; he was simply warned not to commit a similar act again. In 1654 the French ambassador in England, De Bass, conspired against the life of Cromwell; he was ordered to leave the country within twenty-four hours.²

§ 388. As diplomatic envoys are sacrosanct, the principle of their inviolability is generally recognised. But there is one exception. If a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or if he conspires against the receiving State and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. Thus in 1717 the Swedish ambassador in London, Gyllenburg, who was an accomplice in a plot against King George I., was arrested, and his papers were searched. In 1718 the Spanish ambassador in France, Prince Cellamare, was placed in custody because he organised a conspiracy against the French Govern-

¹ In November 1935, police officers at Elkton, United States of America, stopped the car of the Iranian Minister to the United States for exceeding the speed limit and arrested the occupants of the car, including the Minister. The latter protested and offered some resistance. One of the police officers then put handcuffs upon the Minister and had all the occupants taken to the police station. They were immediately released. In

answer to the protest of the Minister, the Government of the United States, while expressing formal regret, intimated that the privilege of diplomatic immunity imposes upon the person in question the obligation of observing meticulously the laws and regulations of the country to which he is accredited: see Reeves in *A.J.*, 30 (1936), pp. 95, 96.

² See Phillimore, ii. §§ 160-165.

ment.¹ It must be emphasised that a diplomatic envoy cannot complain if he is injured in consequence of his own unjustifiable behaviour, as for instance in attacking an individual who in self-defence retaliates, or in unreasonably or wilfully placing himself in dangerous or awkward positions, such as in a disorderly crowd.²

IX

EXTRITERRITORIALITY OF DIPLOMATIC ENVOYS

Grotius, ii. c. 18, §§ 9, 10—Vattel, iv. §§ 80-119—Hall, §§ 50, 52, 53—Westlake, i. pp. 273-283—Phillimore, ii. §§ 176-210—Twiss, i. §§ 217-221—Moore, ii. §§ 291-304, and iv. §§ 680-689—Hackworth, iv. §§ 400-411—Hyde, i. §§ 426-428, 430, 431, 433-437, 439-443—Geffcken in *Holtzendorff*, iii. pp. 654-659—Nys, ii. pp. 406-433—Rivier, i. § 38—Fauchille, §§ 695-721 (1)—Travers, ii. §§ 837-875—Pradier-Fodéré, iii. §§ 1306-1495—Mérignhac, ii. pp. 249-294—Fiore, ii. §§ 1145-1163—Calvo, iii. §§ 1490-1531—Martens, ii. §§ 12-14—De Louter, ii. pp. 39-41, 49-59—Cruchaga, §§ 621-637—Gemma, pp. 137-144—Suarez, §§ 266-276—Keith's Wheaton, pp. 453-470—Genet, i. pp. 423-593—Goulé in *Répertoire*, i. pp. 327-340, 343-354—*Harvard Research* (1932), pp. 49-137—*Annuaire*, vol. 35 (1929) (ii.), pp. 307-311—Vercamer, *Des franchises diplomatiques et spécialement de l'extraterritorialité* (1891)—Droin, *L'extraterritorialité des agents diplomatiques* (1895)—Ozanam, *L'immunité civile de juridiction des agents diplomatiques* (1912)—Praag, §§ 49-68, 163, 203-226—Satow, §§ 307-423—Frisch, *Iber völkerrechtliche Begriff der Extraterritorialität* (1917), pp. 4-32, 63-100, and in Strupp, *Wörterb.*, i. pp. 394-403—Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1920)—Hedlaza, *Les immunités des agents diplomatiques* (1932)—Ogdon, *Juridical Basis of Diplomatic Immunity* (1936), and in *A.J.*, 31 (1937), pp. 440-465—Strisower in *Hague Recueil*, 1923, pp. 237-262—Hurst, *ibid.*, 1926 (ii.), pp. 124-200—Heyking, *L'extraterritorialité* (1926)—Report for League Codification Committee, cited above, § 386—Deák in *R.I.*, 3rd ser., 9 (1928), pp. 192-206, 522-567—Hurst in *B.Y.*, 10 (1929), pp. 1-13—Hill in *A.J.*, 25 (1931), pp. 252-269—Preuss in *New York University Law Quarterly Review*, 10 (1932-1933), pp. 170-187, and in *R.I. (Geneva)*, 10 (1932), pp. 1-18—Holland in *Current Legal Problems*, 4 (1951), pp. 81-106—*Report on Diplomatic Immunity*, Misc. No. 1 (1952), Cmd. 8460—Lyons in *B.Y.*, 30 (1953), pp. 116-151.

Reason for
and Fictional
Character of Extraterritoriality.

§ 389. The extraterritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the members

¹ See Phillimore, ii. §§ 166 and 170; and Hall, § 50, who suggests that the ground of justification is either (1) an act of self-defence against the State whose representative has offended, or (2) that there is a reserva-

tion of the right to exercise jurisdiction over an envoy 'upon sufficient emergency'; Hall prefers (2).

² See Article 6 of the rules adopted by the Institute of International Law in 1895 (*Annuaire*, 14, p. 241).

of the international community is not, as in the case of sovereign Heads of States, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, control, and the like, of the receiving States. Extraterritoriality, in this as in every other case, is a fiction¹ only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States.² The term 'extraterritoriality' is nevertheless valuable because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States.³ The so-called extraterritoriality of envoys takes practical form in a body of privileges which must be severally discussed.

§ 390. The first of these privileges is immunity of domicile, the so-called *franchise de l'hôtel*. The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every respect considered to be outside the territory of the receiving

¹ See Praeg, §§ 49-54.

² They are exempt not from legal liability, but from the jurisdiction of the courts of the country to which they are accredited. See *Dickinson v. Del Solar* [1930] 1 K.B. 376. See also *Rekstin v. Severo Sibirsko Gosudarstvennoe* [1933] 1 K.B. 47 for an unsuccessful attempt to invoke diplomatic immunity in order to evade a garnishee order. See also the *Cartier* case, decided in 1948 by the Court of Appeal of Brussels: *Annual Digest*, 1948, Case No. 101.

³ The modern tendency among writers is towards rejecting the fiction of extraterritoriality: see Frisch. *op. cit.*, and Hurst, *op. cit.*, at p. 146. See also Noël-Henry in 54 *Clunet* (1927), pp. 983-987. The Court of Rome held in 1935 that although the Lateran Treaty of 1929 (see above, § 106) conferred upon certain buildings belonging to the Holy See but situated outside the Vatican City 'immunities granted by international law to the premises of diplomatic representatives,' these premises were not to be deemed as situated outside Italy so as to exclude the application

of Italian law in an inheritance action: *Trenta v. Ragonesi*, *Annual Digest*, 1935-1937, Case No. 93. The French Court of Cassation held in 1934 that an offence committed by a French subject within premises covered by the privilege of extraterritoriality could not be considered as having been committed outside France: *Ministère public v. Dame veuve Pacory*, *Annual Digest*, 1933-1934, Case No. 170. In a decision given in 1934 the German Supreme Court declined to accept the plea of the accused, who had murdered the Afghan Minister on the premises of the Afghan Legation, that German courts had no jurisdiction on the ground that the act was committed outside German territory: *Afghan Embassy Case*, *Annual Digest*, 1933-1934, Case No. 166. For a rejection of the fiction of extraterritoriality see also the decisions of the Italian Court of Cassation in *In re Moriggi* (*Annual Digest*, 1938-1940, Case No. 172) and *Trenta v. Ragonesi* (*ibid.*, Case No. 173). This was an appeal from the case referred to above in this note.

States, and when this extritoriality was, in many cases, even extended to the whole quarter of the town in which such a residence was situated. One used then to speak of the *franchise du quartier* or the *jus quarteriorum*. An inference from this *franchise du quartier* was the so-called right of asylum, whereby envoys claimed the right to grant asylum, within the boundaries of their residential quarters, to any individual who took refuge there.¹ But already in the seventeenth century most States opposed this *franchise du quartier*, and it totally disappeared in the eighteenth century, leaving behind, however, the claim of envoys to grant asylum within their official residences.² During the nineteenth century all remains of this so-called right of asylum vanished, and when in 1867 the French envoy in Lima claimed it the Peruvian Government refused to concede it.³

¹ See, however, Grotius, ii. c. 18, § 8: 'Ex concessione pendet ejus apud quem agit. Istud enim juris gentium non est.' See also Bynkershoek, *De foro legatorum*, c. 21.

² Thus, when in 1726 the Duke of Ripperda, first minister to Philip v. of Spain, who was accused of high treason and had taken refuge in the residence of the British ambassador in Madrid, was forcibly arrested there by order of the Spanish Government, the British Government complained of this act as a violation of International Law (see Martens, *Causas célebres*, i. p. 178). Twenty-one years later, in 1747, a similar case occurred in Sweden. A merchant named Springer was accused of high treason, and took refuge in the house of the British ambassador at Stockholm. On the refusal of the British envoy to surrender Springer, the Swedish Government surrounded the embassy with troops, and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers. At last Springer was handed over to the Swedish Government under protest, but Great Britain complained and recalled her ambassador, as Sweden refused to make the required reparation (see Martens, *Causas célebres*, ii. p. 52). As these two examples show, the right of asylum, although claimed and often conceded, was nevertheless

not universally recognised. It was reported—*Sunday Times* January 18, 1949—that when an inquest was contemplated on the three-year-old daughter of a Soviet Consulate official who died in an annexe to the Soviet Embassy, the Ambassador claimed immunity and that, in consequence, no inquest was held.

³ The South American States, Peru excepted, still grant to foreign envoys the right to afford asylum to political refugees in time of revolution. It is, however, acknowledged that this right is not based upon a rule of International Law, but merely upon local usage. See Hall, § 52; Westlake, i. p. 282; Moore, ii. §§ 201-304; Hackworth, ii. §§ 192, 193; Gilbert in *A.J.*, 3 (1909), pp. 562-595; Robin in *R.G.*, 15 (1908), pp. 461-508; Scelle in *R.G.*, 19 (1912), pp. 623-634; Moore, *Asylum in Legations and Consulates, and in Vessels* (1892) (a reprint from the *Political Science Quarterly*, 7); Tobar y Borgono, *L'asile interne devant le droit international* (1912); Hurst, *op. cit.*, pp. 214-221; Alcinder in *Répertoires*, ii. pp. 34-44; *Harvard Research* (1932), pp. 62-66; Genêt, i. pp. 550-556; *Fontes Juris Gentium*, Series B, Section 1, vol. i. (Part 1) Nos. 1238-1250; Nervo in *Académie Diplomatique Internationale*, 1932, pp. 99 et seq.; Reale in *Hague Review*, vol. 63 (1938) (i.), pp. 541-540; Morgenthau in *B.F.*

Nowadays the official residences of envoys are, *in a sense and in some respects only*, considered as though they were outside the territory of the receiving States. For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences¹ to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys.² Therefore, no act of jurisdiction³ or administration of the receiving Governments can take place within these residences, except by special permission of the envoys. The stables and garages of envoys are considered to be parts of their residences. But such immunity of domicile is

25 (1948), pp. 236-261; Raestad and others in *Annuaire*, 43 (1) (1950), pp. 133-205; McNair in *B.Y.*, 28 (1951) pp 194-203. That in practice in times of revolution and of persecution of certain classes of the population asylum is occasionally granted to refugees, and respected by the local authorities, there is no doubt; but this occasional practice does not impair the validity of the general rule of International Law according to which there is no obligation on the part of the receiving State to grant to envoys the right of affording asylum to individuals not belonging to their suites; see, however, Moore, ii. § 293. See Scott in *A.J.*, 21 (1927), at p. 444. The Sixth International American Conference adopted, in February 1928, a Convention on Asylum which laid down that asylum granted to political offenders in legations shall be respected subject to certain specified conditions: *A.J.*, Suppl., 22 (1928), p. 158; Hudson, *Legislation*, vol. 4. The Convention on Political Asylum adopted by the Seventh International American Conference in 1933 amended the former Convention inasmuch as it forbids the granting of asylum to persons accused of or condemned for common crimes, or to deserters from the army or the navy: Hudson, *Legislation*, vol. 6, p. 607. The United States, in an express reservation, refused to recognise or to subscribe to the so-called doctrine of asylum as part of International Law. See also Bestiau, *Droit d'asile dans les ambassades et légations au cours de la*

guerre d'Espagne (1936-1939) (1942)

¹ As to the absence of immunity in the case of non-diplomatic premises such as the office of a foreign State Railway or Trade Delegation see below, § 454a.

² Can the official residence of an envoy, if the property of his home State, be confiscated after his departure by the State on the territory of which it is situated as a measure of reprisals? During the First World War, on August 25, 1916, the Italian Government confiscated the Palais de Venice in Rome, which was the seat of the Austrian Legation at the Holy See, as a measure of reprisals against the bombardment of Venice by Austrian aircraft. See Soelle in *R.G.*, 24 (1917), pp. 244-255, and below, vol. ii. § 247.

³ This includes jurisdiction in the form of enforcement of judgments against immovable property of a foreign State if such property is identical with the legation buildings or official residence of the diplomatic representative of that foreign State. See the judgment of the Supreme Court of Czecho-Slovakia of December 28, 1929 (*Annual Digest*, 1927-1928, Case No. 251), reversing, in effect, the decision of that Court of April 3 1928 (*ibid.*, Case No. 111). This was a case of enforcing an award rendered against Hungary by the Mixed Arbitral Tribunal established by the Treaty of Versailles. For an account and criticism of the first stage of the case see Neák in *A.J.*, 23 (1929), pp. 582-594.

granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official documents and archives.¹ If an envoy abuses this immunity, the receiving Government need not bear it passively. If a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of extritoriality, the criminal must be surrendered to the local Government.² Again, an envoy has no right to seize a subject of his home State who is within the boundaries of the receiving State, and keep him under arrest inside the embassy with the intention of handing him over to his home State.³

So-called
Diplo-
matic
Asylum.

§ 390a. There is no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals, or to other individuals not belonging to his suite. Of course, an envoy need not deny entrance to criminals or accused persons desiring to take refuge in the embassy. But, apart from any treaty or established usage to the contrary, he must surrender them to the prosecuting Government at its request; and if he refuses, any measures may be taken

¹ In *R. v. Rose*—a Canadian case discussed by Maxwell Cohen in *B.Y.*, 25 (1948), pp. 404-414—it was held that 'espionage reports' removed from the Russian embassy by one of its employees were not 'diplomatic papers' and that they could properly be produced in court for the purpose of evidence.

² The case of Nikitschenkow, which occurred in Paris in 1867, is an instance of this. Nikitschenkow, a Russian subject not belonging to the Russian legation, made an attempt on, and wounded, a member of that legation within the precincts of the embassy. The French police were called in, and arrested the criminal. The Russian Government requested his extradition, maintaining that, as the crime was committed inside the Russian embassy, it fell exclusively under Russian jurisdiction; but the French Government refused extradition, and Russia dropped her claim.

³ An instance thereof is the case of the Chinese, Sun Yat Sen, which occurred in London in 1896. He was

a political refugee from China, living in London, who was induced to enter the house of the Chinese legation and was kept under arrest there in order to be conveyed forcibly to China. The Chinese envoy contended that, as the house of the legation was Chinese territory, the British Government had no right to interfere. But the latter did interfere, and Sun Yat Sen was released after several days. In contrast to this case may be mentioned that of Kalkstein, which occurred on the Continent in 1870. Colonel von Kalkstein, a Prussian subject, had fled to Poland for political reasons, since he was accused of high treason against the Prussian Government. Frederick William, the Great Elector of Brandenburg, ordered his diplomatic envoy at Warsaw, the capital of Poland, to obtain possession of the person of Kalkstein. On November 28, 1870, this order was carried out. Kalkstein was secretly seized and, wrapped up in a carpet, was carried across the frontier. He was afterwards executed at Mamel

to induce him to do so, short of such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy. But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been requested to surrender the criminal. It must also be noted that the grant of temporary asylum 'against the violent and disorderly action of irresponsible sections of the population' ¹ is a legal right which, on grounds of humanity, may be exercised irrespective of treaty, and that the authorities of the territorial State are bound to grant full protection to the foreign diplomatic missions providing shelter for refugees in such circumstances.

§ 390b. While, with the possible exception of the most The Asylum Case between Colombia and Peru. compelling considerations of humanity,² there is no right to refuse to surrender to the territorial State persons who have been granted asylum within diplomatic premises, the position is different where the right to grant asylum, and the duty by the territorial State to respect it, are expressly recognised in a treaty—as is the case in numerous treaties concluded between Latin-American States.³ In the *Asylum* case between Colombia and Peru the International Court of Justice, confronted with the interpretation of a treaty of that character, held that although, in the first instance, the head of the foreign diplomatic mission is entitled to determine whether a case for granting asylum, in conformity with the treaty, has arisen, such determination is not conclusive. 'The principles of international law do not recognise any right of unilateral and definitive qualification [of the right to grant asylum] by the State granting diplomatic asylum.'⁴ However, in case of disagreement between the States in

¹ *Asylum* case between Colombia and Peru, *I.C.J. Reports*, 1950, p. 187. See also the Resolution adopted in 1950 by the Institute of International Law at Bath: *Annuaire*, 43 (1950) (ii.), p. 377. Article 3 (2) lays down that 'asylum may be granted to every individual whose life, person or liberty are threatened by violence emanating from local authorities or against which local authorities are manifestly not in

the position to offer protection, which they tolerate or to which they invite.'

² An exception which defies legal definition in advance and which must be classed as coming within the category of humanitarian intervention (see above, § 137).

³ As, e.g., in the Havana Convention of 1928 referred to above, p. 63, n.

⁴ *I.C.J. Reports*, 1950, p. 274.

question whether asylum has been properly granted in pursuance of the treaty, the territorial State is not entitled to take unilateral action to enforce the surrender of the person concerned. Recourse must be had to some impartial agency, judicial or other, for resolving any disagreement on the question. If the territorial State demands that that person be sent out of the country, it must issue a safe-conduct, when it does so, the diplomatic mission is under a duty to arrange for his departure. A serious difficulty arises if, as was the position in the *Asylum* case, it is held that the asylum was not granted in accordance with the treaty¹ and must be terminated and yet, having regard to the terms of the treaty prohibiting the surrender of persons accused of political offences, that there is no obligation—and no right—to surrender him. It is believed that in such cases it is within the province of a court to resolve the difficulty by a decision laying down which of the two conflicting rights must prevail in law,² a task which the International Court of Justice preferred to leave for direct settlement by the parties.

Exemption from Civil Jurisdiction.

§ 391. The second privilege of envoys in reference to their extritoriality is their exemption from criminal and civil jurisdiction.³ As their exemption from criminal jurisdiction is also a consequence of their inviolability, it, has

¹ The Court held that the grant of asylum in the case before it did not arise out of an 'urgent case' in the meaning of the treaty, seeing that there was no question of sheltering the refugee in question, who was prosecuted by the authorities for revolutionary activity, from violent and disorderly action of irresponsible sections of the population. However, while in the view of the Court 'asylum cannot be opposed to the operation of justice,' it can be invoked and maintained where 'in the guise of justice, arbitrary action is substituted for the rule of law,' i.e. if administration of justice is 'corrupted by measures clearly prompted by political aims' (*ibid.*, p. 284).

² *I.C.J. Reports*, 1951, p. 83. It is arguable that the province of the judicial function is to decide not only between the existence of a right and

the absence thereof but also to determine which of two valid legal positions is to prevail. For an instructive analysis of some aspects of the case see Fitzmaurice in *B.Y.*, 27 (1950), pp. 31-41. In cases of this description a substantial difficulty confronting an international court is the necessity of interpreting against the background of general International Law, including in particular that relating to prohibition of intervention, an institution specular to the political climate and tradition of a particular region of the world. For a discussion of this case see also Barcia Trelles in *Revista Española*, 3 (1950), pp. 753-801; Alona Evans in *A.J.*, 45 (1951), pp. 755-762; Morgenstern in *L.Q.R.*, 67 (1951), pp. 364-382.

³ See Dicey, pp. 207-215, and Westlake, *Private International Law* (7th ed., 1925), pp. 266-280.

already been discussed,¹ and we have here only to deal with their exemption from civil² jurisdiction. No civil action of any kind as regards debts and the like can be brought against them in the civil courts of the receiving State.³ They cannot be arrested for debts, nor can their furniture, their motor-cars, their horses, and the like, be seized for debts. They cannot be prevented from leaving the country for not having paid their debts, nor can their passports be refused to them on this account.⁴ But the rule that an envoy is exempt from civil jurisdiction has certain exceptions: namely, (a) if an envoy enters an appearance to an action against himself and allows the action to proceed without pleading his immunity⁵; or (b) if he himself brings an action under the jurisdiction of the receiving State, whereupon the courts of the latter have civil jurisdiction over him to the extent, it is submitted, of enforcing the ordinary incidents of procedure, including a set-off or counterclaim by the defendant arising out of the same matter, but even then not so as to enable the latter to

¹ See above, §§ 387, 388.

² See Ozanam, *op. cit.*, pp. 110-188.

³ In England even the issue of a writ of summons commencing an action, apart from any question of service of it or of obtaining judgment upon it, is apparently within the prohibition of the statute of Anne, c. 12, and is null and void: *Musurus Bey v. Gadban* [1894] 2 Q.B. 352.

The immunity applies equally to debts and other obligations incurred before the beginning of the diplomatic mission: see Hurst, *op. cit.*, p. 177.

⁴ Thus, when in 1772 the French Government refused passports to Baron de Wrech, the envoy of the Landgrave of Hesse-Cassel at Paris, for not having paid his debts, all the other envoys in Paris complained of this act of the French Government as a violation of International Law (see Martens, *Causées célèbres*, ii, p. 282).

⁵ But even when he has waived his immunity down to judgment, he can still, so long as his diplomatic

mission continues and for a reasonable period after its termination (see below, § 406 (n.)), plead his immunity as a bar to the execution of the judgment: *In re Suarez, Suarez v. Suarez* [1917] 2 Ch. 131; [1918] 1 Ch. 176. The immunity being the right of the sending State, its waiver is said to require the consent of the Government of that State or of the diplomatic person's official superior; but it is not clear what steps an English court will take to ascertain whether or not that consent has been given: *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch. 139; *In re Suarez, supra*. See also Rubrik, *Die Bedeutung der Extraterritorialität der Gesandten für den Zivilprozess* (1934). In *Friedberg v. Santa Cruz* a New York State Court held in an action for damage arising out of a motor-car accident that the defendant had waived his immunity by appearing and, also, that obtaining a motor-car driving licence amounted to a waiver of immunity: 84 N.Y.S. (2d) 148; *Annual Digest*, 1948 Case No. 103.

recover from the envoy an excess over and above the latter's claim.¹ (c) The local courts also have jurisdiction as regards immovable property held within the boundaries of the receiving State by an envoy, not in his official character but as a private individual,² and (d) in some countries (but not in Great Britain), as regards mercantile³ ventures in which he might engage on the territory of the receiving State.⁴

Waiver of
Immunity
and
Abuse of
Diplo-
matic
Privilege.

§ 391a. While, in some respects, the principle of diplomatic immunity from suit is open to the same sort of objections as is the immunity of foreign Governments⁵ and while arguments adduced in its support often partake of a certain degree of artificiality,⁶ it does not, in general, give rise to serious difficulties or to abuses resulting in denial of legit-

¹ This is mainly based upon inference from the position of a foreign monarch or State when suing as plaintiff; see above, § 115a, n.

² There does not appear to be any English decision which is authority for this proposition, but note in *Magdalena Steam Navigation Co. v. Martin* (1859) 2 E. and E. 94, at p. 111, that the envoy is referred to by Lord Campbell, C.J., as 'having no real property in England,' an allegation which it was considered necessary to plead; and, more explicitly, in *In re Suarez* [1917] 2 Ch. at p. 138. See Vattel, iv. § 115.

As to the duration of immunity from civil process for a reasonable period after termination of the diplomatic mission see below, § 406 (n.). Immunity extends not only to actions affecting uncontested property but also to those in which the title in goods is in dispute: *The Amazone* [1940] P. 40.

³ The statute of 7 Anne, c. 12, does not exclude an envoy who embarks on mercantile ventures from the benefit of the Act; see the case of *Magdalena Steam Navigation Co. v. Martin*, *supra*, removing a doubt left in *Taylor v. Best* (1854) 14 C.B. 487. But that exemption does not, according to the Act, apply to the envoy's servants. See also *Westlake*, i. 227, and *Praag*, §§ 85-87.

⁴ As to the recent tendency of

Italian courts to distinguish between immunity from jurisdiction for acts done in the exercise of the diplomatic mission and that for acts done in the envoy's private capacity see the case *Comina v. Kite* before the Court of Cassation on January 31, 1922, in *Rivista*, 16 (1924), p. 173; but note the protest of the doyen of the diplomatic corps at Rome in *Z.J.*, 32 (1924), p. 474 (n.), and *Annual Digest*, 1919-1922, Case No. 202. A comparison of two, not easily reconcilable, decisions of the Court of Rome—*Harrie Lurie v. Steinmann* and *Perrucchelli v. Pung y Casasuso* (*Annual Digest*, 1927-1928, Cases Nos. 246, 247)—shows the difficulties inherent in the attempt to distinguish between activities of a public and those of a private character.

⁵ See above, § 115ad.

⁶ This applies, for instance, to the occasional reference to the dignity or independence of foreign States or to the argument that the normal functioning of the diplomatic mission would be impaired if its members were subjected to the jurisdiction of courts. It will be noted that the principle of immunity does not absolve diplomatic persons from the necessity, when sued, of appearing before the court for the purpose of pleading to the jurisdiction and that, at least to that extent, inconvenience or publicity cannot be avoided.

imate legal remedies.¹ This is so on account of the widely adopted practice of voluntary waiver of immunity. Thus in the United Kingdom in case of unsuccessful efforts to obtain satisfaction from a person entitled to diplomatic immunity, the matter is usually referred to the Foreign Office, which seeks either to obtain a waiver of immunity with the view to submission of the dispute to a court or to secure agreement of the diplomatic person in question to resort to private arbitration. Such intervention is, as a rule, successful. In the absence of response, the head of the diplomatic mission concerned is informed that that person can no longer be accepted as an individual holding a diplomatic appointment. The principle that immunity is granted for reasons connected with the true purpose of the mission, and not in order to enable individuals to avoid liability generally, is clearly recognised in the Convention on the Privileges and Immunities of the United Nations.² That Convention lays down expressly³ that privileges and immunities are granted to officials in the interest of the United Nations, and not for the personal benefit of the individuals themselves; that the Secretary-General shall have the right and the duty to waive the immunity of any official when, in his opinion, the immunity would impede the course of justice and when it can be waived without prejudice to the interests of the United Nations; and that the United Nations shall make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party and involving an official of the United Nations in cases in which immunity has not been waived.⁴

§ 392. The third privilege of envoys in reference to their exterritoriality is exemption from subpoena as witnesses.

Exemption from Subpoena as Witnesses.

¹ In *Parker v. Bogan* [1917] All E.R. 46, it was held that the refusal of a landlord to give consent to a subletting to a diplomatic person, on the ground that owing to diplomatic privilege he might be deprived of remedies otherwise available to him, was unreasonable. The Court pointed out that such persons do not habitually abuse their privilege.

² See below, § 417a.

³ In Section 20.

⁴ See also below, § 417a. In the United Kingdom every person possessing diplomatic immunity and holding a motor-car licence must be insured against third-party risks. For the application of that practice see *Dickinson v. Del Solar* [1930] 1 K.B. 376.

No envoy can be compelled, or even requested, to appear as a witness in a civil or criminal or administrative court,¹ nor is an envoy obliged to give evidence before a commissioner sent to his house. But if he chooses for himself to appear as a witness, the courts can make use of his evidence. Thus in 1881, at the trial of one Guiteau for the murder of President Garfield, the Venezuelan envoy, Señor Comancho, who was present when the crime was committed, appeared as a witness for the prosecution, the Venezuelan Government having authorised him to do so.²

Exemption from Police.

§ 393. The fourth privilege of envoys in reference to their exterritoriality is exemption from the police of the receiving States. Orders and regulations of the police do not in any way bind them. On the other hand, this exemption from police does not carry with it any privilege for an envoy to do what he likes as regards matters which are regulated by the police. He is expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course, he cannot be punished if he acts otherwise, but the receiving Government may request his recall, or even be justified in taking other measures of such a kind as do not affect his inviolability.³

Exemption from Taxes and the like

§ 394. The fifth privilege of envoys in reference to their exterritoriality is exemption from taxes and the like. As an envoy, through his exterritoriality, is considered not to

¹ A remarkable case of this kind is that of the Dutch envoy in Washington, Dubois, which happened in 1856. A case of homicide occurred in the presence of M. Dubois, and as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the court as a witness, recognising the fact that Dubois had no duty to do so. When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Dutch

Government. The latter approved of Dubois' refusal, but authorised him to give evidence under oath before the American Foreign Secretary. As, however, such evidence would have had no value at all according to the local law, Dubois' evidence was not taken, and the Government of the United States asked the Dutch Government to recall him (see Wharton, i. § 98; Moore, iv. § 662; and Calvo, iii. § 1620).

² See Moore, iv. § 662; Scott, Cases, p. 209, n. 18.

³ See Hill in A.J., 25 (1931), pp. 253, 254, 261-265.

be subject to the territorial supremacy of the receiving State, he must be exempt from all direct personal taxation, and, therefore, need not pay income tax or any other direct taxes. As regards rates, it is necessary to draw a distinction. Payment of rates imposed for local objects from which the envoy himself derives benefit, such as sewerage, lighting, water, night-watch, and the like, can be required of the envoy, although often¹ this is not done. Other rates, however, such as poor-rates and the like, he cannot be requested to pay. As regards customs duties, International Law imposes no obligation of exemption therefrom. In practice, and by courtesy, however, the Municipal Laws of many States allow diplomatic envoys, within certain limits, to receive free of duty goods intended for their own private use.² If the house of an envoy is the property of his home State, or his own property, the house need not be exempt from property tax, although it is often so exempted by courtesy of the receiving State. Such property tax is not a personal and direct, but an indirect, tax.³

¹ As, for instance, in England, where the payment of local rates cannot be enforced by suit or distress against a member of a legation; see *Parkinson v. Potter* (1885) 16 Q.B.D. 152, and *Macartney v. Garbutt* (1890) 24 Q.B.D. 368. See also *Westlake*, i. p. 278. It should be noted that the two cases mentioned in this note rest on a local Act, 35 (Geo. 3, c. 73, s. 190, relating to the parish of St. Marylebone in London. As to exemption from taxation in the United States see the detailed survey in Hackworth, iv. §§ 400-412. See also *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa*, etc., where the Supreme Court of Canada held that no rates could be levied on buildings owned and occupied by foreign legations. A minority of the Judges held that rates could be imposed, but that their payment could not be enforced. *Canada Law Reports* [1943] S.C.R. 208; *Annual Digest*, 1941-1942, Case No. 106.

² See *Harvard Research* (1932), pp. 107-113; Lyons in *B.Y.*, 30 (1953), pp. 138-151.

For an alleged abuse of privilege by attempting to ship from Greece objects of archaeological value packed in an envoy's luggage see London *Times* newspaper, November 5, 1927. On diplomatic immunity with regard to the prohibition laws in the United States see Preuss in *I.L.*, 3rd ser., 13 (1932), pp. 184-202, and in *Michigan Law Review*, 30 (1931-1932), pp. 333-348.

³ The account, in the text above, of diplomatic immunity from taxation is necessarily of a general character. It is not intended as a guide to the practice of any particular State. For that practice differs considerably, in matters of detail, from country to country. However, it may be useful to give here an account of the position in the matter of immunity from taxation enjoyed by members of foreign diplomatic missions in the United Kingdom. (A) *National Taxation*: (a) *Income Tax*: Diplomatic emoluments, salaries or wages received by a Head of Mission or by any member of his official or domestic staff (except a British subject on the official staff) in return for his duties in

Right of
Chapel.

§ 395. A sixth privilege of envoys in reference to their extritoriality is the so-called Right of Chapel (*droit de chapelle* or *droit du culte*). This is the privilege of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving State.¹

connection with the Mission, are treated as exempt from United Kingdom income tax. No title to exemption is recognised in respect of any other earnings in the United Kingdom. Investment income arising abroad is treated as exempt from tax, but no title to exemption is recognised in respect of income from investments in the United Kingdom, except that a Head of Mission is allowed exemption in respect of income derived from British Government securities. Where a property is occupied for diplomatic purposes, including the personal residence of any member of the official or domestic staff (except a British subject on the official staff), exemption is given from tax in respect of such property. In cases where a privileged person has income liable to tax in the United Kingdom, the usual statutory reliefs are not set off against that income before an assessment is made.

(b) *Customs Franchise* All Heads of Diplomatic Missions are granted exemption from examination of baggage on first arrival and subsequently on the production of a baggage pass and are given facilities for the duty-free delivery of imported packages for their personal use and that of their families. This privilege extends to packages imported by parcels post and to imported goods deposited in a bonded warehouse. Subject to fulfilment of the requirement of reciprocity, these facilities are extended also to diplomatic officers of the rank of Counsellor, Secretary and Attaché; these officers are not, however, eligible to hold Customs Baggage passes. Exemption from Customs duty includes also exemption from purchase tax levied along with the duty at the time of importation on goods which are liable to the tax.

(c) *Motor-Car Licence Duty* All members of the Diplomatic Corps (except menial servants) whose names are recorded in the Foreign Office as

having been received by Her Majesty's Government in a diplomatically privileged capacity are exempted from payment of motor-car licence duty and also from the fee normally payable on the issue of motor driving licences. (d) *Wireless Licence Duty*: Subject to fulfilment of the requirement of reciprocity, all members of the Diplomatic Corps (except menial servants) are exempted from the fees chargeable on the issue or renewal of wireless licences (including those in respect of television receivers). (B) *Local Taxation* Subject to fulfilment of the requirement of reciprocity, members of foreign diplomatic missions (excluding menial servants) are granted exemption from that portion of the local rates leviable on their residences which represents a contribution towards the cost of those municipal services from which they are deemed not to derive direct benefit. The proportion thus remitted amounts to approximately two-thirds of the total rate leviable. In matters of taxation the French Court of Cassation clearly distinguishes between income derived from commercial activities and that from other sources. The first is subject to taxation. See *Thams v. Minister of Finance*, *Annual Digest*, 1929-1930, Case No. 101. The Italian Central Commission for Direct Taxes held in 1941 that Italian nationals on the staff of foreign legations did not enjoy immunity from taxation: *In re di Sorbello*, *Annual Digest*, 1941-1942, Case No. 108.

¹ A privilege of great value in former times, when freedom of religious worship was unknown in most States, it has at present a historical value only. But it has not disappeared and might become again of practical importance in case a State should in the future give way to reactionary intolerance. It must, however, be emphasised that

§ 396] THEIR POSITION AS REGARDS THIRD STATES 805

§ 396. The seventh and last privilege of envoys in reference to their extritoriality is self-jurisdiction within certain limits. As the members of an envoy's retinue are considered to be extritorial, the receiving State has no jurisdiction over them, and the home State may therefore delegate civil and criminal jurisdiction to the envoy. But no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit. Thus, an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like. But no civilised State would nowadays allow an envoy himself to try a member of his retinue, though in former centuries this used to happen.¹

X

POSITION OF DIPLOMATIC ENVOYS AS REGARDS THIRD STATES

(Grotius, n. c. 18, § 5—Vattel, iv. §§ 84-86—Hall, §§ 99-101—Phillimore, ii. §§ 172-175—Moore, iv. §§ 643, 644—Wheaton, §§ 244-247—Hyde, i. § 432—Heffter, § 207—Rivier, i. § 39—Nys, n. p. 445—Pradier-Fodéré, iii. § 1394—Fiore, ii. §§ 1143, 1144—Calvo, iii. §§ 1532-1539—Praag, § 227—Satow, pp. 226-237—Travers, ii. § 870—Hurst in *Hague Recueil*, 1926 (ii.), pp. 222-229, 234-236—Yeh Sao-hang, *Les privilèges et les immunités des agents diplomatiques à l'égard des États tiers* (1938)—*Harvard Research* (1932), pp. 85-89

the right of chapel need only comprise the privilege of religious worship in a private chapel inside the official residence of the envoy. No right of having and tolling bells need be granted. The privilege includes the office of a chaplain, who must be allowed to perform every religious ceremony within the chapel, such as baptism and the like. It further includes permission to all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service. But the receiving State need not allow its own subjects to take part therein.

¹ The Duc de Sully, then Marquis de Rosny, was sent in 1603 by Henri IV. of France on a special mission to England, as a ceremonial

envoy to congratulate James I. upon his accession to the throne. On the very day of his arrival certain members of his retinue fell into a brawl with some Englishmen, and one of the latter was killed. Sully had the murderer seized, and called together a jury of some Frenchmen who had accompanied him to London. This jury condemned the culprit to death for murder, and he was handed over to the Mayor of London to be executed. However, the Count of Beaumont-Harley, the permanent French ambassador in London, obtained from James I. a pardon for the convicted man (see Martens, *Causée célèbre*, i. p. 331, and Satow, § 359. See also the two cases reported by Calvo, iii. § 1545)

Possible
Cases.

§ 397. Although, when an individual is accredited as diplomatic envoy by one State to another, these two States alone are directly concerned in his appointment, yet the position of an envoy must be considered in those cases in which he comes in contact with third States. Several such cases are possible. An envoy may travel through the territory of a third State to reach the territory of the receiving State. Or, again, an envoy accredited to a belligerent State and living on the territory of the latter may be found there by the other belligerent who is in military occupation of such territory. Thirdly, an envoy accredited to a certain State might interfere with the affairs of a third State.

Envoy
travelling
through
Territory
of Third
State.

§ 398. If an envoy travels through the territory of a third State *incognito* or for his pleasure only, there is no doubt that he cannot claim any special privileges whatever. He is in exactly the same position as any other foreign individual travelling there, although by courtesy he might be treated with particular attention. But matters are different when an envoy, on his way from his own State to the State of his destination, travels through the territory of a third State, as may happen when the sending and the receiving States are not neighbours. Now, as the institution of legation is necessary for the intercourse of States and is firmly established by International Law, there ought to be no doubt that such third State must grant the right of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or the receiving State.¹ But other privileges,² especially those of

¹ It was reported in the *United States Daily* of November 6, 1926, that the United States Government refused to grant a visa to a diplomatic representative of the Russian Soviet Government to enable her to travel through the United States to Mexico (to which State she was accredited), on account of her association with communist propaganda.

² The matter, which has always been disputed, is fully discussed by Twiss, i. § 222, who also quotes the opinions of Grotius, Bynkershoek,

and Vattel. See also Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp. 110-114. See *New Chile Gold Mining Co. v. Blanco* (1888) 4 T.L.R. 346 (*obiter dictum* by Manisty J. in favour of immunity from civil process); *Wilson v. Blanco* (1889) 4 N.Y. Supp. 714, Scott, *Cases*, 293 (immunity from civil process granted by the Superior Court of the City of New York); and *Carbone v. Carbone* (1924) 206 N.Y. Suppl. 40 (where the same Court, while setting

inviolability and extritoriality, need not be granted to the envoy. Moreover, the right of innocent passage does not include the right to stop on the territory longer than is necessary for the passage.¹

No right of passage need be granted if the third State is at war with the sending or receiving State. The envoy of a belligerent who travels through the territory of the other belligerent to reach the place of his destination, may be seized and treated as a prisoner of war. Thus, in 1744, when the French ambassador, Maréchal de Belle-Isle, on his way to Berlin passed through the territory of Hanover, which country was then, together with England, at war with France, he was made a prisoner of war and sent to England. Again, in August 1917, after Cuba had entered the First World War as an Allied Power, Herr von Heinrichs, formerly secretary to the German embassy at Madrid, was arrested and made a prisoner of war when landing at Havana from a Spanish steamer on which he was proceeding to Mexico, whither he was being transferred. On the other hand, the envoy of a belligerent who travels to a neutral destination on a neutral vessel may not be forcibly removed and made a prisoner of war while the

aside an order for arrest in divorce proceedings, declined to grant immunity from civil process not involving arrest). In *Bergman v. De Sieyes* the United States Circuit Court of Appeals dismissed an action in tort brought against the defendant in New York while he was on his way to Bolivia, to which he was accredited as the French Minister. (1948) 170 F. (2d) 360; *A.J.* 43 (1949), p. 373. *Annual Digest*, 1947, Case No. 43. See *Rush v. Rush, Bailey and Pimenta* [1920] P. 242, where one of the co-respondents was the Secretary of a foreign embassy in a third State, but where the question of immunity was not argued.

¹ Thus, in 1854 Soulé, the envoy of the United States of America at Madrid, who had landed at Calais intending to return to Madrid via Paris, was provisionally stopped at Calais for the purpose of ascertaining whether he intended to make a stay in Paris, which the French Government wanted to prevent

because he was a French refugee naturalised in America and was reported to have made speeches against the Emperor Napoleon Soule at once left Calais, and the French Government declared, during the correspondence with the United States in the matter, that there was no objection to Soulé traversing France on his way to Madrid, but that they would not allow him to make a sojourn in Paris, or anywhere else in France. See Wharton, i. § 97, and Moore, iv. § 643. See also Wheaton, § 247. American practice would seem to grant inviolability and extritoriality in such cases. Article 12 of the Treaty of February 11, 1929, between Italy and the Holy See (the Lateran Treaty, see above, § 106, provides that representatives accredited by foreign States to the Holy See shall continue to enjoy in Italy all the privileges of immunity enjoyed by diplomatic agents under International Law.

vessel is on the open sea.¹ But should the vessel enter the territorial waters, or a port, of the other belligerent, the envoy could be seized. Therefore when, in November 1914, during the First World War, Count Tarnowski, the Austrian envoy to the United States, then neutral, intended to travel from Rotterdam to America, it was necessary to ask Great Britain for a safe-conduct.² Otherwise he could have been made a prisoner of war when the vessel on which he was travelling entered British territorial waters.³ The same procedure was necessary, for the same reason, when in 1915 the Austrian ambassador at Washington, Dr. Dumba, and in 1917 the German ambassador at Washington, Count Bernstorff, desired to return to their home States.

Envoy
found by
Belli-
gerent on
Occupied
Enemy
Territory.

§ 399. When in time of war a belligerent occupies the capital of an enemy State and finds there envoys of other States, these envoys do not lose their diplomatic privileges as long as the State to which they are accredited is in existence.⁴

Envoy
interfer-
ing with
Affairs of
a Third
State.

§ 400. There is no doubt that an envoy must not interfere in matters with regard to which the State to which he is accredited is involved with a third State. If he does interfere, he enjoys no privileges whatever in relation to such third State. Thus, in 1734, the Marquis de Monti, the French envoy in Poland, who took an active part in the war between Poland and Russia, was made a prisoner of war by the Russians, and was not released until 1736, although France protested.⁵

XI

THE RETINUE OF DIPLOMATIC ENVOYS

Grotius, ii. c. 18, § 8—Vattel, iv. §§ 120-124—Hall, § 51—Phillimore, ii. §§ 186-193—Moore, iv. §§ 664-665—Hackworth, iv. §§ 371-372—Hyde, i.

¹ See the *Trent* case, below, vol. ii. § 408, p. 835, n.

² See vol. ii. § 218.

³ Similarly, a member of the suite of an envoy may be made a prisoner of war if apprehended in a third State which is at war with his home State. Therefore, when in February 1918, during the First World War, Captain von Krohn, the so called

naval attaché to the German legation at Madrid, desired to return to Germany by crossing France, he had to obtain a safe-conduct from the French Government. On the case of *von Papen* see below, vol. ii, § 218.

⁴ See below, vol. ii. § 157, and Wharton, i. § 97.

⁵ See Martens, *Causas celebres*, i. p. 207.

§§ 412, 413, 429, 438—Heffter, § 221—Rivier, i. pp. 458-461—Nys, ii. pp. 440-444—Pradier-Fodéré, iii. §§ 1472-1486—Fiore, li. §§ 1164-1168—Calvo, iii. §§ 1348-1350—Martens, ii. § 16—Suarez, §§ 251-261—Genet, ii. pp. 313-356—Goulé in *Répertoire*, i. pp. 340, 341, 354-356—*Harvard Research* (1932), pp. 67-77—Roederer, *De l'application des immunités de l'ambassadeur au personnel de l'ambassade* (1904), pp. 22-84—Lilienstein, *Die Exterritorialität des Personals der Gesandtschaft* (1934)—Praag, §§ 229-236—Satow, §§ 357-359—Travers, ii. §§ 851-864—Hurst in *Hague Recueil*, 1926 (ii.), pp. 152-159, 200-207—Makino in *Japanese Review of International Law* (January 1922)—Wehberg in *R.I.*, 3rd ser., 7 (1926), pp. 360-370—Brookfield in *B.Y.*, 19 (1938), pp. 151-160—Mervyn Jones in *J.C.L.*, vol. 22 (3rd ser., 1940), pp. 19-31—Gutteridge in *B.Y.*, 24 (1947), pp. 148-159—Moushkely in *R.G.*, 54 (1950), pp. 43-64—Report on Diplomatic Immunity, Misc. No. 1 (1952), Cmd. 8460.

§ 401. The individuals accompanying an envoy officially, or in his private service, or as members of his family, or as couriers, compose his retinue. The members of the retinue belong, therefore, to four different classes. All those individuals who are officially attached to an envoy are members of the legation,¹ and are appointed by the home State of the envoy. To this first class belong the counsellors, attachés,² and secretaries of the legation; the chancellor of the legation and his assistants; the interpreters, and the like; the chaplain, the doctor, and the legal advisers, provided that they are appointed by the home State and are sent specially as members of the legation. A list of these members of a legation is handed by the envoy to the Secretary for Foreign Affairs of the receiving State, and is revised from time to time.³ The counsellors and secretaries

Different
Classes
of Mem-
bers of
Retinue.

¹ For instance, the chief of the Mail Department of the American embassy in London (*Assurance Compagnie Excelesior v. Smith* (1923) 40 T.L.R. 105).

² See Beauvais, *Attachés militaires, attachés navales, et attachés de l'air* (1937); La Torza in *Annuario Italiano di diritto internazionale*, ii. (1939), pp. 1-32.

³ In *Musmann v. Engelke* [1928] 1 K.B. 90 the Court of Appeal, by a majority, declined to accept as conclusive and binding upon them the statement of the Attorney-General, upon the instructions of the Foreign Office, that the defendant was included as 'consular secretary' in the list of members of the staff of

the German embassy sent to the Foreign Office and was performing services there 'on the right side of the line between consular service and ambassadorial service'; whereupon the Court directed that the plaintiff should have leave to cross-examine the defendant as to the precise nature of his employment, the plaintiff alleging that it was consular, the defendant that it was diplomatic. But on July 18, 1928, the House of Lords reversed this decision and treated the Attorney-General's statement as conclusive. As to the conclusiveness in judicial proceedings of statements made by or on behalf of the Crown in international matters see above, § 357a.

of a legation are personally presented to the Secretary for Foreign Affairs, and very often also to the Head of the receiving State. The second class comprises all those individuals who are in the private service of the envoy, such as servants of all kinds, the private secretary of the envoy, the tutor and the governess of his children. The third class consists of the members of the family of the envoy—namely, his wife, children, and such of his other near relatives as live within his family, and under his roof. And, lastly, the fourth class consists of the so-called couriers. They are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy. Such couriers are attached to most legations to guarantee the safety and secrecy of the despatches.

Privileges
of Mem-
bers of
Legation.

§ 402. It is a generally—though, with regard to clerical and similar staff,¹ not universally—recognised² rule of International Law that all³ members of a legation are as inviolable and extraterritorial as the envoy himself. They must, therefore, be granted by the receiving State exemption from criminal and civil jurisdiction, exemption from police,⁴ subpoena as witnesses, and taxes. They are considered, like the envoy

¹ In the United Kingdom full immunity is granted to this category of persons.

² Some authors, however, plead for an abrogation of this rule: see Martens, ii. § 16. The Statute of 7 Anne, c. 12, s. 5, denies immunity to any person in 'the service of an ambassador or other public minister' who engages in trading: see Dicey, p. 215. It is believed that this provision coincides with and is declaratory of the common law. Contrast the immunity of the envoy himself, above, § 391, p. 800, n. 3.

³ That is, *bona fide* members and not persons appointed merely for the purpose of conferring immunity upon them. In *re Cloete* (1891) 7 T.L.R. 265.

⁴ A case of this kind occurred in 1904 in the United States. Mr. Gurney, Secretary to the British embassy at Washington, was fined by the police magistrate of Lee, in

Massachusetts, for furious driving of a motor car. But the judgment was afterwards annulled, and the fine remitted. Another case of interest occurred in London in May 1913. The body of a young man was recovered from the River Thames and identified as that of Mogen Scheested, a secretary to the Danish legation. The inquest necessary in such cases, according to English Law could not be held, because the Danish legation claimed exemption for Scheested as one of its members. The body was therefore conveyed to Copenhagen without further interference by the police. Again, when in February 1916 Roberto Centaro, the first secretary to the Italian embassy in London, committed suicide by shooting himself in a hotel, the coroner, on the demand of the Italian ambassador, refrained from holding an inquest, and the police did not further interfere.

himself, to retain their domicile within their home State. Children born to them during their stay within the receiving State are considered as born on the territory of the home State. While in matters of private law it is within the envoy's power to waive these privileges belonging to members of a legation,¹ in criminal matters it is probably only the home State itself that can waive them.²

§ 403. There is no uniformity in the practice of States on the question whether the receiving State must grant to all persons in the private service of the envoy exemption from civil and criminal jurisdiction.³ Some States, such as Denmark, France, Switzerland, the United States⁴ and, probably, the United Kingdom, grant full immunity to servants without qualification. Others, such as Belgium,

Privileges
of Private
Servants.

¹ See *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch 139, *Dickinson v. Del Solar* [1930] 1 K.B. 376, and *Baty in Law Magazine and Review*, 39 p. 349. In *Price v. Griffin*, an action for breach of promise, reported in *The Times* newspaper, February 20, 1948, and in *I.L.Q.*, 2 (1948), p. 266, the Court considered that the defendant was not entitled to waive his diplomatic immunity after a claim had been made by the Government of the United States that he was entitled to immunity. Subsequently that Government waived the claim to immunity.

² Thus when, in 1909, Wilhelm Beckert, the chancellor of the German legation at Santiago in Chile, murdered the porter of this legation, a Chilean subject, and then set fire to the chancery in order to conceal his embezzlement of money belonging to the legation, the German Government consented to his being prosecuted in Chile; he was tried, found guilty, and executed at Santiago on July 5, 1910. On the other hand, when in 1915 Gottfried Ruh, a registrar of the Swiss legation in Berlin, embezzled monies entrusted to the legation, the Swiss Government asked the German Government to arrest and extradite him to Switzerland; he was tried at Bern in June 1916, and sentenced to penal servitude.

³ When, in 1827, a coachman of Mr. Gallatin, the American minister in London, committed an assault outside the embassy, he was arrested in the stable of the embassy and charged before a local magistrate, and the British Foreign Office refused to recognise the exemption of the coachman from the local jurisdiction. The statute 7 Anne, c. 12, § 3, makes 'utterly null and void' all writs and processes . . . sued forth or prosecuted whereby . . . the domestic servant or servants of any such ambassador or other public minister may be arrested or imprisoned, or his or their goods or chattels may be detained, seized or attached,' provided that (§ 6) the names of the servants are registered with the Foreign Office; moreover, it does not apply to servants engaged in trading. In the case of Mr. Gallatin's coachman the Law Officers of the Crown appear to have taken the view that this statute does not apply to the arrest of servants upon criminal charges; see *Satow*, p. 199. And see generally *M. Jones in J.C.L.*, vol. 22 (3rd ser., 1940), pp. 19-31.

⁴ Thus in *Carrera v. Carrera* an United States Court of Appeals affirmed the immunity, in an action for maintenance and support of a child, of a domestic servant of the Czechoslovak Embassy; (1949) 174 F. (2d) 496; *A.J.*, 44 (1950), p. 184.

Brazil, the Netherlands, Poland, Roumania, Spain and Sweden¹ withhold immunity from servants who are nationals of the receiving State. Other States, such as Chile, Italy, Peru, Turkey and the Soviet Union, do not recognise the immunity of servants of any nationality. In others still, the position on the subject is obscure. However that may be, the envoy can disclaim these immunities of servants, and these persons cannot then claim exemption from police, immunity of domicile, or exemption from taxes.

Privileges
of Family
of Envoy.

§ 404. Although the wife of the envoy, his children, and such of his near relatives as live within his family and under his roof belong to his retinue, there is a distinction to be made as regards their privileges. His wife must certainly be granted all his privileges in so far as they concern inviolability and extraterritoriality. The same rules apply to the husband whose wife is an envoy. As regards, however, the children and other relatives of the envoy, no other general rule of International Law can safely be said to be generally recognised, than that they must be granted exemption from civil and criminal jurisdiction. But even this rule was formerly not generally recognised. Thus, when in 1653 Don Pantaleon Sà, the brother of the Portuguese ambassador in London and a member of his suite, killed an Englishman, named Greenaway, he was arrested, tried in England, found guilty, and executed.² Nowadays the exemption from civil and criminal jurisdiction of such members of an envoy's family as live under his roof is always granted. Thus, when in 1906 Carlos Waddington,³ the son of the Chilean envoy at Brussels, murdered the secretary of the

¹ With regard to British subjects employed by foreign missions in a diplomatic or clerical capacity the British practice has been to make it a condition of their acceptance as such that they should enjoy no immunity (except in respect of official acts). No such condition has been imposed with regard to servants for reasons connected, apparently, with the continuing operation of the Diplomatic Privileges Act, 1708 (see above, p. 811). There is apparently no decided authority with regard to immunity of servants from criminal jurisdiction.

In *Macartney v. Garbutt* [1890] 2 Q.B.D. 368 it was laid down that unless a British subject appointed to a foreign diplomatic mission in this country has been received on the condition that he will be subject to local jurisdiction, he is entitled to immunity. For the statement that there is no objection to such a condition being imposed see *Engelke v. Musmann* [1928] A.C. 433, at p. 450.

² The case is discussed by Phillimore, ii. § 169.

³ See *R.G.*, 14 (1907), pp. 159-165.

Chilean legation, the Belgian authorities did not take any steps to arrest him. Two days afterwards, however, the Chilean envoy waived the privilege of the immunity of his son, and on March 2 the Chilean Government likewise agreed to the murderer being prosecuted in Belgium. The trial took place in July 1907, but Waddington was acquitted by the Belgian jury.¹

§ 405. To ensure the safety and secrecy of the diplomatic despatches they bear, couriers² must be granted exemption from civil and criminal jurisdiction, and afforded special protection during the exercise of their office. It is therefore usual to provide them with special passports. It is particularly important to observe that they must have the right of innocent passage through *third* States, and that, according to general usage, those parts of their luggage which contain diplomatic despatches and are sealed with the official seal must not be opened and searched.³

XII

TERMINATION OF DIPLOMATIC MISSION

Vattel, iv §§ 125, 126—Hall, § 98**—Phillimore, ii §§ 237-242—Moore, iv, §§ 636, 639, 640, 666—Hackworth, iv, §§ 377, 387—Hershey, §§ 267-269—Taylor, §§ 320-323—Wheaton, §§ 250, 251—Hyde, i, §§ 421, 423, 424—Fenwick, pp. 368-371—Ullmann, § 53—Heffter, §§ 223-226—Rivier, i, § 40—Nys, ii, pp. 447-449—Fauchille §§ 730-732—Pradier-Fodéré, iii, §§ 1513-1535—Flore, ii, §§ 1169-1175—Calvo, iii, §§ 1363-1367—Martens,

¹ In *Herman v. Apple* (*Annual Digest*, 1927-1928, Case No. 244) the Supreme Court of New York adopted the view that the consent of the home State is not necessary to enable the envoy to waive the immunity of his wife, family, or domestic servants.

² See *Embassies and Foreign Courts* (1855), pp. 178-199. See also Hackworth, iv, §§ 415-418, on diplomatic pouches, couriers, and immunity of correspondence in time of war. In answer to a request from the United States Department of State that instructions be issued to British censorship officials directing them to abstain from interference with the diplomatic and consular mails of the United

States it was stated, in February 1940, that: (a) both diplomatic and consular correspondence, if addressed to a State department and if certified as emanating from a diplomatic mission or consulate, were exempt from examination; and (b) the censorship examiners must be left free to determine whether a particular governmental institution was 'to be regarded as a State Department for the purpose of examination' (*ibid.*, p. 632).

³ This usage was abused during the First World War, when couriers in the service of the German legations in Norway and Switzerland carried explosives concealed in their sealed luggage.

ii. § 17—Suarez, §§ 283-292—Keith's *Wheaton*, pp. 471-480—Gould in *Répertoire*, i. pp. 341-343, 356-358—*Harvard Research* (1932), pp. 133-138—Genet, ii. pp. 432-524—Foster, *Practice of Diplomacy* (1906), ch. 9—Satow, §§ 487-528—Hurst in *Hague Recueil*, 1928 (ii.), pp. 237-240.

Termination in contradiction to Suspension.

§ 406. A diplomatic mission may come to an end from different causes — such as accomplishment of the object for which the mission was sent; expiration of letters of credence given to an envoy for a specific time only; recall of the envoy by the sending State; his promotion to a higher class; the delivery of passports to him by the receiving State; request of the envoy for his passports; war between the sending and the receiving State; constitutional changes in the headship of the sending or receiving State; revolutionary change of government in the sending or receiving State; extinction of the sending or receiving State; and, lastly, death of the envoy. The termination of diplomatic missions must not be confused with their suspension.¹

Accomplishment of Object of Mission.

§ 407. A mission comes to an end through the fulfilment of its objects in all cases of missions sent for special purposes, such as ceremonial functions like representations at weddings, funerals, and coronations; or notification of changes in the headship of a State, or representation of a

¹ It may be stated as a general principle that, "at any rate according to English law, the immunity of an envoy from civil process continues after the termination of his diplomatic mission for such reasonable period as is necessary to enable him to wind up his official business; consequently the statutes of limitation will not begin to run in respect of a cause of action which accrues against him during the period of his diplomatic immunity until that reasonable period expires: *Musurus Bey v. Gaddan* [1894] 2 Q.B. 352; see also *In re Suarez, Suarez v. Suarez* [1918] 1 Ch. 176. It was held in *Rez v. Kent* that that principle does not apply to an official of the embassy after his dismissal and waiver of his diplomatic privilege by the ambassador or by his State: [1941] 1 K.B. 464. Kent was a code clerk in the United States embassy in London. He was convicted of offences against the Official

Secrets Act and also of larceny. He had been previously dismissed from his post in the embassy. On the day of his dismissal his immunity was waived by the ambassador and the waiver confirmed by the United States Government. He was arrested on the same day. As to other States see Hill in *A.J.*, 25 (1931), pp. 258-260; *Harvard Research* (1932), pp. 134-137. And see *Salin v. Frazier*, *Annual Digest*, 1933-1934, Case No. 161; *A.J.*, 28 (1934), pp. 382, 383, for a decision of the Court of Appeals of Rouen to the effect that a French court would not enforce the decision of an Austrian court against a former representative of the United States in Vienna, rendered after he had ceased to exercise the diplomatic mission, in respect of acts connected with the mission. See generally on termination of diplomatic immunity Jones in *B.Y.*, 25 (1948) pp. 262-269.

State at conferences and congresses, and the like. Although the mission is terminated through the accomplishment of its object, the envoys enjoy all their privileges on their way home.

§ 408. If a letter of credence of a limited duration is given to an envoy, his mission terminates at the expiration of the period. A temporary letter of credence may, for instance, be given to an individual for the purpose of representing a State diplomatically during the interval between the recall of an ambassador and the appointment of his successor.

§ 409. The mission of an envoy, be he permanently or only temporarily appointed, terminates through his recall by the sending State. If this recall is not caused by unfriendly acts of the receiving State but by other circumstances, the envoy receives a letter of recall from the Head or, in case he is only a chargé d'affaires, from the Foreign Secretary of his home State, and he¹ hands this letter to the Head of the receiving State in a solemn audience or, in the case of a chargé d'affaires, to the Foreign Secretary. In exchange for the letter of recall the envoy receives his passports and a so-called *Lettre de récréance*, a letter in which the Head of the receiving State (or the Foreign Secretary) acknowledges the letter of recall. Although therewith his mission ends, he enjoys nevertheless all his privileges on his homeward journey.² A recall may be caused by the resignation of the envoy, by his transference to another post, and the like. It may, secondly, be caused by the outbreak of a conflict between the sending and the receiving State which leads to a rupture of diplomatic intercourse,³ and in these circumstances the sending State may order its

¹ But sometimes his successor presents the letter recalling his predecessor to the Head of the receiving State, or to the Foreign Secretary in the case of chargés d'affaires.

² See the interesting cases discussed by Moore, iv. § 666. See also *In re Suarez*, *Suarez v. Suarez* [1917] 2 Ch. 131; [1918] 1 Ch. 176.

³ But not necessarily. In 1936 the

Iranian Government withdrew its minister from the United States as a sign of disapproval in connection with an alleged insult to the person of the ruler of Iran. It was, however, explained, that that step in no way affected the status of the American Legation at Teheran and that the Iranian Government would continue to transact business with it: Hackworth, iv. p. 459.

envoy to ask for his passport and depart at once without handing in a letter of recall. Thirdly, a recall may result from a request of the receiving State by reason of real or alleged misconduct of the envoy.¹ Such request for recall may lead to a rupture of diplomatic intercourse, if the receiving State insists upon the recall and the sending State does not recognise the act of its envoy as misconduct.²

Examples of requests by a receiving State for the recall of diplomatic envoys occurred during the First World War.³ On September 8, 1915, the United States requested the Austro-Hungarian Government to recall its ambassador at Washington, Dr. Dumba, for proposing plans to instigate strikes in American munition factories, and for employing an American citizen with an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary. On December 4, 1915, the United States requested Germany to recall Captain Roy-Ed, naval attaché, and Captain von Papen, military attaché, to the German embassy at Washington, on account of their 'connection with the illegal and questionable acts of certain persons within the United States.'⁴ In 1953 the Government of Soviet Russia asked for the recall of Mr. Kennan, the Ambassador of the United States, on account of an interview given to a press agency and said to be derogatory to the Soviet Government.

§ 410. When an envoy remains at his post but is promoted

Promo-
tion to
Higher
Class.

¹ The Pan-American Convention of February 20, 1928, concerning the Rights and Duties of Diplomatic Officers (see above, § 35, n.) provides, in Article 8, that a State may request the recall of a foreign diplomatic representative without being obliged to state the reasons for the request. This is an innovation which many will regard as undesirable. See Satow, § 528.

² As to the threatened expulsion of Mr. Cummins, the British diplomatic agent in Mexico City, by the Government of Mexico in June 1924 and his withdrawal by the British Government resulting in a rupture of diplomatic relations for more than a year

see the London *Times* newspaper, June 16, 17, 1924, and *Parl. Papers*, Mexico No. 1 (1924), Cmd. 2225. The British Government approved the action of Mr. Cummins which gained for him the displeasure of the Mexican Government. See also above, § 383.

³ Earlier cases of request for recall of envoys are reported by Taylor, § 322, Hall, § 98^o; Moore, iv, § 639; Hershey, § 269; and Satow, pp. 260-275.

⁴ See *A.J.*, § 10 (1916), Special Suppl., pp. 361, 363. For a selection from papers found in the possession of Captain von Papen see *Parl. Papers*, Misc. No. 6 (1916), Cmd. 8174.

to a higher class—for instance, when a chargé d'affaires is created a minister resident, or a minister plenipotentiary is created an ambassador—his original mission technically ends, and he therefore receives a new letter of credence.

§ 411. A mission may terminate, further, through the Dismissal of the envoy by the receiving State. The reason for such dismissal may be either gross misconduct on his part,¹ or a quarrel between the sending and the receiving State which leads to a rupture of diplomatic intercourse. Whenever such rupture takes place, diplomatic relations between the two States come to an end and all diplomatic privileges cease when the envoy departs and crosses the frontier. If the archives of the legation are not removed, they must be put under seal by the departing envoy and confided to the protection² of some other foreign legation.

§ 412. Without being recalled, an envoy may, on his own Request for Passport account, ask for his passport and depart, in consequence of ill-treatment by the receiving State. This may, or may not, lead to a rupture of diplomatic intercourse.

§ 413. When war breaks out between the sending and the receiving State before their envoys accredited to each other are recalled, their mission nevertheless comes to an end. They receive their passports, but they must be granted their privileges³ on their way home.

§ 414. If the Head of the sending or receiving State is a Constitutional sovereign, his death or abdication terminates the missions sent and received by him, and all envoys remaining at their posts must receive new letters of credence. But though they receive new letters of credence, their place in order of seniority remains as before. Moreover, during the time between the termination of their mission and the arrival

¹ On the expulsion, in June 1931 of the apostolic nuncio accredited to Lithuania and the resulting severance of diplomatic relations with the Vatican City see *R.G.*, 38 (1931), pp. 663-665. It is sometimes difficult to say whether the termination of the mission is the result of dismissal or of recall by the sending State. Thus, for instance, M. Suritz, the Russian ambassador to France, was recalled

in March 1940 after the French Government declared him to be a *persona non grata* following upon the dispatch by him of a public telegram to the Government insulting to the Allies. See *The Times* newspaper, March 28, 1940.

² As regards the case of *Montagnini* see p. 229, n. 1, of the fourth edition of this work.

³ See below, vol. ii. § 98.

of new letters of credence they enjoy all the privileges of diplomatic envoys.

As regards the effect of constitutional changes in the headship of republics on the missions sent or received, this general rule can be laid down: When, as in France or the United States of America, the President is considered to be the Head of the republic, and it is he who sends and receives diplomatic envoys, a constitutional change in the headship through death, abdication or expiration of office must necessarily terminate the missions sent and received by the former Head, and new letters of credence must be provided. But when, as in Switzerland, the Bundesrath, a body of individuals, is considered to be the Head of the republic, the death or abdication of the President, or the expiration of his term of office, does not terminate the missions, and no new letters of credence are necessary.

Revolu-
tionary
Changes
of Govern-
ment.

§ 415. A revolutionary movement in the sending or receiving State which creates a new Government, changing, for example, a republic into a monarchy or a monarchy into a republic, or deposing one sovereign and enthroning another, terminates the missions. All envoys remaining at their posts must receive new letters of credence, but no change in seniority takes place if they do receive them. It may happen that in cases of revolutionary changes of government foreign States for some time neither send new letters of credence to their envoys nor recall them, watching the course of events in the meantime and waiting for more proof of a permanent settlement. In such cases the envoys are, according to an international usage, granted all privileges of diplomatic envoys although in strict law they have ceased to be such. In cases in which the receiving State continues to recognise the previous Government operating abroad or in a part of national territory, no change of representation is called for.¹ In cases of recall subsequent to

¹ As to the continued recognition by the United States of the representative of the Kerensky Government of Russia, after its fall see Hersey in *A.J.*, 16 (1922), pp. 426-428, and Fraenkel in *Columbia Law Review*, 25 (1925), pp. 551, 552. When

in 1933 the United States recognised the Soviet Government the United States withdrew the authority of the consuls appointed by the former Russian régime. See *A.J.*, 28 (1934), Suppl., p. 13. Thus, in and after 1949, when the Government of the People's

revolutionary changes, the protection of subjects of the recalling States remains in the hands of their consuls, since the consular office¹ does not come to an end through constitutional or revolutionary changes in the headship of a State.²

§ 416. If the State sending or receiving a mission is extinguished by voluntary merger into another State, or through annexation in consequence of conquest, the mission terminates *ipso facto* in all cases in which such changes are recognised by the receiving State.³ In case of annexation of the receiving State there can be no doubt that, although the annexing State will not consider the envoys received by the annexed State as accredited to itself, it must grant those envoys the right to leave the territory of the annexed State unmolested, and to take their archives away with them. In case of annexation of the sending State, the question arises what becomes of the archives and official property belonging to the missions of the annexed State accredited to foreign States. This question is one of so-called succession⁴ of States. The annexing State acquires, *ipso facto*, by the annexation the property in those archives and other official property, such as the premises, furniture, and the like. But as long as the annexation is not notified and recognised *de jure*,⁵ the receiving States have no duty to interfere.

Republic established itself on the mainland of China, many States continued to maintain diplomatic relations with the former (Nationalist) Government of China established on the island of Formosa.

¹ See below, § 438.

² As to the position of the agents of Governments which are unrecognised or only recognised *de facto* see above, § 74, n. See also Hackworth, iv, § 377, on representatives of unrecognised or fallen Governments.

³ When in 1940 Soviet Russia incorporated Latvia, Lithuania and Esthonia, many States declined to recognise those changes *de jure* and continued to receive the diplomatic representatives previously appointed by those States.

⁴ See above, § 82.

⁵ It must be noted that the mere

fact of closing the legation or the embassy does not amount to such recognition. Thus when, in December 1936, Great Britain closed her legation in Addis Abbaba, it was announced that that step did not constitute a recognition *de jure* of the Italian annexation of Abyssinia. When in 1939 Great Britain and the United States closed their legations at Prague, that measure did not in itself amount to a recognition of the German protectorate over Czechoslovakia. This was also the case with regard to the purported annexation of Austria by Germany in 1938. On that occasion the Government of the United States informed Germany that it found itself 'under the necessity as a practical measure' of closing its legation in Vienna and of establishing a consulate in its place: *Documents*, 1938, vol. II.

Death of
Envoy.

§ 417. A mission ends, lastly, by the death of the envoy. As soon as an envoy dies, his effects, and especially his papers, must be sealed. This is done by a member of the legation of the dead envoy, or, if there be no such members, by a member of another legation accredited to the same State. The local Government must not interfere, unless at the special request of the home State of the deceased envoy.

Although the mission, and therefore the privileges, of the envoy come to an end on his death, the members of his family who resided under his roof, and the members of his suite, enjoy their privileges until they leave the country. But a certain time may be fixed for them to depart, and on its expiration they lose their privilege of extraterritoriality. The courts of the receiving State have no jurisdiction whatever over the goods and effects of the deceased envoy, and no death duties can be demanded.

XIII

DIPLOMATIC PRIVILEGES OF NON-DIPLOMATIC PERSONS

Fauchille, § 685 (1)—Sibert, pp. 35-44—Hyde, i. § 416—Hackworth, iv. § 378—Rey, *Les immunités des fonctionnaires internationaux* (1928)—Pogea, *Die Vorrechte der internationalen Funktionäre* (1929)—Balz, *Die besondern Staatenvertreter und ihre völkerrechtliche Stellung* (1931)—Baudévant (Suzanne), *Les fonctionnaires internationaux* (1931), pp. 290 et seq.—Kaufmann, *Die Immunität der Nicht Diplomaten* (1932)—Hill, *Immunities and Privileges of International Officials* (1947)—Rougier in *R.G.*, 28 (1921), pp. 277-279—Borsi in *Rivista*, 3rd ser., ii. (1923), pp. 437, 438—*Annuaire*, 31 (1924), pp. 1-15—van Vollenhoven in *A.J.*, 19 (1925), pp. 469-474—Committee of Experts for the Progressive Codification of International Law: C. 196. M. 70. 1927. V., pp. 77 et seq.—Hill in *Annuaire*, 33 (1) (1927), pp. 420-427—Rey in *Revue de droit international privé*, 23 (1928), p. 257—Preuss in *A.J.*, 25 (1931), pp. 694-710—Hammarshjöld in *Annuaire*, 38 (1934), pp. 358-397, and in *R.I.*, 3rd ser., 16 (1935), pp. 5-31—Secretan in *B.Y.*, 16 (1935), pp. 56-78, and in *Répertoire*, i. pp. 317-325—Hammarshjöld in *Hague Recueil*, vol. 56 (1936) (ii.), pp. 112-206—McKinnon Wood in *Grotius Society*, 30 (1944), pp. 141-164—Jenks in *B.Y.*, 22 (1945), pp. 58-60—Parry in *B.Y.*, 23 (1946), pp. 407-412 and in *Modern Law Review*,

p. 76. See *U.S. ex rel. Zdunir v. Uhl*, *Annual Digest*, 1941-1942, Case No. 164 (p. 524), for a statement of the

Secretary of State deprecating any intention of recognition on that occasion.

§ 417a] PRIVILEGES OF NON-DIPLOMATIC PERSONS 821

10 (1947), pp. 97-121—Kunz in *A.J.*, 41 (1947), pp. 828-862—Spencer in *Michigan Law Review*, 49 (1950), pp. 101-110—Aufricht, *A.S. Proceedings*, 1952, pp. 85-101—Seidl-Hohewaldern in *Archiv des Völkerrechts*, 4 (1953), pp. 30-58.

§ 417a. In addition to the diplomatic persons upon whom customary International Law confers certain immunities and privileges, there are several classes of officials whom States have agreed by treaty to invest with the same, or at any rate a similar, status. These persons may be classified as (a) international officials, and (b) certain national officials and agents of a miscellaneous character.

Diplo-
matic
Privileges
of Non-
Diplo-
matic
Persons.¹

(a) *International Officials*.—Among these may be mentioned—

(i) *The United Nations and its Officials*. The Charter of the United Nations lays down, in Article 105, that officials of the Organisation—as well as representatives of the Members of the United Nations—shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation. The details of these privileges and immunities are left for determination as the result of recommendations of the Assembly or of special conventions made with the Members of the United Nations. Unlike the corresponding Article 7 of the Covenant of the League,² the

¹ As to the normal position of non-diplomatic State agents in foreign countries see below, §§ 452-457.

² 'Officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.' It seems that these privileges and immunities attached to these persons, even when they were in the territory of the State whose nationals they were, provided that they were 'engaged on the business of the League.' See Schücking und Wehberg, *op. cit.*; Rougier, *op. cit.*; Borsi, *op. cit.*; *Annuaire, loc. cit.*, as to the probable meaning of 'officials' and the scope of the privileges. For a number of cases bearing on the diplomatic immunities of the officials of the International Labour Organisation and for some instructive notes on the subject see *Annual Digest*, 1929-1930, Cases Nos. 205-207. The *Cour*

de Justice Civile at Geneva held, in March 1929, that although an official of the League of Nations was not, because of his Swiss nationality, entitled to immunity, his salary could not be attached while it was in the hands of the League because the premises of the League were inviolable by virtue of Article 7 of the Covenant: *Annual Digest*, 1929-1930, Case No. 204.

The position of persons covered by Article 7 of the Covenant was regulated by two agreements concluded in 1921 and 1926 by the Secretary-General of the League with the Swiss Government: *Off J.*, 1926, pp. 1422 *et seq.* In 1935 a Paris court held that the Secretary-General of the League was not immune from the jurisdiction of French courts in respect of an action for maintenance brought by his wife from whom he was

Charter does not refer to *diplomatic* privileges and immunities. The probable reason for that change was the intention to leave room for a substantial measure of elasticity suggested by the experience of the League. The First General Assembly approved, on February 13, 1946, a convention on the privileges and immunities of the United Nations and proposed it for accession by each member of the United Nations.¹ The Convention embodies detailed provisions concerning the juridical personality of the United Nations; the immunity and inviolability of its property, its premises, and its archives; exemption from taxation and customs duties; facilities in respect of communications; and various jurisdictional and other immunities and privileges for the representatives of Members of the United Nations, and for its officials and experts on missions for the United Nations.² Provision was made for ensuring that such immunities shall be enjoyed primarily in the interest of the proper functioning of the United Nations and its organs, and not for the private benefit of the individuals concerned.³ In the United King-

separated: *Avenol v. Avenol*, *Annual Digest*, 1935-1937, Case No. 185.

A United States District Court held in *United States v. Keeney*, with reference to Article 105 of the Charter, that a former American employee of the Secretariat of the United Nations was not, in the circumstances of the case, immune from prosecution for refusal to testify before a Senate judicial sub-committee on a question relating to the manner in which she obtained employment: *I.C.L.Q.*, 2 (1953), p. 482; 111 F. Suppl. 233, A.J., 47 (1953), p. 715. See also *Curran v. City of New York*, 77 N.Y.S. 2d 206, *Annual Digest*, 1947, Case No. 74, where it was held, *inter alia*, that as the Charter of the United Nations was part of the municipal law of the United States, the United Nations enjoyed immunity from taxation, without the necessity of further legislative action, having regard to Article 105 of the Charter of the United Nations providing for immunities 'necessary for the fulfilment of its purposes'.

¹ On the question of the waiver of these immunities see above, § 391a.

² See above, § 391a. However, by reference to the Headquarters Agreement between the United Nations and the United States (see above, p. 421), a New York court declined jurisdiction, in *City of New Rochelle v. Page Sharp* over a secretary of the Australian Mission to the United Nations on a charge of exceeding the speed limit. It was also held that the defendant had no authority to waive immunity. *A.J.*, 41 (1950), p. 418. For the detailed regulation of the immunities of the United Nations and of the International Court of Justice (see below, p. 823), see the *Diplomatic Privileges (United Nations and International Court of Justice) Order in Council, Statutory Rules and Orders*, 1947, No. 1772. See also the comprehensive compilation prepared by the Secretariat of the United Nations and entitled 'Handbook on the Legal Status, Privileges and Immunities of the United Nations' (General. St/ Leg/2 of September 19, 1952). On the United Nations *laissez-passer* see Brandon in *B.Y.*, 27 (1950), pp. 448-455.

¹ *Treaty Series* No. 10 (1950) Cmd. 7891; *A.J.*, 43 (1949), Suppl., p. 1.

dom the Convention was given effect by the Diplomatic Privileges (Extension) Act, 1946.¹

(ii) *The Judges of the International Court of Justice*, who by Article 19 of the Statute of the Court 'when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities' These are regulated in an Exchange of Letters between the President of the Court and the Dutch Government of June 26, 1946. The Agreement provides that the members of the Court and the Registrar shall, generally, be accorded the same treatment as heads of diplomatic missions accredited to the Queen of the Netherlands.² The higher officials of the Court are to be accorded the same treatment as Secretaries attached to diplomatic missions at The Hague; other officials are to be treated as officials of comparable rank attached to diplomatic missions at The Hague. Judges and officials who are of Dutch nationality are to be exempt from the jurisdiction of Dutch courts with regard to acts performed by them in their official capacity; they are also exempt from direct taxation with regard to their official salaries.

(iii) *International Organisations and their Officials*. The constitutions of various international organisations set up since the Second World War contain provisions regulating immunities for the organisations concerned and their officials.³ On November 21, 1947, the Second General

¹ 9 & 10 Geo. 6 c. 66. The provisions of this Act were repeated and amplified in the International Organisations (Immunities and Privileges) Act, 1950 - an Act which consolidated the successive Diplomatic Privileges (Extension) Acts from 1944 to 1950. See below p. 828. As to the United States see *Enabling Instruments of Members of the United Nations*, compiled by Zeydel and Chamberlain (1951).

² First General Assembly Journal No. 75, Suppl., A-64, Add. 1, p. 936. See also *ibid.*, p. 933, for the recommendation of the General Assembly approving the Agreement and providing for the immunities and privileges of the members and officials of the Court when outside the Netherlands and for the recognition as a

valid travel document of the *laissez-passer* issued by the Court to its members and officials. See also *Yearbook of the International Court of Justice*, 1946-1947, pp. 86-94. And see the British Diplomatic Privileges (Extension) Act, 1946, which makes provision for the privileges and immunities of the Judges of the Court, and of suitors and their agents, counsel and advocates, as may be required to give effect to the Resolution of the General Assembly. And see above, n. 1.

³ See e.g. the Constitution of the Food and Agriculture Organisation of the United Nations (Arts. VIII (4) and XV (2), Misc. No. 4 (1945) Cmd. 63901); Articles of Agreement of the International Monetary Fund (Art. 1X); Draft Articles of Agreement of an

Assembly approved a Convention on the Privileges and Immunities of the Specialised Agencies.¹ In Great Britain, the Diplomatic Privileges (Extension) Act, 1944,² gave His Majesty in Council the power to confer various immunities and privileges, laid down in the Act, upon international organisations of which the Government of the United Kingdom and foreign Governments are members.³ The Act enumerates the maximum of such privileges and immunities and leaves it to an Order in Council to apply its provisions to the several international organisations. Since the Diplomatic Privileges (Extension) Act, 1946, the various privileges and immunities conferred upon the persons concerned apply, apart from minor exceptions, also to British subjects.⁴ By

International Bank for Reconstruction and Development (Art. VII) (Final Act of the United Nations Monetary and Financial Conference, Cmd. 6546 (1944)); Resolutions 32, 34 and 36 of the First Session of the Council of United Nations Relief and Rehabilitation Administration in 1943 (Cmd. 6497 (1943))—see also Cmd. 6566 (1944) as to the relevant Resolutions of the Second Session; Article 15 of the Final Act of the Paris Conference on Reparations of December 21, 1946, setting up the Inter-Allied Reparation Agency (Cmd. 6721); Article VIII of the Agreement of January 4, 1946, establishing the European Coal Organisation (Cmd. 6732). The Statute of the Council of Europe of May 5, 1949, provides, in Article 40, that the Council of Europe, representatives of member-States and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. It is expressly laid down that these immunities shall include immunity for all representatives in the Consultative Assembly from arrest and legal proceedings in the territories of all members in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions. See General Agreement on Privileges and Immunities of the Council of Europe of September 2, 1949; *Treaty Series*, No. 34 (1953), Cmd. 8852. See on the subject generally Jenks in *Grotius Society*, 28 (1942), pp. 113

et seq.; Friedmann in *Modern Law Review*, 6 (1943), pp. 193 *et seq.*; Schwelb, *ibid.*, 8 (1945), pp. 56-63; Jessup in *A.J.*, 38 (1944), pp. 658-662; Kuhn, *ibid.*, pp. 662-667.

¹ *U.N.T.S.*, 33, p. 261.

² 7 & 8 Geo. 6, c. 44.

³ In introducing the Bill the Attorney General expressed the view that when a number of States joined in creating an international organisation for fulfilling a public purpose, it was proper under international law, that the Governments members of the organisation should collectively enjoy the same immunities which they would enjoy individually.

⁴ 9 & 10 Geo. 6, c. 66, First Schedule. For an analysis of the Act see Parry in *Modern Law Review*, 10 (1947), pp. 97-121. For a criticism of the tendency to exempt the State's own nationals from the benefits of diplomatic immunity see Hurst in *B.Y.*, 10 (1929), p. 10; Hammarström in *Hague Recueil*, 56 (1930) (ii.), p. 204; Jenks in *B.Y.*, 22 (1945), p. 100, n. 2.

The Act makes it obligatory upon the Secretary of State to issue lists of the officials on whom diplomatic status is conferred. He may issue such lists in respect of persons who are entitled to immunity only in respect of their official acts. See above, § 391a, on the undertakings, given in this connection, as to the waiver of immunities. See also the instructive debate in the House of Commons, *Hansard*, vol. 403, cols. 349, 2086, and 2770 *et seq.*, and

successive Orders in Council these provisions were made applicable to a number of international agencies.¹ In 1950 the various Diplomatic Privileges (Extension) Acts were consolidated in the International Organisations (Immunities and Privileges) Act, 1950.² That Act covers comprehensively the International Court of Justice,³ international conferences taking place in the United Kingdom,⁴ and international organisations. As to the latter, the Act applies to public international organisations, *i.e.* organisations of which the United Kingdom and one or more other sovereign States are members. The organisation as such is to be granted immunities and privileges and is to have the legal capacities of a body corporate. Secondly, the Act authorises the conferment, by Orders in Council, of diplomatic immunities, generally described in the Act,⁵ upon (a) persons who are representatives, whether of Governments or not, on any organ of such organisations or are members of their committees or organs; (b) holders of high offices, to be specified in the Order, in the organisation; and (c) persons employed on missions of the organisation in question. Thirdly, certain immunities and privileges, referred to below, are provided in favour of other classes of officials and servants to be specified by an Order in Council, and upon the staffs and the families of the officers of the organisation. Provision is made for the compilation and publication of the lists of persons entitled to these immunities.

By virtue of the Act of 1950 the immunities and privileges of international organisations as such are as follows: (1)

vol. 404, cols. 94 *et seq.*; Corbett, *Post-War Worlds* (1942), p. 183; Friedmann in *Modern Law Review*, 6 (1943), p. 198, who suggests an International Administrative Tribunal as a necessary counterpart to immunity from municipal jurisdiction. And see Hackworth, *iv.* § 378.

¹ The following are some of the Orders in Council passed in pursuance of the Diplomatic Privileges (Extension) Acts, 1944 to 1950, in relation to various international organisations: United Nations and International Court of Justice, 1947 (No. 1772); Brussels Treaty Permanent Commission, 1948 (No. 2253); International

Civil Aviation Organisation, 1949 (No. 134); International Labour Organisation, 1949 (No. 133); World Health Organisation, 1949 (No. 136); Food and Agriculture Organisation, 1949 (No. 834); International Refugee Organisation, 1949 (No. 837); United Nations Educational, Scientific, and Cultural Organisation, 1949 (No. 835); Organisation for European Economic Co-operation, 1949 (No. 1831); Council of Europe, 1950 (No. 1268).

² 14 Geo. 6, c. 14.

³ See above, p. 823.

⁴ See below, p. 827.

⁵ See below, p. 826.

Immunity from suit and legal process ; (2) Inviolability of official archives and premises occupied as offices as is accorded in respect of the official archives and premises of a foreign envoy ; (3) Exemption or relief from taxes and rates, other than taxes on the importation of goods, as is accorded to a foreign State ; (4) Exemption from taxes on the importation of goods directly imported by the organisation for its official use in the United Kingdom or the importation of any publications ; (5) Exemption from prohibitions and restrictions on importation or exportation in the case of goods directly imported or exported by the organisation for its official use and in the case of any publications of the organisation ; (6) The right to avail itself, for telegraphic communications sent by it and containing only matter intended for publication by the press or for broadcasting, of any reduced rates applicable for the corresponding service in the case of press telegrams.

The immunities and privileges of representatives, members of committees, high officers and persons on missions consist of immunity from suit and legal process ; inviolability of residence ; and exemption or relief from taxes all in the same way as corresponding immunities accorded to foreign envoys. The same applies to the official staffs and the families of these persons. The immunities and privileges of other officers and servants of the organisation comprise immunity from suit and legal process in connection with the performance of official duties, and exemption from income tax in respect of emoluments received as an officer or servant of the organisation.

The Act gives power to the Crown to decline to accord or to withdraw immunities or privileges in relation to nationals or representatives of any State on the ground that that State is failing to accord corresponding immunities or privileges to British nationals or representatives.

In 1945 the United States Congress approved an Act to extend certain privileges, exemptions and immunities to international organisations and their officers and employees.¹

¹ Public Law 291 (70th Congress, the Act provides that international ch. 662, 1st Session), Section 2 of organisations shall possess the cap-

(b) *National Officials*.—By treaty national officials, other than diplomatic representatives, sent to transact business in a foreign State are occasionally granted a degree of diplomatic immunity. This has been the case, for instance, with various Trade Delegations acting on behalf of the Soviet Government.¹ National officials sent to international organisations such as the United Nations² and international congresses and conferences enjoy, by virtue of special provisions, either customary or specially defined diplomatic immunities. Thus, the British Diplomatic Privileges (Extension) Act, 1944, authorises the Secretary of State, whenever a conference is held in the United Kingdom and is attended by representatives of the United Kingdom and of one or more foreign sovereign Powers, to compile a list of such foreign representatives, who, together with their retinue, shall be entitled to the ordinary diplomatic immunities.³ These immunities and privileges were reaffirmed in the Act

acity to contract, to acquire and dispose of property, and to institute legal proceedings; that they shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments; that their property shall be immune from search; that their archives shall be inviolable; and that with regard to customs duties and internal revenue taxes as well as the treatment of their official communications they shall be entitled to immunities accorded to foreign governments. Section 3 lays down that the baggage and effects of alien officers and employees of international organisations, or of aliens designated by foreign governments to serve as their representatives in or to such organisations, or of the families, suites and servants of such persons shall be free from customs duties. Section 4 provides for exemption from taxation: (a) of the income of foreign governments or international organisations from any source within the United States; (b) of wages and salaries of their officials other than citizens of the United States provided that the State of which these persons are nationals grant similar exemption to citizens of the United States. See Preuss in *A.J.*, 40 (1946),

pp. 332-345. And see the same, *ibid.*, 41 (1947), pp. 555-578, for lucid comment on the case of *Westchester County v. Ranollo* (*ibid.*, p. 690), which came before the City Court of New Rochelle, New York, in November 1946 and which provided the first judicial construction of the Act of 1945. The Court held that the defendant was not necessarily immune from prosecution for driving a car in excess of the speed limit for the mere reason that he was an employee of the United Nations and was driving the Secretary-General of the United Nations at the material time. The action in respect of which immunity was sought had to bear some relation 'to the importance or the success of the Organisation's deliberations'—a question which could not be decided without a trial of the issue of fact. The claim for immunity was subsequently withdrawn.

¹ As to Great Britain see below, § 454a (n.). As to France see, for instance, *De Fallois v. Piatiaff*, *A. val Digest*, 1935-1937, Case No. 84. And see generally Stoupinitzky, *Statut international de l'U.S.S.R.* (1936), pp. 255-300.

² Article 105 of the Charter.

³ § 3.

passed in 1950 to consolidate the successive Diplomatic Privileges (Extension) Acts from 1944 to 1950.¹ During the Second World War the presence in Great Britain of a number of Governments of countries invaded by Germany gave occasion for the Diplomatic Privileges (Extension) Act, 1941, which extended diplomatic immunities to members and high officials of Governments of foreign States allied with Great Britain and established there. Similar rights were accorded to members of any national committee or other foreign authority established in Great Britain and recognised as competent to maintain armed forces for service in association with British forces.²

¹ 14 Geo. 6, c. 14. The principle of reciprocity—see above, p. 826—applies also to the immunities of these representatives.

² The Diplomatic Privileges (Extension) Act, 1944, s. 5, provided that such immunities shall continue, in

respect of members and officials of such foreign Governments and authorities as perform their functions wholly or in part in Great Britain, even though such Governments or authorities had transferred their seat elsewhere.

CHAPTER III

CONSULS

I

THE INSTITUTION OF CONSULS

Hall, § 105—Phillimore, ii. §§ 243-246—Fenwick, pp. 371-377—Twiss, i. § 223—Rivier, i. § 41—Nys, ii. pp. 450-460—Calvo, iii. §§ 1368-1372—Fauchille, §§ 733-742—Pradier-Fodéré, iv. §§ 2034-2043—Martens, ii. §§ 18, 19—Fiore, ii. §§ 1176-1178—De Louter, ii. pp. 69-66—Warden, *A Treatise on the Origin, Nature, etc., of the Consular Establishment* (1814)—Salles, *L'institution des consulats, son origine, etc.* (1898)—Chester Lloyd Jones, *The Consular Service of the United States Its History and Activities* (1906)—Stowell, *Le consul* (1909), and *Consular Cases and Opinions, etc.* (1909)—Pillaut, *Manuel de droit consulaire*, 2 vols. (1910, 1912)—Puentes, *The Foreign Consul* (1926)—Torroba, *Derecho Consular* (1927)—Desaint, *Essai de classification juridique des actes et des attributions des consuls* (1927)—Heyking, *Les principes et la pratique des services consulaires* (1928); the same in *Hague Recueil*, vol. 34 (1930) (iv.), pp. 816-829—Ferrara, *Manuale di diritto consolare* (1936)—Jordan in *R.I.*, 2nd ser., 8 (1906), pp. 479-507 and 717-750, and in *Répertoire*, i. pp. 284-302—*Harvard Research* (1932), pp. 201-216—Stuart in *Hague Recueil*, vol. 48 (1934) (ii.), pp. 483-501.

§ 418. The roots of the institution of consuls go back to the second half of the Middle Ages. In the commercial towns of Italy, Spain, and France the merchants used to appoint by election one or more of their fellow-merchants as arbitrators in commercial disputes, and these were called *Juges Consuls* or *Consuls Marchands*. When, between and after the Crusades, Italian, Spanish, and French merchants settled down in the Eastern countries and founded factories, they brought the institution of consuls with them, the merchants belonging to the same nation electing their own consul. The competence of these consuls became, however, more and more enlarged through treaties, called 'Capitulations', between the home States of the merchants and the Mohammedan monarchs on whose territories these merchants

Develop-
ment of
the Insti-
tution of
Consuls.

had settled down.¹ The competence of consuls came to comprise the whole civil and criminal jurisdiction over, and protection of, the privileges, the life, and the property of their countrymen. From the East the institution of consuls was brought to the West. Thus, in the fifteenth century Italian consuls existed in the Netherlands and in London, English consuls in the Netherlands, Sweden, Norway, Denmark, and Italy (Pisa). These consuls in the West exercised, just as did those in the East, exclusive civil and criminal jurisdiction over the merchants of their nationality. But the position of the consuls in the West decayed in the beginning of the seventeenth century through the influence of the rising permanent legations on the one hand, and, on the other, from the fact that everywhere foreign merchants were brought under the civil and criminal jurisdiction of the State in which they resided. This change in their function altered the position of consuls in the Christian States of the West altogether. Their functions now shrank into a general supervision of the commerce and navigation of their home States, and into a kind of protection of the commercial interests of their countrymen. Consequently, they did not receive much notice in the seventeenth² and eighteenth centuries, and it was not until the nineteenth century that the general development of international commerce, navigation, and shipping again drew the attention of the Governments to the value and importance of the institution of consuls. It was now systematically developed. The position of the consuls, their functions, and their privileges were the subject of provisions, either in commercial treaties or in special consular treaties,³ and a number of States enacted statutes regarding the duties of their consuls abroad, such as the Consular Act passed by Great Britain in 1825.

Nature of
Consular
Activity.

§ 419. Nowadays consuls are agents of States residing abroad for purposes of various kinds, but mainly in the interests of the commerce and navigation of the appointing

¹ See Twiss, i. §§ 263-263.

553-578, on consular service in the reign of Charles II.

² See Barbour in *American Historical Review*, 33 (1927-1928), pp.

³ Phillimore, ii. § 255, gives a list of such treaties.

State. As they are not diplomatic representatives, they do not enjoy diplomatic privileges. Nor have they, ordinarily, anything to do with intercourse between their home State and the State in which they reside. However, this is not always so. Until quite recently,¹ consuls of Christian Powers in certain non-Christian States retained their former competence, and exercise full civil and criminal jurisdiction over their countrymen. Sometimes consuls are charged with the tasks which are normally fulfilled by diplomatic representatives. Thus, too, on occasions small States, instead of accrediting diplomatic envoys to another State, send only a consul, who combines consular functions with those of a diplomatic envoy.² It must, however, be emphasised that consuls thereby neither become diplomatic envoys, although they may have the title of 'Diplomatic Agents,' nor enjoy the privileges of diplomatic envoys if such privileges are not specially provided for by treaties between the home State and the State in which they reside. Different, however, is the case in which a consul is at the same time accredited as *chargé d'affaires*, and in which, therefore, he combines two distinct offices; for as *chargé d'affaires* he is a diplomatic envoy and enjoys all the privileges of a diplomatic representative, provided he has received a letter of credence.

II

CONSULAR ORGANISATION

Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), § 13—
 Phillimore, ii. §§ 253, 254 Moore, v. § 696—Hackworth, iv. § 423—
 Hyde i. § 460 Rivier, i. § 41 Calvo, iii. §§ 1373-1376—Fauchille, §§ 743-

¹ See above, § 316.

² As an instance of the difficulties which the amalgamation of the diplomatic and consular services into one service is apt to create see *Musmann v. Engelke* [1928] 1 K.B. 90, [1928] A.C. 433, and above, § 401 (n.). Soviet Russia in 1918 and the United States of America in 1924 each amalgamated their diplomatic and consular services into a common foreign service; see, as to the latter, Garner in *A.J.*, 18 (1924),

pp. 774-777; Rogers, *ibid.*, pp. 791-794; and Hackworth, iv. § 379. See also Lyons in *B.Y.*, 26 (1949), p. 434 in connection with the unreported case of *Price v. Griffin*. In Great Britain the Foreign Service Act 1943 (6 & 7 Geo. 6, c. 36) gives effect to the proposals of the White Paper (Cmd. 6420) for a measure of unification of the diplomatic and consular services. As to Soviet Russia see Taracuzio, *The Soviet Union and International Law* (1935), pp. 209 *et seq.*

748—Pradier-Fodéré, iv. §§ 2050-2055—Mérignhao, ii. pp. 320-333—Martens, ii. § 20—De Louter, ii. pp. 65-69—Stowell, *Le consul* (1909) pp. 186-205—*General Instructions for His Majesty's Consular Officers* (1907), as revised from time to time—Heyking in *Hague Recueil*, vol. 34 (1930) (4), pp. 830-844—*Harvard Research* (1932), pp. 207-209 217-222—*A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*. Edited by Feller and Hudson, 2 vols. (1933)—(Jachet, *Memento à l'usage des Chancelleries diplomatiques et consulaires* (published under the auspices of the French Ministry of Foreign Affairs, 2nd ed., 1933).

Different
Kinds of
Consuls.

§ 420. Consuls are of two kinds. They are either specially sent and paid for the administration of their consular office (*Consules missi*),¹ or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*).² Consuls of the first kind, who are the so-called professional consuls and are always subjects of the sending State, have to devote their whole time to the consular office. Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings. Some States, such as France, appoint professional consuls only; most States, however, appoint consuls of both kinds, according to the importance of the consular districts. But there is a general tendency with most States to appoint professional consuls for important districts.

No difference exists in the general position of the two kinds of consuls according to International Law. But, naturally, a professional consul enjoys in practice greater authority and a more important social position, and consular treaties often stipulate special privileges for professional consuls.

Consular
Districts.

§ 421. As the functions of consuls are of a more or less local character, most States appoint several consuls in the larger States, confining the duties of each to certain districts of such territories, or even to a certain town or port only. Consular districts as a rule coincide with the provinces of the State in which the consuls administer their offices. Consuls in each consular district are independent of each

¹ Sometimes called *consuls de carrière*.

ponds in the British Consular Service the distinction between 'Consular Officers' and 'Trading Consular Officers.'

² To this distinction there corres-

other, and conduct their correspondence directly with the Foreign Office of their home State, the agents-consular excepted, who correspond only with the consul who appoints them. The extent of the districts is agreed upon between the home State of the consul and the admitting State. Only the consul appointed for a particular district is entitled to exercise consular functions within its boundaries, and to him alone the local authorities have to grant the consular privileges, if any.

§ 422. Four classes of consuls are generally distinguished according to rank: consuls-general, consuls, vice-consuls, and consular agents. Different
Classes of
Consuls Consuls-general are appointed either as the head of several consular districts, and have then several consuls subordinate to themselves, or as the head of one very large consular district. Consuls are usually appointed for smaller districts, and for towns or even ports only. Vice-consuls are assistants of consuls-general and consuls who themselves possess consular character and so can take the consul's place in regard to all his duties; they are, according to the Municipal Law of some States, appointed by the consul subject to the approbation of his home State. Agents-consular are agents with consular character, appointed, subject to the approbation of the home Government, by a consul-general or consul for the exercise of certain parts of the consular functions in certain towns or other places of the consular district. Agents-consular are not independent of the appointing consul, and do not correspond directly with the home State, since the appointing consul is responsible to his Government for them. The so-called proconsul is not a consul but a *locum tenens* only, during the temporary absence or illness of a consul; he possesses, therefore, consular character for such time only as he actually is the *locum tenens*.

The British Consular Service consists of the following five ranks: (1) consuls-general; (2) consuls; (3) vice-consuls; (4) consular agents; (5) proconsuls. In the British Consular Service proconsuls exercise, as a rule, only the notarial functions of a consular officer.

Consuls
subordi-
nate to
Diplo-
matic
Envoys.

§ 423. Although consuls conduct their correspondence directly with their home Government, they are nevertheless subordinate to the diplomatic envoy of their home Government accredited to the State in which they administer their consular office. According to the Municipal Law of almost every State the diplomatic envoy has full authority and control over them. He can give instructions and orders, which they have to execute. In doubtful cases they have to ask his advice and instructions. On the other hand, the diplomatic envoy has to protect the consuls in case they are injured by the local Government.

III

APPOINTMENT OF CONSULS

Hall, § 105—Phillimore, ii. § 250—Moore, v. §§ 697-700—Hackworth, iv. §§ 424, 425—Hershey, § 285—Hyde, i. §§ 461-463—Rivier, i. § 41—Nys, ii. p. 457—Calvo, iii. §§ 1378-1384—Fauchille, §§ 749-752 (4)—Pradier-Fodéré, iv. §§ 2056-2067—Fiore, ii. §§ 1181, 1182—Martens, ii. § 21—De Louter, ii. pp. 69-71—Stowell, *Le consul*, pp. 207-216—*Harvard Research* (1932), pp. 226-243.

Qualifica-
tions of
Candi-
dates.

§ 424. International Law has no rules in regard to the qualifications of an individual whom a State can appoint as consul. Many States, however, by their Municipal Law require certain qualifications in professional consuls. The question whether women can be appointed consuls cannot be answered in the negative; but, on the other hand, no State is obliged to grant them the *exequatur*, and some States would at present certainly refuse it.¹

Obliga-
tion to
admit
Consuls.

§ 425. According to International Law a State is not obliged to admit any consuls.² But the commercial interests of all States are so important that in practice every State must admit consuls of foreign Powers; for a State which refused would in its turn not be allowed to have its own consuls abroad. Commercial and consular treaties stipulate, as a rule, that the contracting States shall have the

¹ See above, § 370 (n.), as to 241-243. And see the Pan-American women envoys. Convention of 1923 on Consular Agents

² See *Harvard Research* (1932), pp. (above, § 35, n.), Articles 1-8.

right to appoint consuls in all those parts of each other's country in which consuls of third States are already or may in future be admitted. Consequently a State cannot refuse admittance to a consul of one State for a certain district if it admits a consul of another State. But as long as a State has not admitted the consul of any State for any particular district, it can refuse to admit the consuls of all. Thus, for instance, Russia refused for a long time for political reasons to admit consuls in Warsaw, now the capital of Poland.

§ 426. There is no doubt that it is within the competence of every full sovereign State to appoint consuls. As regards not-full sovereign States, everything depends upon the special case. In regard to member-States of a Federal State it is the constitution of the Federal State which settles the question.

§ 427. Consuls are appointed through a patent or commission, the so-called *Lettre de provision*, of the State whose consular office they are intended to administer. Vice-consuls are sometimes, and agents-consular are always, appointed by the consul, subject to the approval of the home State. Admittance of consuls takes place through the grant of the so-called *exequatur*¹ by the Head of the admitting State.² The diplomatic envoy of the appointing State hands the patent of the appointed consul to the Secretary for Foreign Affairs for communication to the Head of the State, and the *exequatur* is given either in a special document or by means of the word *exequatur* written across the patent.

Exequaturs are granted to consuls appointed to act in a British Dominion only after reference by the British Foreign

¹ *Exequatur*, which comes from *exsequor*, means 'let him perform,' and was originally the term used to describe a 'temporal sovereign's authorisation of a bishop under Papal authority, or of publication of Papal bulls' (*Concise Oxford Dictionary*). As to the question whether the *exequatur* is the source or merely the evidence of consular authority see *In re Dargie's Estate*, decided in 1941 by the California District Court of

Appeal: *Annual Digest*, 1941-1942, Case No. 116.

² In *Foreign Office List* (1928), at p. 506, it is stated that: 'The King's Exequatur is granted to Foreign Consular Officers holding a Commission signed by the Supreme Sovereign Authority of the State appointing them. In other cases a formal recognition is accorded.' As to consuls appointed to protected States see above, § 92 (n.).

Office to the Government of the Dominion concerned, and upon the counter-signature of a Minister of that Dominion.¹

The *exequatur* can be refused for personal reasons: Thus, in 1869 England refused the *exequatur* to an Irishman named Haggerty, who was naturalised in the United States and appointed American consul for Glasgow. Similarly, the *exequatur* can be withdrawn for personal reasons at any time. Thus, in 1834 France withdrew it from the Prussian consul at Bayonne for having helped in getting supplies of arms into Spain for the Carlists.²

Appoint-
ment of
Consuls
and
Recog-
nition.

§ 428. As the appointment of consuls takes place in the interests of commerce, industry, and navigation, and has merely local importance without political consequences, it is maintained³ that a State does not indirectly recognise a newly created State merely by appointing a consul to a district in it. There is much support in the practice of States for that view.⁴ On the other hand, some weight must be attached to the view that since no consul can exercise his functions before he has handed over his patent to the local State and has received its *exequatur*, the appointing State thereby enters into such formal intercourse with the admitting State as indirectly⁵ involves recognition. In any case it is only if consuls are formally appointed and formally receive the *exequatur* on the part of the receiving State, that indirect recognition has been said to be involved.

¹ See Summary of Proceedings of the Imperial Conference of 1926: Cmd. 2768, p. 26.

² The British Government withdrew the *exequatur* of the consul, and the recognition of the vice-consul, of the United States of America at Newcastle in August 1922, on the ground that they were using their authority to grant *visas* in such a way as to divert traffic from British to American vessels. The American Government, after a local investigation, did not concur in the view taken by the British Government of the action of these officers and closed the consulate. On April 2, 1924, the British Government informed the American ambassador that it was 'prepared not to insist upon the

charge' against these officers, and a new consul was appointed; see *A.J.*, 17 (1923), pp. 344 and 516; *ibid.*, 18 (1924), p. 564.

³ Hall, §§ 26*, 105; Moore, i. §§ 30, 72; Hackworth, iv. § 427; and *Harvard Research* (1932), pp. 238-241.

⁴ See *Harvard Research* (1932), *loc. cit.*

⁵ See above, § 75d. The question is discussed in detail by Lauterpacht in *B.Y.*, 21 (1944), pp. 133-136, where the view is expressed that while it is controversial whether a request for an *exequatur* implies recognition, such scant practice as exists on the subject suggests that the issue of an *exequatur* implies recognition as a State or Government.

If, on the other hand, no formal appointment is made and no formal *exequatur* is asked for and received, foreign individuals may, with the consent of the local State, in fact exercise the functions of consuls without recognition following therefrom. Such individuals are not really consuls, although the local State allows them, for political reasons, to exercise consular functions.

IV

FUNCTIONS OF CONSULS

Hall, § 105—Phillimore, ii. §§ 257-260—Moore, v. §§ 717-731—Hackworth, iv. §§ 439-450—Hyde, i. §§ 477-488—Rivier, i. § 42—Calvo, iii. §§ 1421-1429—Fauchille, §§ 762-771—Pradier-Fodéré, iv. §§ 2069-2113—Fiore, ii. §§ 1184-1186—Martens, ii. § 23—De Louter, ii. pp. 72-75—Stowell, *Le consul* (1909), pp. 15-136—*General Instructions to His Majesty's Consular Officers* (1907)—Bouffanaia, *Les consuls en temps de guerres et de troubles* (1933)—Puente, *Traité sur les fonctions internationales des consuls* (1937)—Morelli in *Rivista*, 3rd ser., i. (1921-1922), pp. 315-341, 507-541—Van de Wetering in *R.I. (Geneva)*, 2 (1924), pp. 170-188, 363-374—Hrabar in *53 Clunet* (1920), pp. 578-583—Jordan in *Répertoire*, v. pp. 46-50, 65-185—*Harvard Research* (1932), pp. 251-313—Heyking in *Hague Recueil*, vol. 34 (1930) (iv.), pp. 845-888—Stuart, *ibid.*, vol. 45 (1934) (ii), pp. 545-565—Best in *B.Y.*, 25 (1948), pp. 280-295.

§ 429. Although consuls are appointed chiefly in the interests of commerce, industry, and navigation, they are also charged with various functions for other purposes.¹ Custom, commercial and consular treaties, Municipal Laws, and Municipal Consular Instructions prescribe detailed rules in regard to these functions.² They may be grouped under the heads of promotion of commerce and industry, supervision of navigation, protection, and notarial functions.

¹ As to the position and functions of the 'commercial representatives' of Soviet Russia in foreign countries see Murkine-Guetzévitch in *R.G.*, 33 (1928), pp. 372-386. On some special functions of consuls in time of war see Bouffanaia, *op. cit.*; Rousseau in *R.G.*, 40 (1933), pp. 506-519. In February and March 1932, the Council of the League invited the consular officers of some members of the League at Shanghai to investigate

and report on the hostilities between Japanese and Chinese troops: see *Off. J.*, March 1932.

² For a clear statement that while consular privileges are appropriate subject of treaties it does not follow that every act of a consul must be based upon a specific provision of a treaty see *Blackmer v. The United States of America*, 284 U.S. 421; *A.J.*, 26 (1932), p. 611, at p. 615.

Promo-
tion of
Com-
merce and
Industry.

§ 430. As consuls are appointed in the interests of commerce and industry, they must be allowed by the receiving State to watch over the execution of the commercial treaties of their home State, to send reports to the latter in regard to everything which can influence the development of its commerce and industry, and to give information to merchants and manufacturers of the appointing State necessary for the protection of their commercial interests.

Super-
vision of
Navigation.

§ 431. Another task of consuls consists in supervising the navigation of the appointing State. A consul at a port must be allowed to keep his eye on all merchantmen sailing under the flag of his home State which enter the port, to control and legalise their ship's papers, to inspect them on their arrival and departure, and to settle disputes between the master and crew or the passengers.¹ He assists sailors in distress, undertakes the sending home of shipwrecked crews and passengers,² and attests marine protests and surveys. Consuls must, upon the request of the commander, assist in every possible way any public vessel³ of their home State which enters their port; but they have no power of supervision over them.

Protec-
tion.

§ 432. In exercising the protection which they must be allowed by the receiving State to provide for subjects of the appointing State, consuls fulfil a very important task. For that purpose they keep a register, in which these subjects can have their names and addresses recorded. Consuls make out passports, and they have to render certain assistance and help to paupers and the sick, and to litigants before the courts. If a foreign subject is wronged by the local authorities, his consul has to give him advice and help, and eventually to interfere on his behalf. He is entitled for that purpose to communicate with imprisoned nationals of his State.⁴ If a foreigner dies, his consul may be ap-

¹ See Best in *B.Y.*, 25 (1948), pp. 293-295.

² As to the position of a consul who assists his fellow-nationals to return to their home State upon the outbreak of war between that State and the State to which he is appointed

see *R. v. Ahlers* [1915] 1 K.B. 616, and below, vol. ii. § 190.

³ See Lenain, *Rapports des consuls et de la marine de guerre* (1932).

⁴ See Briggs in *A.J.*, 44 (1950), pp. 254-257.

proached for securing his property and for rendering all kind of assistance and help to the family of the deceased.

As a rule, a consul exercises protective functions over subjects of the appointing State only; but the latter may charge him with the protection of subjects of other States which have not nominated a consul for his district.

§ 433. Very important are the notarial and similar functions with which consuls are charged. They attest and legalise signatures, examine witnesses and administer oaths for the purpose of procuring evidence for the courts and other authorities of the appointing State. They conclude or register marriages¹ of the subjects of the State which they represent, take charge of their wills, legalise their adoption, register their births and deaths. They provide authorised translations for local and for home authorities, and furnish attestations of many kinds. All consular functions of this kind are enumerated in detail in Municipal Laws and Consular Instructions. However, whereas promotion of commerce, supervision of navigation, and protection are functions the exercise of which must, according to a customary rule of International Law, be permitted to consuls by receiving States, many of their notarial functions need not be, in the absence of treaty stipulations.

Notarial
Func-
tions.

V

POSITION AND PRIVILEGES OF CONSULS

Hall, § 105—Phillimore, ii. §§ 261-271—Moore, v. §§ 702-716—Hackworth, iv. §§ 428-438—Hyde, i. §§ 464-476—Rivier, i. § 42—Calvo, iii. §§ 1385-1420—Fauchille, §§ 753-761—Pradier-Fodéré, iv. §§ 2114-2121—Fiore, ii. § 1183—Martens, ii. § 22—De Louter, ii. pp. 75-79—Travers, ii. §§ 793-835—Bodin, *Les immunités consulaires* (1890)—Stowell, *Le consul* (1909), pp. 137-184—Ludwig, *Consular Treaty Rights* (1914)—Stewart, *Consular Privileges and Immunities* (1926), and *American Diplomatic and Consular Practice* (1936), pp. 428-446—Report for League Codification Committee by Guerrero and Mastny in *A.J.*, 22 (1928), Special Suppl., pp. 105-110, and comment by Brown in *A.J.*, 22 (1928), pp. 135, 136—Weyking in *J.C.L.*, New Ser., 13 (1913), pp. 574-581—Lederle in *Z.I.*, 27 (1918), pp. 154-176—Jordan

¹ See Clunet in 48 *Clunet* (1921), pp. 813-824. See also Ketkitch, *Les mariages diplomatiques ou consulaires* (1831). As to functions of consuls in the matter of social insurance see Métall in *R.G.*, 45 (1938), pp. 241-248.

in *Répertoire*, v. pp. 50 65—*Harvard Research* (1932), pp. 313-352—*Puente in Columbia Law Review*, 30 (1930), pp. 281-307 (as to Latin America)—*Heyking in Hague Recueil*, vol. 34 (1930) (lv.), pp. 845-867—*Beckett in B.Y.*, 21 (1944), pp. 34-50.

Position of
Consuls.

§ 434. Consuls do not enjoy the position of diplomatic envoys, since no State in practice grants to foreign consuls the privileges of diplomatic agents.¹ On the other hand, since they are appointed by foreign States and have received the *exequatur*, they are publicly recognised by the admitting State as agents of the appointing State. Consuls are not diplomatic representatives, for they do not represent the appointing States in the totality of their international relations, but for a limited number of tasks and for local purposes only. Yet they bear a recognised public character, in contradistinction to mere private individuals, and, consequently, their position is different, even though legally they may not be entitled to claim special privileges of any kind. This is certainly the case with regard to professional consuls, who are officials of their home State and are specially sent to the foreign State for the purpose of administering the consular office.² But in regard to non-professional consuls the admitting State, by granting the *exequatur*, recognises their official position towards itself, and this demands at least a special protection³ for their persons and residences. The official position of consuls, however, does not involve direct intercourse with the Government of the admitting State. Consuls are appointed for *local* purposes only, and they have, therefore, direct intercourse with the *local authorities* only. If they desire to approach the Government itself, they can do so only through the diplomatic envoy, to whom they are subordinate.

Consular
Privi-
leges.

§ 435. From the undoubted official position of consuls no universally recognised privileges of importance have as yet been evolved. Apart from the special protection due to consuls according to International Law, there is neither a

¹ *Barbuit's Case* (1737) Cas. t. Talbot, 281; *Phillimore*, ii. § 265; *Viveash v. Becker* (1814) 3 M. and S. 284; *United States v. Rarara* (1794) 2 Dall. 299; *In re Bais* (1890) 135 U.S. 403; *United States v. Trumbull* (1891) 48 Fed. 94.

² For the position of a 'consular

secretary' who had been transferred to the embassy from the consulate on its being closed see *Musmann v. Engelke* [1928] 1 K.B. 90; [1928] A.C. 433, and above, § 401, p. 809, n. 1.

³ As to trade with the enemy see below, vol. ii. § 90.

custom nor universal agreement between the Powers to grant them ordinary diplomatic privileges. Such privileges of a diplomatic character as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations in a commercial or consular treaty between the sending and the admitting State. However, consuls do in fact enjoy the jurisdictional immunities granted to diplomatic representatives inasmuch as, according to the generally accepted practice, they are not liable in civil nor, perhaps, in criminal proceedings¹ in respect of acts which they perform in their official capacity on behalf of their States and which fall within the scope of consular functions as recognised by International Law.² In view of this the time may be ripe for a general international convention with regard to the position and privileges of consuls.³

¹ See *R. v. Ahlers* [1915] 1 K.B. 616, where the Court of Appeal quashed the conviction of a German consul on a charge of treason for assisting German nationals of military age to return to Germany at the beginning of the war. However, the decision is not conclusive as it was based on the absence of *mens rea*.

² There is no such immunity in respect of acts which do not properly fall within the scope of the consular function, or, *a fortiori*, which are contrary to the law of the receiving State for instance, when the consul forcibly detains a national of his State. See *Preuss v. A.J.*, 43 (1949), pp. 37-56, for an account of the *Kasenkina* incident between the United States and Soviet Russia in 1948. In that case a writ of *habeas corpus* was served upon the Soviet consul in New York on the steps of the consulate building. And see *Emmet v. Lomakin*, where a New York court held, with regard to the same case, that 'diplomatic immunity' did not permit the Soviet Consul-General in New York to ignore a writ of *habeas corpus* requiring him to produce Mrs. Kasenkina, a Soviet national, detained by him: *A.J.*, 43 (1949), p. 381. No warrant to enforce the writ was issued as Mrs. Kasenkina had in the meantime escaped from the consulate. For a lucid exposition of the practice of Governments and of courts on the subject, as well as of

the opinions of writers, see Beckett in *B.Y.*, 21 (1914), pp. 34-50. The basis of consular immunity in accordance with the rule stated in the text above is not the same as that underlying immunities of diplomatic representatives. Unlike the latter, consuls do not enjoy immunity in respect of acts of a private law nature. The immunity of consuls constitutes, upon analysis, one aspect of the jurisdictional immunity of States on whose behalf they act. The same applies to the immunity of government property administered by consuls: see *Auer v. Costa*, *Annual Digest*, 1938-1940, Case No. 174.

³ The Institute of International Law at its meeting at Venice in 1896 adopted a 'Règlement sur les Immunités consulaires' comprising twenty-one articles (*Annuaire*, 15, p. 304). For a summary of American treaty provisions relating to the privileges and immunities of consuls see Stewart in *A.J.*, 20 (1926), pp. 81-102, and *ibid.*, 21 (1927), pp. 257-267. See also above, § 35, n. And see Articles 14-22 of the Pan-American Convention of 1928 on Consular Agents (see above, § 35, n.). The French Court of Cassation held in 1928, in the case of *Princess Zizianoff v. Kahn and Bigelow*, that a United States consular officer was not immune from French jurisdiction in respect of a libel committed by giving

Meanwhile, it is of interest to notice some of the more important provisions to be found in treaties between States in regard to consular privileges :

(1) A distinction is very often made between professional and non-professional consuls, more privileges being accorded to the former.

(2) Although consuls are not exempt from the local civil and criminal jurisdiction, criminal jurisdiction over professional consuls is often limited to crimes of a more serious character.

(3) In many treaties it is stipulated that consular archives shall be inviolable from search or seizure. These treaties are declaratory of what may be regarded as a rule of International Law recognised by most States, including Great Britain.¹ Consuls are therefore obliged to keep their official documents and correspondence separate from their private papers.²

(4) Inviolability of the consular buildings is also sometimes provided for, so that no officer of the local police, courts etc., can enter these buildings without special permission from the consul. But it is the duty of consuls to surrender criminals who have taken refuge in these buildings.

(5) Professional consuls are often exempt from all kinds of rates and taxes,³ from the liability to have soldiers

information as to his reasons for refusing a visa to the plaintiff:

* *Annual Digest*, 1927-1928, Case No 266. The Supreme Court of Mauritius held in *Thureau Danquin v. Paturau*—Mauritius Reports, 1949, p. 160—that it had no jurisdiction in an action against the French consul for damages on account of his refusal to issue a passport. See also the decision of the Italian Court of Cassation in *In re Vukotitch*, *Annual Digest*, 1933-1934, Case No. 171, where the Court restored the conviction of the Yugoslav Consul-General in Genoa who ran into and fatally injured a pedestrian.

* ¹ It is occasionally stated by writers that the British practice in the matter constitutes an exception to the general rule. See e.g. Fauchille, I. (Part 3), § 780; Guerrero in *Dictionnaire*

Diplomatique, vol 1 p 555. Morton, *Les privilèges et les immunités diplomatiques* (1927), p 114. There seems to be no substance in this view. See Beckett, *op cit*, pp 37, 38.

* See *Telkes v. Hungarian National Museum* [No 1] where the Court, relying on a corresponding provision of the Treaty, held that a consul acting as garnishee was not entitled to refuse disclosure of property of third parties on consular premises. In this case the Swedish Consul acted on behalf of Hungarian interests in the United States after the outbreak of war with Hungary: *Annual Digest*, 1941-1942, Case No. 389.

* It has been held that State owned consular premises are immune from taxation. *Yin-Tao Hwang v. Toronto* [1950] 4 D.L.R. 209. See Bishop in *A J.*, 46 (1952), pp. 247-254.

quartered in their houses, and from the duty of appearing in person as witnesses before the courts. In the latter case consuls have either to send in their evidence in writing, or their evidence may be taken by a commission on the premises of the consulate.

(6) Consuls of all kinds have the right to put up the arms of the appointing State over the door of the consular building, and to hoist the national flag.

VI

TERMINATION OF CONSULAR OFFICE

Hall, § 105—Moore, v. § 701—Hackworth, iv. § 426—Rivier, i. pp. 533, 534—Calvo, iii. §§ 1382, 1383, 1450—Fauchille, § 775—Fiore, ii. § 1187—Martens, ii. § 21—De Loutre, ii. 79-81—Stowell, *Le consul* (1909), pp. 217-222—*Harvard Research* (1932), pp. 247-251.

§ 436. Death of the consul, withdrawal of the *exequatur*,¹ Un-recall or dismissal, and, lastly, war between the appointing ^{doubted} and the admitting State, are universally recognised causes ^{Causes of} of the termination of the consular office. When a consul ^{Termination.} dies, or war breaks out, the consular archives must not be touched by the local authorities. They remain either under the care of an *employé* of the consulate, or under the charge of a consul of another State, until the successor of the deceased consul arrives, or peace is concluded.

§ 437. It is not certain in practice whether the office of ^{Doubtful} a consul terminates when his district, through cession, ^{Causes of} annexation following conquest, or revolt, becomes the pro- ^{Termination.} perty of another State. The question ought to be answered in the affirmative, because the *exequatur* given to him originates from a Government which no longer possesses the territory. In 1836, Belgium, which was then not yet recognised by Russia, declared that she would no longer treat the Russian consul, Aegi, at Antwerp as consul, because he was appointed before the revolt and his *exequatur* was granted by the Government of the Netherlands. Although

¹ See above, § 427.

Belgium gave way in the end to the urgent remonstrances of Russia, her original attitude was legally correct.¹

Change in
Headship
of States.

§ 438. It is universally recognised that, in contradistinction to a diplomatic mission, the consular office does not come to an end through a change in the headship of the appointing or the admitting State. Neither a new patent nor a new *exequatur* is therefore necessary whether another king comes to the throne or a monarchy turns into a republic, or in any like case.²

VII

CONSULS IN NON-CHRISTIAN STATES

Halleck, i. pp. 414-424—Phillimore, ii. §§ 272-277—Sibert, pp. 64-94—Frisch in *Strupp, Wort.*, i. pp. 672-678—Rivier, i. § 43—Nys, ii. pp. 460-475—Calvo, iii. §§ 1431-1444—Fauchille, §§ 776-791—Pradier-Fodéré, iv. 2122-2138—Mérignac, ii. pp. 338-351—De Louter, ii. pp. 80-97—Cruchaga, §§ 660-666—Travers, ii. §§ 518-656, iii. §§ 1279-1300—Strupp, *Éléments*, 12d—Martens, ii. §§ 24-26, and *Konsularwesen und Konsularjurisdiction im Orient* (German translation from the Russian original by Skerst, 1874)—Tarring, *British Consular Jurisdiction in the East* (1887)—Hall, *Foreign Powers and Jurisdiction* (1894), §§ 64-85—Brullat, *Étude historique et critique sur les juridictions consulaires* (1898)—Lippmann, *Die Konsularjurisdiction im Orient* (1898)—Verge, *Des consuls dans les pays d'occident* (1903)—Hinckley, *American Consular Jurisdiction in the Orient* (1906)—Piggott, *Exterritoriality. The Law relating to Consular Jurisdiction, etc., in Oriental Countries* (new ed., 1907) And see some of the literature cited above, § 318

¹ When a consular district has been conquered but not annexed, that is to say when it is under military occupation, different considerations apply. In November 1914, during the First World War, after having occupied the greater part of Belgium, the German Government declared that the *exequaturs* granted before the war by the Belgian Government to consuls of neutral States in occupied consular districts had expired through the German occupation, and that the offices of the consuls concerned had terminated. The Belgian Government protested, but the United States of America rightly held that the occupying Government need not recognise an *exequatur* given by the legitimate

Government, but might suspend it. However, suspension is not termination, and such an *exequatur* at once revives on the occupation coming to an end. The functions of consular representatives are not terminated as the result of the displacement of the legitimate governmental authorities by an invader: *In re Zaleski's Estate: Annual Digest*, 1941-1942, Case No. 118.

² As to the anomalous position of Russian consuls appointed by the Tsarist Government to Egypt and Yugoslavia, who after the Revolution received official recognition not as consuls but as 'the heads of the Russian community,' see Goadby in *J.C.L.*, 6 (1924), pp. 264, 265.

§§ 439-442.¹ Until the recent abolition of extraterritoriality in practically all countries in which it had been in existence, ^{Position of Consuls in certain Non-Christian States.} consuls in certain non-Christian States enjoyed a position fundamentally different from that of consuls in general. In the Christian countries of the West consuls have, as has been stated (§ 418), lost jurisdiction over the subjects of the appointing States. In the Mohammedan States consuls not only retained their original jurisdiction, but by degrees acquired, through the so-called Capitulations, complete civil and criminal jurisdiction, the power of protection over the privileges, life, and property of their countrymen, and even the power to expel one of their countrymen for bad conduct. Moreover, custom and treaties secured to consuls in these States inviolability, extraterritoriality, ceremonial honours, and miscellaneous other rights, so that there is no doubt that their position became materially the same as that of diplomatic envoys. A similar position was acquired by consuls in China, Japan, Persia, and certain other non-Christian countries, and in Abyssinia, a Christian country. This extraterritorial consular jurisdiction, which is now a matter of the past, has already been discussed above, in § 318.

¹ See above. § 318

CHAPTER IV

MISCELLANEOUS AGENCIES

I

ARMED FORCES ON FOREIGN TERRITORY

Hall, §§ 54, 56, 103—Phillimore, i. § 341—Wheaton, § 99—Moore, ii. § 251—Hackworth, ii. § 171—Hyde, i. §§ 247-249—Westlake, i. p. 265—Rivier, i. pp. 333-335—Calvo, iii. § 1560—Fiore, i. §§ 528, 529—Praag, §§ 245-250—Travers, ii. §§ 879, 956-974—Frisch, *Der volkerrechtliche Begriff der Exterritorialität* (1917), pp. 44-47—Strasower in *Hague Recueil*, 1923, pp. 270-273—Heyking, *Exterritorialité* (1926), pp. 68, 69—Llewellyn Jones in *Grotius Society*, 9 (1923), pp. 149-162—Schwelb in *A.J.*, 38 (1944), pp. 50-73—Fairman and King, *ibid.*, pp. 258-277—King, *ibid.*, 40 (1946), pp. 257-279—Barton in *B.Y.*, 26 (1949), pp. 380-413 and 27 (1950), pp. 186-234.

Armed
Forces as
State
Organs.

§ 443. Armed forces are organs of the State which maintain them, because they are created for the purpose of maintaining the independence, authority, and safety of the State. In this respect it matters not whether armed forces are at home or abroad; for they are organs of their home State, even when on foreign territory, provided only that they are there in the service of their State, and not for their own purposes. For if a body of armed soldiers enters foreign territory without orders from, or without being otherwise in the service of, its State, but on its own account, whether for pleasure or for the purpose of committing acts of violence, it is no longer an organ of its State.

Occasions
for Armed
Forces to
be Abroad.

§ 444. Besides war, there are several occasions for armed forces to be on foreign territory in the service of their home State.¹ Thus, a State may have a right to keep troops in a foreign fortress, or to send troops through foreign territory. Thus, further, a State which has been victorious in war with another may, after the conclusion of peace, occupy

¹ See Robin, *Des occupations militaires en dehors des occupations de guerre* (1918), pp. 641-651. And see

Chalufour, *Le statut juridique des troupes alliées pendant la Guerre 1914-1918* (1927).

a part of the territory of its former opponent as a guarantee for the execution of the treaty of peace. After the Franco-Prussian War, for example, the Germans in 1871 occupied a part of the territory of France until the final instalments of the indemnity for the war costs of five milliards of francs were paid. Or again, under Articles 428 to 432 of the Treaty of Peace with Germany of 1919, the German territory west of the Rhine and the Rhine bridgeheads were to be occupied by Allied and Associated troops as a guarantee for the execution of the Treaty.¹ After the Second World War the whole of Germany was occupied by the Allies. The armed forces of the Western Allies remained in Germany even after the conclusion, in 1952, of the various Conventions which, subject to their provisions, provided for the full authority of Germany over her internal and external affairs.² One of these Conventions regulated the rights and obligations of foreign armed forces and their members in Germany.³ It may also be a case of necessity for the armed forces of a State to enter foreign territory and commit acts of violence there, as in the case of the *Caroline*.⁴

§ 445. Whenever armed forces are on foreign territory in the service of their home State, they are considered by some to be extraterritorial and as remaining, therefore, under its jurisdiction. According to that view a crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State⁵ in cases where the crime is

Position
of Armed
Forces
Abroad.

¹ This occupation was regulated by a Treaty of June 28, 1919, between Great Britain, France, Belgium, and Germany: British Treaty Series, No. 7 (1919); note Article 3 (d) which subjected the allied troops exclusively 'to the military law and jurisdiction of such forces.' On the evacuation of these territories in 1929 see Toynbee, *Survey*, 1929, pp. 167-188; *Documents*, 1928, pp. 33-50, and 1929, p. 7. See also below, vol. ii. § 277 (n. 2), and Heyland in *Strupp, Wärt.*, ii. pp. 371-378.

² See above, § 237a.

³ Germany No. 6 (1952), Cmd.

8571. The Convention provided for exclusive criminal jurisdiction of the authorities of the forces over members of the forces (Article 6). Jurisdiction in non-criminal matters was to rest with German authorities (Article 9).

⁴ See above, § 133, and below, § 446.

⁵ This is the opinion of the vast majority of writers. But see Bar, *Lehrbuch des internationalen Privatrechts und Strafrechts* (1892), p. 351, and Rivier, i. p. 333. See Hyde, i. §§ 248, 249. For a recent instance of the application of this principle see a

committed either within the place where the force is stationed or in some place where the criminal was on duty. This rule does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime.¹ However, the view which has the support

judgment of the Supreme Court of Panama in *Republic of Panama v. Schwartziger*, in *A.J.*, 21 (1927), pp. 182-187; *Annual Digest*, 1927-1928, Case No. 114. For an application of the same principle to the case of an assault committed by an Italian sergeant on a British corporal, both members of the force sent to the Saar in 1935 to supervise the holding of the plebiscite, see the judgment of the Military Court of Rome given in 1935: *In re Polimani, Foro*, 1935, II, 381. And see the Visiting Forces (British Commonwealth) Act, 1933 (23 & 24 Geo. 5, c. 6), which provides that a visiting force from a Dominion shall, when in the United Kingdom or a colony, a protectorate, or British mandated territory, be governed by its own military law and administration. The provisions of that Act were, by the Allied Forces Act, 1940, made applicable to the military forces of any Allied Power present in the United Kingdom. By § 1 of the latter Act the military courts and authorities of Allied Powers were authorised to exercise, within the United Kingdom and in relation to the members of their armed forces in matters concerning discipline, the jurisdiction conferred upon them by the law of those Powers. Among the Orders in Council issued under the Act some laid down that § 154 of the Army Act relating to the apprehension of deserters should, in the United Kingdom, apply to deserters from allied forces. Similar legislation was enacted in several British Dominions. See *Reeves v. Deane-Freeman* [1952] 2 All E.R. 504. And see, as to allied forces, *In re Amand* (No. 1) [1941] 2 K.B. 239; *In re Amand* (No. 2) [1942] 1 K.B. 445; *Allied Forces (Czechoslovakia) Case*, decided by the Czechoslovak Military Court of Appeal in London: *Annual Digest*, 1941-1942, Case No. 31. See

also *Re de Bruijn* (as to Canada), *ibid.*, Case No. 29, and *Haak and Others v. Minister of External Affairs* (as to South Africa), *ibid.*, Case No. 80. And see Schwelb in *Czechoslovak Year Book of International Law*, 1942, pp. 174-171; Hartmann in *Modern Law Review*, 5 (1941-1942), pp. 256-261; Kuratowski in *Grotius Society*, 28 (1942), pp. 1-20; Oppenheimer in *A.J.*, 30 (1942), pp. 589-594; Jessup, *ibid.*, pp. 653-657; Mann in *L.Q.R.*, 59 (1943), pp. 57, 155; *B.Y.*, 21 (1944), pp. 190-194; Táborský, *The Czechoslovak Cause* (1944), pp. 102-133. And see above, § 141a. See also the Convention between Great Britain and Egypt of August 26, 1936, concerning the Privileges and Immunities of the British Forces in Egypt: Treaty Series, No. 6 (1937), Cmd. 5360, p. 23. And see Brinton in *A.J.*, 38 (1944), pp. 375-382. See also Annex to Article 6 of the Anglo-Ethiopian Agreement of December 19, 1944. The Annex regulates the status of the British Military Mission in Ethiopia (Cmd. 6584). The Treaty of March 11, 1946, between the United Kingdom and Belgium concerning the privileges and facilities for British forces in Belgium in connection with the occupation of Germany and Austria provides for the exclusive criminal jurisdiction of British courts and authorities over members of British forces; Treaty Series No. 13 (1949), Cmd. 7624.

¹ See *Malero Manuel v. Ministère Public*, decided in 1943 by the Court of Cassation of the Mixed Courts in Egypt: *A.J.*, 39 (1945), p. 349. In *Chow Hung Ching v. The King*—(1948) 77 Commonwealth Law Reports 449; *Annual Digest*, 1948, Case No. 48—the High Court of Australia held that civilian labourers, though under military law and discipline, are not members of the armed forces entitled to immunity.

of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise.¹ Thus when in 1942 Great Britain conferred upon the military tribunals of the United States exclusive jurisdiction with regard to offences committed by members of the United States forces stationed in Great Britain, she made a concession going beyond the accepted rule of International Law in the matter.² The Treaty of 1949 between Belgium, France, Luxembourg, the Netherlands and the United Kingdom relative to the status of members of the armed forces of the Parties to the Brussels Treaty of 1948³ provided expressly that members of a foreign force who commit an offence in the receiving State against the laws in force in that State can be prosecuted in the courts of the receiving State.⁴ The Agreement of June 19, 1951, between the Parties to the North Atlantic Treaty⁵ recognises the general jurisdiction of the receiving State. By way of exception, the Agreement permits the jurisdiction of the sending State over the members of its armed forces which are directed solely against the property or security of that State or solely against the person or property of another member of its forces or which arise out of any act or omission done in performance of a legal duty.⁶

¹ For a cogent exposition of that view see Barton in *B.Y.*, 27 (1950), pp. 186-234.

² See above, § 144a.

³ See above, § 89b.

⁴ Article 7, Cmd. 7868.

⁵ Misc. No. 5 (1951). See Notes in *Modern Law Review*, 16 (1953), p. 59, and in *Harvard Law Review*, 65 (1952), p. 1072. And see in particular, for a lucid analysis of these provisions, Baxter in *B.Y.*, 29 (1952), pp. 311-352.

⁶ The provisions of this Agreement have found expression in the Visiting Forces Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2, c. 67), which, although it applies generally to foreign forces in Great Britain, was enacted primarily with a view to giving effect to the

Agreement of 1951 referred to in the text above. See also, to the same effect, the Canadian Visiting Forces (North Atlantic Treaty) Act (15 & 16 Geo. 6, c. 28). And see the Administrative Agreement between the United States and Japan of February 28, 1952 in *Bulletin of State Department*, 26 (1952), p. 382. On the other hand, Article 79 of the Treaty Constituting the European Defence Community of May 27, 1952 and Article 19 of the Jurisdictional Protocol attached thereto provide for the eventual transfer, to the Organisation as a whole, of penal jurisdiction over members of the European Defence Forces—these to be subject to a common disciplinary code and to common legislation to be adopted by the Parties.

The rule as to the jurisdictional immunity of armed forces does not apply if in time of war a belligerent captures members of the armed forces of the enemy who before their capture committed such violations of the laws and customs of war as are considered to be war crimes. A belligerent may try such prisoners of war, and punish them, as war criminals.¹

Case of
McLeod

§ 446. An instructive example of the position of armed forces abroad is furnished by the case of *McLeod*,² which occurred in 1840. Alexander McLeod, who was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the *Caroline*, a boat equipped for crossing into Canadian territory, and taking help to the Canadian insurgents, came in 1840 on business to the State of New York, and was there arrested and indicted for the killing of one Amos Durfee, a citizen of the United States, on the occasion of the capture of the *Caroline*. The British ambassador at Washington demanded the release of McLeod, on the ground that he was, at the time of the alleged crime, a member of a British armed force sent into the territory of the United States by the Canadian Government acting in a case of necessity. McLeod was not released, but had to stand his trial in 1840, when he was acquitted on proof of an *alibi*. However, in the reply of Mr. Webster, the Secretary for Foreign Affairs of the United States, to a note from the British ambassador occurs the following passage: 'The Government of the United States entertains no doubt that, after the avowal of the transaction as a public trans-

¹ See below, vol. ii. § 251. When, during the First World War, the French tried by court-martial, and punished, German prisoners of war who had pillaged before their capture, some German writers—see Strupp in *Z.I.*, 25 (1915), p. 359—asserted that since armed forces abroad remain under the exclusive jurisdiction of their home State, the French had no right to punish captured German soldiers for war crimes. This assertion is unfounded, since the very definition of war crimes as such acts of soldiers or other individuals as may

be punished by the enemy on capture of the offenders—see below, vol. ii. § 251—involves the right of a belligerent to punish prisoners of war for having previously violated the laws and customs of war. See, however, Finch in *A.J.* 14 (1920), pp. 218-223, as to the attitude of American courts.

² See Wharton, i. § 21; Moore, ii. § 179; and Hyde, i. §§ 66, 248, who points out that Mr. Webster denied the justification of the expedition, while admitting the immunity of McLeod from American tribunals.

action, authorised and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it.'¹

II

STATE SHIPS IN FOREIGN WATERS

Hall, §§ 54, 55—Lawrence, § 107—Phillimore, ii. §§ 344-350—Westlake, pp. 266-269—Sibert, pp. 940-961—Moore, ii. §§ 252-256—Hackworth, ii. §§ 172, 173—Hyde, i. §§ 250-257—Twiss, i. § 165—Stephen, *History of the Criminal Law of England* (1883), ii. pp. 43-58—Wheaton, § 100—Bluntschli, § 321—Stoerk in *Holtzendorff*, ii. pp. 434-446—Perels, §§ 11, 14, 15—Heilborn, *System*, pp. 248-278—Rivier, i. pp. 333-335—Fauchille, §§ 614-623 (9)—Mérignhac, ii. pp. 554-565—Calvo, iii. §§ 1530-1559—Fiore, i. §§ 547-550—Testa, p. 86—Praeg, §§ 251-259—Matsunami, *Immunity of State Ships* (1924)—Maurer, *Das Gastrecht der Schiffe im Krieg und Frieden* (1918)—Frisch, *Der völkerrechtliche Begriff der Exterritorialität* (1917), pp. 54-62—Feine, *Die völkerrechtliche Stellung der Staatsschiffe* (1921)—Böger, *Die Immunität der Staatsschiffe* (1928)—Schröder, *Der Kriegsschiffskommandant* (1933)—Klein, *Staatsschiffe und Staatsluftfahrzeuge im Völkerrecht* (1934)—Strisower in *Hague Recueil*, 1923, pp. 273-283—Jordan, *R.I.*, 2nd ser. 10 (1908), p. 343—Keith's Wheaton, pp. 231-241—Higgins and Colombos, §§ 213-242—Gidel, ii. pp. 253-315—Baklanov in *Hague Recueil*, vol. 65 (1938) (un.), pp. 189-302—W. L. McNair in *Grotius Society*, 34 (1948), pp. 31-47. For literature upon State Ships other than men-of-war see below, § 451a.

§ 447. Men-of-war are State organs just as the armed forces are, a man-of-war being in fact a part of the armed forces of a State.² With regard to their character as State organs, it matters not whether men-of-war are at home, or in foreign territorial waters, or on the high seas. But it must be emphasised that men-of-war are State organs only so long as they are manned and under the command of a responsible officer, and, further, so long as they are in the service of a State. A shipwrecked man-of-war abandoned

¹ § 446a. *The Casa Blanca Incident*. As to the interesting case of the Casa Blanca incident, decided by the Hague Court of Arbitration on May 22, 1909, see Martens, *N.B.G.*, 3rd ser., ii. p. 19; an English translation of the award is printed in *A.J.*, 3 (1909), p. 755, and in Wilson, *Hague Arbitration Cases* (1915), pp. 86-101. And see *A.J.*, 3 (1909),

pp. 698-701, and Traversa, ii. § 354.

² Military aircraft in principle would seem to be in the same position as men-of-war when lawfully on or over the territory or territorial waters of a foreign State, as between signatories of the Convention for the Regulation of Aerial Navigation see above, § 197c (c).

by her crew is no longer a State organ ; nor does a man-of-war in revolt against her State, and sailing for her own purposes, retain her character as an organ of the State. On the other hand, public vessels in the service of the police and the customs of a State, private vessels chartered by a State for the transport of troops and war materials,¹ and vessels carrying a Head of a State and his suite exclusively, are also considered to be State organs,² and are, consequently, in every point treated as though they were men-of-war.

Proof of
Character
as Men-
of-war.

§ 448. The character of a man-of-war, or of any other vessel treated as a man-of-war, is, in the first instance, proved by its outward appearance ; a vessel of this kind flies the war flag and the pennant of its State.³ If, nevertheless, the character of the vessel seems doubtful, her commission, duly signed by the authorities of the State which she appears to represent, supplies a complete proof of her character as a man-of-war. It is not necessary to prove that the vessel is really the property of the State, the commission being sufficient evidence of her character.⁴ Vessels chartered by a State for the transport of troops, or for the purpose of carrying its Head, are indeed not the property of such State, although they bear, by virtue of their commissions, the same character as men-of-war.⁵

Occasions
for Men-
of-war
to be
Abroad.

§ 449. Whereas armed forces in time of peace have no occasion to be abroad except under some special conditions,⁶ or in a case of necessity, men-of-war belonging to all maritime States possessing a navy are constantly crossing the high seas in all parts of the world, for all kinds of purposes ;

¹ See below, § 451a.

² It is questionable how far State ships other than men-of-war (see below, § 451a) should be regarded as State organs in the full sense. See Gidel, i. pp. 96-102, on the distinction between private and public ships.

³ Attention must be drawn here to Convention VII. (concerning the conversion of merchant-ships into warships) of the Second Hague Peace Conference of 1907. Although this Convention concerns the time of war only, it is indirectly of import-

ance for the time of peace. For its provisions see below, vol. ii. § 84.

⁴ *The Schooner Exchange v. McFaddon* (1812) 7 Cranch 116, Scott, Cases, p. 300, in which the judgment of Marshall C.J. may be regarded as the foundation of the English and American law on the position of State ships.

⁵ Privateers used to enjoy the same character and exemptions as men-of-war. See also the *Zafiro* case cited above, § 163, p. 362, n. 3.

⁶ See above, § 444.

and occasions for men-of-war to sail through foreign territorial waters, and to enter foreign ports, necessarily arise. No special agreement between the flag-State and the littoral State is necessary to enable them to do this. The territorial waters and ports of civilised States are, as a rule, open to men-of-war as well as to merchantmen of all nations, provided they are not excluded by special international treaties or special Municipal Laws of the littoral States. On the other hand, it must be emphasised that, unless special international agreements, or special treaties between the flag-State and the littoral State, provide to the contrary in regard to a particular port or to certain territorial waters, a State is, in strict law, always competent to exclude men-of-war from all or certain of its ports, and, according to some, from those territorial waters which do not serve as highways for international traffic.¹ Moreover, a State is always competent to impose what conditions it thinks necessary upon men-of-war which it allows to enter its ports, provided these conditions do not deny to men-of-war their universally recognised privileges.

§ 450. The position of men-of-war² in foreign waters is characterised by the fact that, in a sense, they are 'floating portions of the flag-State.' The State owning the waters into which foreign men-of-war enter must treat them, in general, as though they were floating portions of their flag-State. Consequently, a man-of-war, with all persons and goods on board, remains under the jurisdiction of her flag-State even during her stay in foreign waters.³ No legal proceedings can be taken against her either for recovery of possession, or for damages for collision, or for a salvage reward, or for any other cause.⁴ No official of the littoral State is allowed to

Position
of Men-of-
war in
Foreign
Waters.

¹ The matter is controversial. See above, § 188, and Westlake, i. p. 196, in contradistinction to Hall, § 42.

² As to merchantmen see above, § 189, and below, § 451a.

³ But see *Chung 'hi' Cheung v. The King* [1939] A.C. 160, in which the Judicial Committee of the Privy Council rejected the fiction of 'extraterritoriality' implied in the statement in the text above and expressed

its preference for the statement in Brierly, *The Law of Nations* (1st ed., 1928), p. 110.

⁴ This rule became universally recognised only during the nineteenth century. Upon the former doctrines held in England and in the United States of America see Hall, § 54, and Lawrence, § 107. See *The Schooner Exchange v. McFaddon*, *supra*; *The Constitution* (1879) 4

board the vessel without special permission of the commander. Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities. Individuals who are subjects of the littoral State and are only temporarily on board may, although they need not, be taken to the home country of the vessel, to be punished there, if they commit a crime on board. Even individuals who do not belong to the crew but who, after having committed a crime on the territory of the littoral State, have taken refuge on board, cannot be forcibly taken off the vessel¹; if the commander refuses their surrender, it can be obtained only by diplomatic means from his home State.²

P.D. 39. Nor of course will a writ of *habeas corpus* issued by the local court run upon a foreign man-of-war or upon a prize lawfully brought into a neutral port: *The Suka* (1855), Scott, *Cases*, p. 309, Opinion of Attorney-General of United States of America. Nor, in the English jurisdiction, would a maritime lien attach (for instance, for damage by collision or for a salvage reward) so as to be enforceable in the event of the vessel being transferred to private ownership: *The Tervete*, [1922] P. 259 (a public collier). For an application by the Swedish Supreme Court of the principle of immunity with regard to a Norwegian vessel requisitioned in 1940 by the Norwegian Government and handed over to the British Government for use for war purposes see *The Rigmor*, *Annual Digest*, 1941-1942, Case No. 63.

¹ See *Ex parte Sulman*, where the Supreme Court of South Africa declined to issue an order with regard to a Dutch subject placed on a Dutch vessel in South African national waters: *Annual Digest*, 1941-1942, Case No. 64. As in other cases of jurisdictional immunity, the privilege may be waived by the State in question. English courts have, in general, shown reluctance to assume waiver of immunity. See, e.g., *Duff Development Co. v. Government of Kelantan* [1924] A.O. 797; *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch. 139. On the other hand, in

Chung Chi Cheung v. The King [1939] A.C. 160, the Judicial Committee of the Privy Council held that English courts had jurisdiction in respect of a crime committed on board a Chinese customs cruiser on the ground, *inter alia*, that the competent Chinese authorities, subsequent to the failure of their original request for extradition, failed to take the proper steps for securing the surrender of the accused and also that they permitted members of the crew to give evidence before the British Court in aid of the prosecution.

² On the question of asylum on foreign men-of-war generally see Moore, *Asylum in Legations and Consulates and Vessels* (1892), a reprint from the *Political Science Quarterly*, vol. vii.; Hyde, i. § 254; Hackworth, ii. § 194; Baldoni in *Hague Recueil*, vol. 65 (1938) (iii.), pp. 285-292, and in *Archivio di diritto pubblico*, 3 (1938), pp. 20-57; Keith's Wheaton, pp. 247-251; Alcindor in *Répertoire*, ii. pp. 45-49 (and *ibid.*, pp. 49-53, on asylum on merchant-vessels); Morgenstern in *B.Y.*, 25 (1948), pp. 283-255. The Convention on Asylum adopted in February 1928 by the Sixth International Conference of American States recognises in principle the right of asylum on warships for political offenders, but not for persons accused or convicted for common crimes, or for deserters from the army or the navy: *A.J.*, 22 (1928), Suppl., p. 158.

On the other hand, men-of-war cannot do what they like in foreign waters. They are expected to comply voluntarily with the laws of the littoral States with regard to order in the ports, the places for casting anchor, sanitation and quarantine, customs, and the like. A man-of-war which refuses to do so can be expelled, and, if on such or other occasions she commits acts of violence against the officials of the littoral State or against other vessels, steps may be taken against her to prevent further acts of violence.¹ However, even in that case a man-of-war does not fall under the jurisdiction of the littoral State.

§ 451. The position of the commander and the crew of a man-of-war in a foreign port when they are on land is controversial. The majority of writers distinguish between a stay on land in the service of the man-of-war and a stay for other purposes.² The commander and members of the crew ashore in an official capacity in the service of their vessel, to buy provisions or to make other arrangements respecting the vessel, remain under the exclusive jurisdiction of their home State, even in respect of crimes committed ashore. Although they may, if necessary, be arrested to prevent further violence, they must at once be surrendered to the vessel. On the other hand, if they are on land not on official business but for purposes of pleasure and recreation, they are under the territorial supremacy of the littoral State like any other foreigners, and they may be punished for crimes committed ashore.

There are, however, some³ who do not make this dis-

¹ See the 'Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers,' adopted by the Institute of International Law in 1808, of which Articles 8-24 deal with men-of-war in foreign waters; *Annuaire*, 17 (1898), pp. 275-280.

² So also Moore, ii, § 256. And see *Triandafylou v. Ministère Public*, decided in 1942 by the Court of Cassation of the Mixed Courts in Egypt, *A.J.*, 39 (1945), p. 345.

³ See, for instance, Hall, § 55; Phillimore, i, § 346. See also Article 18 of the 'Règlement' referred to

above in § 450, n. 1. Occasionally, as a matter of international courtesy, the authorities of the littoral State surrender to the foreign State a member of the crew who commits a crime while ashore; for an instance of an American seaman, a member of the crew of a destroyer, whom Great Britain, after a verdict against him, by a coroner's jury, of 'wilful murder' of a fellow-seaman, agreed as a matter of courtesy to leave to the United States naval authorities to deal with, see Home Office statement in *London Times* newspaper, September 4, 1926: it is not clear whether he

Position
of Crew
when on
Land
Abroad.

inction, but maintain that commanders, or members of the crew, whilst ashore, are in every case under the local jurisdiction.

State
Ships
other
than Men-
of-war.

§ 451a. The increasing practice of Governments of owning or controlling merchant-ships, either for purposes connected with public services such as the carriage of the mails or the management of railways, or simply for the purpose of trade, has led to some doubts as to whether they are entitled to the immunities which are enjoyed by men-of-war.¹ The practice of the courts of different States in this matter is far from being uniform. In Great Britain the practice is still probably as follows.² As the result of a series of decisions, of which *The Parlement Belge* (a Belgian public mail-ship)³ in 1880 may fairly be regarded as the starting-point of the movement in favour of immunity: (a) a British court of law will not exercise jurisdiction over a ship *which is the property of a foreign State*, whether she is actually engaged in the public service or is being used in the ordinary way of a shipowner's business, as, for instance, being let out under a charter-party; nor can any maritime lien attach, even in suspense, to such a ship so as to be enforceable against it if and when it is transferred to private ownership.⁴

(b) Ships which are not the property of a foreign State, but are chartered or requisitioned by it or otherwise in its possession and control, may not be arrested by process of

was in the hands of the British police or not. As to the surrender of deserters from foreign merchantmen and men-of-war see Gidel, ii. pp. 380-384.

¹ See Matsunami, *op cit.*; Nielsen in *A.J.*, 13 (1919), pp. 12-21; Walton in *J.C.L.*, 3rd ser., 2 (1920), pp. 252-258; Bisschop in *B.Y.*, 1922-1923, pp. 159-166; Garner in *B.Y.*, 1925, pp. 128-143; Gidel, ii. pp. 316-368. As to the Brussels Convention of 1926 see below, p. 858.

² See McNair in *B.Y.*, 1921-1922, pp. 67-74; but see below, p. 857, nn. 4 and 5.

³ (1880) 5 P.D. 197; see also *The Jassy* [1906] P. 270; *The Exposende*,

(1918) *Lloyd's List Newspaper Reports*, February 18 and 25; *The Porto Alexandre* [1920] P. 30 (a Portuguese Government ship 'employed in ordinary trading voyages earning freight for the Government'); *Compania Mercantil Argentina v United States Shipping Board* (1924) 40 T.L.R. 601; unless the foreign State voluntarily submits to the jurisdiction, as the United States of America frequently did. Upon the conclusiveness of the statement of a foreign Government that the ship belongs to the State see *The Schooner Exchange v. McFaddon*, *supra*, *The Porto Alexandre*, *supra*, and *The Jupiter* [1924] P. 236.

⁴ *The Terrate* [1922] P. 259

the Admiralty Court while subject to such possession and control,¹ nor (it need hardly be stated) will any action lie against the foreign State; nor can any maritime lien attach, to the ship in respect of damage done by her or salvage services rendered to her while she was subject to such possession and control²; but when the governmental possession and control cease to operate and she is re-delivered to her owner, an action *in personam* will lie against him in respect of salvage services rendered to her while in governmental possession and control, if he has derived benefit from those services.³

There are now only a few States which adhere without qualifications⁴ to the practice of conceding jurisdictional immunities to State-owned ships engaged in commerce.⁵

¹ *The Messicano* (1916) 32 T.L.R. 519; *The Erisos* (1917) *Lloyd's List Newspaper Reports*, October 23; *The Koursk* (1918) *ibid.*, June 19; *The Eolo* [1918] 2 *Irish Reports*, 78; *The Crimdon* (1918) 35 T.L.R. 81. It is important to note the distinction made in most of these cases between a writ of summons instituting an action *in rem*, and a warrant of arrest: the writ *in rem* is free from objection; it is the arrest that must be prevented by the Court. When a ship chartered or requisitioned by a Government is merely being employed in ordinary trading voyages, it has been suggested (by Hill J., *obiter* in *The Annette* [1919] P., at p. 111) that she enjoys no immunity.

² *The Sylran Arrow* [1923] P. 220.

³ *The Meandros* [1925] P. 61. Upon the domestic question of the remedies of a British subject against a ship requisitioned by the British Government see *The Broadmayne* [1916] P. 64, and against a ship owned by a British Dominion, *The Scotia* [1903] A.C. 501. The attitude of American courts has not been uniform, but in 1926 the Supreme Court of the United States in *Berizzi Brothers Co. v. The Steamship Pesaro* (A.J., 20 (1926), pp. 811-815; *Annual Digest*, 1925-1926, Case No. 135) extended the doctrine of *The Schooner Exchange v. McFaddon*, *supra*, and held that 'a ship owned and possessed by a foreign Govern-

ment and operated by it in the carriage of merchandise for hire is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court . . .'; see also Garner in *B.Y.*, 1925, pp. 128-143, and in *A.J.*, 19 (1925), pp. 745-748; *ibid.*, 20 (1926), pp. 759-767; and *ibid.*, 21 (1927), pp. 742-747; Dickinson, *ibid.*, pp. 108-111; and Hyde, *i. § 256*. Much authoritative doubt was cast on this case by the Supreme Court in *The Baja California*, A.J., 39 (1945), p. 585. And see Sanborn, *ibid.*, pp. 794-796 and Kahn, *ibid.*, pp. 772-775. And see above, § 115*ad*.

⁴ For the suggestion that even in the United Kingdom the position is not free of doubt see above, § 115*ad*, and W. L. McNair in *Grotius Society*, 34 (1948), p. 43, who inclines to the view that there is probably no longer a right to immunity in respect of commercial activities.

⁵ In *The Cristina* [1938] A.C. 845; *Annual Digest*, 1938-1940, Case No. 86, some members of the House of Lords expressed doubts whether this was in fact a principle accepted by English law and, assuming that it was, whether it was not superseded by the recent developments in State trading. See Lauterpacht in *L.Q.R.*, 54 (1938), pp. 339-344; Mann in *Modern Law Review*, 2 (1938-1939), pp. 57-62; *Revue de droit maritime comparé*, 38 (1938), pp. 156-175.

This is so although only a relatively small number of States have so far ratified the Brussels Convention of 1926 which abolishes that privilege as between the contracting parties.¹ The Convention operates normally only in time of peace. In time of war each Contracting State may notify the other Parties that no ships owned or operated by that State nor cargoes owned by it shall be subject to any arrest, seizure or detention by a foreign court of law.² However, the result of such notification is to confer upon the notifying State only immunity from arrest, seizure, or detention, but not from jurisdiction generally. Article 3 of the Convention exempts from its operation warships, hospital and supply ships, and the like, as well as ships employed exclusively 'on Government and non-commercial service.' An additional Protocol provides that the ships as defined in Article 3 include also ships on time or voyage charter to a State while exclusively employed on governmental and non-commercial activities. With regard to both the Protocol and the Convention as a whole it may be difficult, on occasions, to decide whether a vessel is or is not employed on commercial work.³ However, notwithstanding its imperfections and ambiguities the Convention must be regarded as embodying a principle which is in accordance with modern developments and

¹ After prolonged preparatory work by the International Maritime Committee (which is unofficial but representative of shipping and other interests), culminating in the Gothenburg Conference of 1923, and the Genoa Conference of 1925, that Convention was signed at Brussels on April 10, 1926. It embodies the general principle that ships (with their cargoes) operated or owned by Governments for commercial purposes shall in time of peace be subject to ordinary maritime law and shall not enjoy the immunities described above. The Convention, which is printed in Hudson, *Legislation*, iii. p. 1837, and *L.N.T.S.*, No. 4062, had been ratified by 1953 by the following States: Germany, Belgium, Brazil, Chile, Hungary, Italy, Norway, Holland, Poland, Portugal, Roumania, Sweden. Great Britain signed, but has not ratified, the Convention. It does not appear

that the reasons for non-ratification by the United Kingdom have been due to any objection to the main principle of the Convention. See Franck in *L.Q.R.*, 42 (1926), pp. 308-312; Slooten in *R.J.*, 3rd ser., 7 (1926), pp. 453-484; *Bulletin of the International Maritime Committee*, No. 74 (1926); Report by de Magalhães and Briery for League Codification Committee in *A.J.*, 20 (1926), Special Suppl., pp. 260-278; Gidel in *R.J.*, 3rd ser., 13 (1932), pp. 34-70. See also, as to the Brussels Convention, *The Visurgis and the Siena*, decided in 1938 by the German Supreme Court: *Annual Digest*, 1938-1940, Case No. 94.

² Article 7.

³ This applies, for instance, to cases in which a State-owned ship carries State imports for re-sale to private individuals or carries emigrants free or for a nominal fare under a Government emigration scheme.

with the increasing tendency to submit the State to the normal operation of the law.¹

III

AGENTS WITHOUT DIPLOMATIC OR CONSULAR CHARACTER ²

Hall, §§ 103, 104*—Moore, iv. § 623—Hackworth, ii. § 175, iv §§ 374-376—Bluntschli, §§ 241-243—Rivier, i. § 44—Calvo, iii. §§ 1337-1339—Fiore, ii. §§ 1188-1191—Martens, ii. § 5—Adler, *Die Spionage* (1906), pp. 63-62—Routier, *L'espionnage et la trahison en temps de paix et en temps de guerre* (1915)—Heyking, *L'exterritorialité* (1926), pp. 117-120—Kaufmann, *Die Immunität der Nicht-Diplomaten* (1932)—Beauvais, *Attachés Militaires, Attachés Navals et Attachés de l'Air* (1937)—Eagleton in *A.J.*, 19 (1925), pp. 293-314.

§ 452. Apart from diplomatic envoys and consuls, States Agents lacking may, and do, send various kinds of agents abroad—namely, Diplo- public political agents, secret political agents, commercial matic or agents, spies, commissaries, and bearers of despatches. The Consular position of these agents varies according to the class to which Character. they belong.

§ 453. Public political agents are agents sent by one Public Political Power to another for political negotiations of different kinds. Agents. They may be sent for an unlimited period, or for a limited time only. As they are not invested with diplomatic character, they do not receive a letter of cred-ence, but only a letter of recommendation or commission. They may be sent not only by one full sovereign State to another, but also by and to insurgents recognised as a belligerent Power, and by and to States under suzerainty. Political agents without diplomatic character afford, in fact, the only means

¹ See above, § 115ad. In the United Kingdom, according to the Crown Proceedings Act, 1947, the Crown is in general in the same position as a private shipowner in respect of litigation arising in connection with ships owned by the Crown. However, the Act expressly prohibits the arrest or detention of any State property or proceedings in rem in respect of any

claim against the Crown. In the United States, as the result of the Federal Tort Claims Act, 1947, the position is similar.

² The status of non-diplomatic persons possessing diplomatic privileges has been discussed above, § 417a. This section deals with agents, neither diplomatic nor consular, who do not possess diplomatic privileges.

for personal political negotiations with such insurgents and with States under suzerainty.

As regards the position and privileges of public political agents, it is obvious that they enjoy neither the position nor the privileges of diplomatic envoys.¹ But, on the other hand, they have a public character, being admitted as public political agents of a foreign State, and must, therefore, be granted special protection. No distinct rules, however, concerning the special privileges to be granted to such agents seem to have grown up in practice. Their persons and official papers are inviolable.²

Secret
Political
Agents

§ 454. Secret political agents may be sent for the same purposes as public political agents. But two kinds of secrecy must be distinguished. An agent may be secretly sent to another Power with a letter of recommendation, and admitted by that Power. Such an agent is secret in so far as third Powers do not know, or are not supposed to know, of his existence. As he is admitted by the receiving State, although secretly, his position is essentially the same as that of a public political agent. On the other hand, an agent may be secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is to fulfil his task. Such an agent has no recognised position whatever according to International Law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be tried and punished if he commits a political or ordinary crime.³

Com-
mercial
Agents.

§ 454a. Occasionally a State sends to the territory of an-

¹ Contrast, however, Heffter, § 222.

² Rivier, i. § 44, maintains that they must be granted the privilege of inviolability to the same extent as diplomatic envoys. As to the status of Mason and Shidell, the political agents of the American Confederate Government, see the *Trend* case, below, vol. ii. § 408 (n.).

³ A United States Act of Congress of June 8, 1938 (*A.J.*, 32 (1938), Suppl., p. 207), requires the registration of persons employed by foreign agencies, including foreign Governments, to disseminate propaganda in the United States and for other purposes.

other agents to represent it in regard to some public service or business carried on by it—for instance, the management of a State railway or a State tobacco industry or even a Trade Delegation for the purpose of general trading.¹ Agents of this kind do not possess diplomatic character or immunities, and are fully subject to the jurisdiction of the State in whose territory they are. They only differ from their fellow-nationals in the respect that, being governmental agents, both prudence and international courtesy demand that as far as possible special consideration should be shown by the local authorities to them and to premises occupied by them for official purposes. No distinct rules have been developed with regard to their position, but in some cases the matter is dealt with by agreement between the two States.²

¹ Such a person must be distinguished from a commercial *attaché* on the staff of an embassy or legation for the purpose (*inter alia*) of reporting upon the commerce and industry of the receiving State. In some cases higher customs officials of a foreign State have been recognised as commercial *attachés* to the diplomatic representative of that foreign State and accorded corresponding diplomatic status. For the settlement in 1929 of a controversy which arose in this connection between the United States and France see Stowell in *A.J.*, 24 (1930), pp. 110-118.

² For instance, Great Britain and the Union of Soviet Socialist Republics made an agreement on March 16, 1921 (Cmd. 1207), regarding the position of official agents of either party in the territory of the other; this agreement conferred exemption from taxation and immunity from arrest and search, but it was held in *Fenton Textile Association v Krassin* (1922) 38 T.L.R. 259, that it did not protect a Russian official agent from an action for the price of goods sold and delivered, and did not confer diplomatic privileges and immunities. The British Government committed no violation of International Law when in May 1927 a search warrant was executed upon the premises of the Russian Trade

Delegation (incidentally to the search of the premises of an English company known as 'Arcos Limited'), for the premises of the Trade Delegation had no diplomatic immunity, either under the agreement of March 16, 1921, or otherwise. For a somewhat similar incident between Germany and Russia on May 3, 1924, see Toynbee, *Survey*, 1924, pp. 215-217, and Strupp in *Strupp, Wort.*, ii. pp. 560-563. As to the subsequent Anglo-Soviet Temporary Commercial Agreement, 1934 (Cmd. 4513), in which the British Government undertook to accord diplomatic privileges and immunities to certain members of the Soviet Trade Delegation, see McNair in *B.Y.*, 15 (1934), p. 144. On the status of Russian commercial representations abroad see Lieberich, *Die russische Handelsvertretung in Deutschland* (1928); Freund, *Das Aussenhandelsmonopol der Sowjetunion* (1928), and in 61 *Clunet* (1934), pp. 5-21; Linker, *Der Umfang der Extraterritorialität*, etc. (1929); Metzler, *Die auswärtige Gewalt der Sowjetunion* (1930), pp. 67-74; Stauffenberg, *Die Rechtsstellung der russischen Handelsvertretungen* (1930); Hendler, *Die völkerrechtliche Stellung der Handelsvertretung der U.S.S.R.* (1931); Stoupnitzky, *Statut international de l'U.R.S.S. État Commercant* (1936) (a comprehensive and valuable work).

Spies.

§ 455. Spies are secret agents of a State sent abroad¹ for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognised position whatever according to International Law, since they are not official agents of States for the purpose of international relations. Every State punishes them severely if they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. A spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy.

Com-
missaries.

§ 456. Commissaries and members of commissions are agents sent with a letter of recommendation or commission by one State to another for negotiations, not political but of a technical or administrative character only; for instance, to make arrangements between the two States as regards railways, post, telegraphs, navigation, delineation of boundary lines, and so on.² No distinct practice of guaranteeing certain privileges to commissaries has grown up, but inviolability of their persons and official papers ought to be granted to them, as they are officially sent and received for official purposes. Thus Germany, in 1887, in the case of the French officer of police, Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes and then arrested, recognised the rule that a safe-conduct is tacitly granted to foreign officials when they enter the territory of a State in an official

¹ Concerning spies in time of war see below, vol. ii. §§ 159 and 210, and Adler, *op. cit.*, pp. 7-82.

² As to their protection while in foreign countries see the literature arising out of the Corfu affair, cited below, vol. ii. § 52a (n.), and Eagleton in *A.J.* 19 (1925), pp. 293-314, and literature cited by him. The Report of the Committee of Jurists

appointed by the Council of the League after the Corfu affair states that 'the recognised public character of a foreigner, and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf': *B.Y.*, 1924, at p. 181. As to the position of the representatives of the occupying Powers see above, § 417a,

capacity with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government.

§§ 457-476. Individuals commissioned to carry official ^{Bearers} despatches from a State to its Head or to diplomatic envoys ^{of De-} abroad are agents of that State. Despatch-bearers who ^{spatches} belong to the retinue of diplomatic envoys as couriers must enjoy, as stated above (§ 405), exemption from civil and criminal jurisdiction, special protection in the State to which the envoy is accredited, and a right of innocent passage through third States. But bearers of official despatches who are not in the retinue of the diplomatic envoys employing them must nevertheless be granted inviolability for their persons and official papers, provided they possess special passports stating their official character as despatch-bearers. The same applies to bearers of despatches between the Head of a State who is temporarily abroad and his Government at home.

PART IV
INTERNATIONAL TRANSACTIONS

CHAPTER I

ON INTERNATIONAL TRANSACTIONS IN GENERAL

I

NEGOTIATION

Heffter, §§ 234-239—Fauchille, §§ 792-795 (1)—Pradier-Fodéré, iii. §§ 1354-1362—Rivier, ii. § 45—Calvo, iii. §§ 1316-1320, 1670-1673—Cruchaga, §§ 519-522—Kaasik in *R.I.*, 3rd ser., 14 (1933), pp. 62-95. And see literature cited below, vol. ii. § 4.

§ 477. International negotiation is the term for such ^{Concept-}intercourse between two or more States as is initiated, and ^{tion of}directed, for the purpose of effecting an understanding ^{Negotia-}between them or settling a dispute.¹

§ 478. Full sovereign States are, therefore, the regular ^{Parties to}parties to international negotiation. However, States which ^{Negotia-}are not fully sovereign can on occasions be parties to international negotiations. They can conduct negotiations on matters with regard to which they have no international standing. Thus, for instance, while Bulgaria was a half sovereign State, she was nevertheless able to negotiate on several matters with foreign States independently of Turkey.²

Negotiation between a State, on the one hand, and, on the other, a party which is not a State, is not *international* negotiation, although such party may reside abroad. Thus, too, negotiations between States and a body of foreign bankers and contractors concerning a loan, the building of a railway, the working of a mine, and the like, are not, as a rule,³ international negotiations.

¹ There are many other international transactions (see below, §§ 486-490), but negotiation is by far the most important of them. And it must be emphasised that negotiation as a means of amicably settling conflicts between two or more States, is only a particular kind of negotia-

tion, although it will be specially discussed in another part of this work (see below, vol. ii. §§ 4-8).

² See above, § 91.

³ See *Marrommatis Palestine Concessions* case (*Jurisdiction*): P.C.I.J., Series A, No. 2, pp. 11-15.

Purpose of Negotiation. § 479. Negotiations between States may have various purposes. Their purpose may be only an exchange of views on some political question; or it may be an arrangement as to the line of action to be taken in future with regard to a certain point, or a settlement of differences,¹ or, in particular, the conclusion of a treaty.²

Persons who conduct Negotiations. § 480. International negotiations are conducted by agents representing the negotiating States. The Heads of these States may conduct the negotiations in person, either by letters or by a personal interview. Important negotiations have, in the past, been conducted by Heads of States.³ As a rule, however, negotiation between States concerning more important matters is conducted by their Secretaries for Foreign Affairs, with the help either of their diplomatic envoys, or of agents without diplomatic character.⁴

Form of Negotiation. §§ 481-482. The Law of Nations does not prescribe any particular form in which international negotiations must be conducted. Such negotiations may, therefore, take place *viva voce*, or through the exchange of written representations and arguments, or both. The more important negotiations are regularly conducted through the diplomatic exchange of written communications, as only in this way can misunderstandings be avoided, which easily arise during *viva voce* negotiations.⁵

¹ See below, vol. ii. §§ 4-6, and particularly § 4 (n. 1), as to the qualified recognition by the Permanent Court of negotiation as an international institution.

² On the question of 'open diplomacy' see above, § 167n.

³ See below, § 495. President Wilson, one of the four American signatories of the Treaty of Versailles, was stated in the preamble to be 'acting in his own name and by his own proper authority.'

⁴ Negotiations between the armed forces of belligerents are regularly conducted by soldiers. See below, vol. ii. §§ 220-240.

⁵ During *viva voce* negotiations it happens sometimes that a diplomatic

envoy negotiating with the Secretary for Foreign Affairs reads out a letter received from his home State. In such case it is usual to leave a copy of the letter at the Foreign Office. If a copy is refused, the Secretary for Foreign Affairs can, on his part, refuse to hear the letter read. Thus in 1825 Canning refused to allow a Russian communication to be read to him by the Russian ambassador in London with regard to the independence of the former Spanish colonies in South America, because the ambassador was not authorised to leave a copy of the communication at the British Foreign Office. As regards the language used during negotiation see above, § 359.

II

CONGRESSES AND CONFERENCES

Phillimore, ii. §§ 39, 40—Bluntschli, § 12—Heffter, § 242—Fauchille, §§ 796-814 (10)—Sibert, pp. 96-178—Pradier-Fodéré, vi. §§ 2593-2599—Rivier, ii. § 46—Nys, ii. pp. 486-496—Calvo, iii. §§ 1674-1681—Cruchaga, §§ 523-539—Suarez, §§ 304-310—Genet, iii pp. 3-265—Fiore, ii. §§ 1216-1224, and *Code*, §§ 1211-1250—Martens, i. § 52—Charles de Martens, *Guide diplomatique* (1851), i. § 58—Pradier-Fodéré, *Cours de droit diplomatique* (1881), ii. pp. 372-425—Nippold, *Die Fortbildung des Verfahrens in volkerrechtlichen Streitigkeiten* (1907), pp. 480-526—Satow, §§ 529-557, and *International Congresses* (1920) (Foreign Office Peace Handbook)—Bittner, §§ 25-58—Frisch in *Strupp, Wort.*, i. pp. 663-669—Gruber *Internationale Staatenkongresse und Konferenzen* (1919)—Potter *Introduction to the Study of International Organisation* (1920), pp. 317-375—Dunn, *The Practice and Procedure of International Conferences* (1929)—Hill, *The Public International Conference* (1929)—Potter, *This World of Nations* (1929), pp. 200-217—Moulton, *A Structural View of the Conference as an Organ of International Cooperation* (1930)—Riches, *Majority Rule in International Organisation* (1940), pp. 31-138—Pastuhov, *A Guide to the Practice of International Conferences* (1945)—Report by Mastny and Rundstein on *Procedure of International Conferences* for League Codification Committee, in *A.J.*, 20 (1926), Special Suppl.—Myers in *A.J.*, 8 (1914), pp. 81-108—Wright, *ibid.*, 20 (1926), pp. 33-45—Sibert in *Hague Recueil*, vol. 48 (1934) (ii.), pp. 391-454—Liang in *A.J.*, 44 (1950) pp. 333-341

§ 483. International congresses and conferences are formal meetings of representatives of several States for the purpose of discussing matters of international interest, and of coming to an agreement concerning these matters. The term 'congress' as well as the term 'conference' may be used for the meetings of the representatives of only two States; but as a rule congresses or conferences denote such bodies only as are composed of the representatives of a greater number of States.

§ 484. With regard to the parties to a congress or conference,¹ everything depends upon the purpose for which a congress or a conference meets, and upon the State which invites other States to the meeting. If it is intended to settle certain differences, it is reasonable that all the States

¹ The League Codification Committee examined the question of framing model rules upon a Report by Mastny (printed in *A.J.*, 20 (1926), Special Suppl., pp. 205-213), and the Assembly in 1927 requested the Council to instruct the Secretariat to continue the investigation.

concerned should be represented, for a State which is not represented is less likely to consent to the resolutions of the congress. If the creation of new rules of International Law is intended, at least all fully sovereign States ought to be represented. To the First Peace Conference at The Hague, nevertheless, only the majority of States were invited to send representatives, the South American republics not being invited at all. But to the Second Peace Conference of 1907, forty-seven States were invited, although only forty-four sent representatives. No State can be a party which has not been invited, or admitted at its own request.¹ If a State thinks it fitting that a congress or conference should meet, it invites such other States it pleases, though the invited States may accept upon condition that certain other States should, or should not, be invited or admitted. Those States which have accepted the invitation become parties, if they send representatives.² Each party may send several representatives, but they have only one vote, given by the senior representative for himself and his subordinates.³

Procedure
at Con-
gresses
and Con-
ferences.

§ 485. After the place and time of meeting have been arranged—such place may be neutralised for the purpose of securing the independence of the deliberations and discussions—the representatives meet, and constitute themselves by exchanging their credentials and electing a presi-

¹ In 1949 the General Assembly adopted a set of rules for the calling of international conferences of States by the Economic and Social Council. For an examination of these rules see Liang in *A.J.*, 44 (1950), pp. 333-341. See also Hill in *Georgetown Law Journal*, 41 (1952), pp. 1-17.

² Notice the recent practice, designed to facilitate presence at a conference in a non-committal manner, of appointing 'observers' (as the United States of America frequently did in the case of conferences summoned by the League of Nations). At the San Francisco Conference in 1945, in addition to the fifty States which attended the Conference, a number of established international organisations were invited to send representatives for the purpose

of consultation. These were: the League of Nations, the International Labour Organisation, the Permanent Court of International Justice, the United Nations Relief and Rehabilitation Administration, and the Food and Agriculture Organisation. Article 3 (5) of the Constitution of the Food and Agriculture Organisation of the United Nations provides that the Conference may invite any public international organisation which has responsibilities related to those of the Organisation to appoint a representative who, without having the right to vote, shall participate in its meetings on conditions prescribed by the Conference (Cmd. 6590 (1945)).

³ As to the immunity of representatives at conferences see below, § 417d.

dent and other officers. It is usual, but not obliagtry,¹ for the Secretary for Foreign Affairs of the State within whose territory the congress meets to be elected president. At the San Francisco Conference which in 1945 adopted the Charter of the United Nations, the principal delegates of the four Sponsoring Powers—the United States, the Soviet Union, Great Britain and China—were elected Presidents of the Conference and presided in turn over the Plenary Session.² If the difficulty of the questions on the programme makes it advisable, special committees are appointed for the purpose of preparing the matter for discussion by the body of the congress.³ In such discussion all representatives can take part. After the discussion follows the voting. The motion must be carried unanimously if it is to be binding on all, for the vote of the majority does not in any way bind the dissenting parties.⁴ But it is possible for the majority to consider the motion binding upon themselves. If the discussions and voting lead to a final result upon which the parties agree, the points agreed upon are generally drawn up in an Act, which is signed by the representatives and called the Final Act, or the General Act, of the congress or conference.⁵

III

TRANSACTIONS BESIDES NEGOTIATION AND TREATIES

Bluntschli, § 482—Hartmann, § 91—Garcis, § 77—Liszt, § 30, iii. (3)—Rousseau, pp. 126-133—Bittner, §§ 97-104—Cavaglieri in *Lo stato di necessità nel diritto internazionale* (1917), pp. 88-92, and in *Rivista*, 2nd ser., 7 (1918), pp. 3-33, and *ibid.*, 3rd ser., 5 (1926), pp. 188-204—Balladore

¹ Thus at both Hague Peace Conferences, which were convened at the instance of Russia, the first Russian delegate was elected President. See Whitton in *A.J.*, 39 (1945), pp. 535-537.

² However, the principal delegate of the United States was throughout Chairman of the Steering Committee and of the Executive Committee.

³ The practice of holding preparatory meetings of experts, legal and other, is becoming increasingly com-

mon. See Pastuhov *Guide to International Conferences* (1945), pp. 16-65.

⁴ See above, §§ 115 and 116a. Unless, of course, the Conference is being held under a treaty by the terms of which the parties have bound themselves to accept a majority vote.

⁵ See Bittner, §§ 75, 76. With the consent of the minority, resolutions accepted by a majority only may be inserted in the Final Act; see Fauchille, § 807 (1).

Pallieri, pp. 73-80, 150-161—Anzilotti, pp. 345-351—Pflüger, *Die einseitigen Rechtsgeschäfte im Völkerrecht* (1936)—Biscottini, *Atti unilaterali nel diritto internazionale* (1951)—Sereni in *A.J.*, 34 (1940), pp. 638-660—Lauterpacht in *B.Y.*, 27 (1950), pp. 393-398—MacGibbon, *ibid.*, 30 (1953), pp. 293-319.

Different
Kinds of
Transac-
tions.

§ 486. International transaction is the term for every act on the part of a State in its intercourse with other States. Besides negotiation, which has been discussed above in §§ 477-482, and treaties, which will be discussed in §§ 491-554 and 569-580, there are other kinds of international transactions which are of legal importance—namely, declaration, notification, protest and renunciation.

Declara-
tion.

§ 487. The term 'declaration' is used in three different meanings. It is, in the first place, sometimes used as the title of a body of stipulations of a treaty, according to which the parties undertake to pursue in future a certain line of conduct. The Declaration of Paris, 1856, and the Declaration of St. Petersburg, 1868, are instances of this: declarations of this kind differ in no respect from treaties. Secondly, there are unilateral declarations which create rights and duties for other States, and it is this kind which is to be regarded as an international transaction within the meaning of this part of this chapter. The different declarations belonging to this group are by no means of a uniform character; among them are declarations of war, declarations on the part of belligerents concerning the goods they will condemn as contraband, declarations at the outbreak of war on the part of third States that they will remain neutral, and others. Thirdly, when States communicate to other States, or *urbi et orbi*, an explanation and justification of a line of conduct pursued by them in the past, or an explanation of views and intentions concerning certain matters, this is called a declaration. Declarations of this kind may be very important, but they hardly comprise transactions out of which follow rights and duties of other States. This is, for instance, the position with regard to the so-called Atlantic Charter of August 14, 1941, in which the President of the United States and the Prime Minister of Great Britain 'deemed it right to make known certain common principles in the national policies of their respective coun-

tries on which they base their hope for a future world.' ¹ But while it is clear that such declarations cannot, in law, be relied upon by States other than those which made them, ² it is not certain to what extent they create rights and obligations as between the latter. The answer depends to a large extent on the precision of the language used in the declaration. A mere general statement of policy and principles cannot be regarded as intended to give rise to a contractual obligation in the strict sense of the word. On the other hand, official statements in the form of Reports of Conferences signed by the Heads of States or Governments and embodying agreements reached therein may, in proportion as these agreements incorporate definite rules of conduct, be regarded as legally binding upon the States in question. The question of the legal nature of the Reports of the Conferences of the Heads of Governments of Great Britain, the United States and Russia at Crimea in February 1945 ³ and at Potsdam in August of that year ⁴ may be mentioned as examples of the problem involved. ⁵

¹ U.S. No. 3 (1941), Cmd. 6321: *A.J.*, 35 (1941), Suppl., p. 191.

² While a statement by the British Deputy Prime Minister lent itself to the interpretation that the Charter had the 'status of a treaty' (378 H.C. Deb., 5th ser., col. 510), the Prime Minister described it on May 24, 1944, as 'a guiding signpost, expressing a vast body of opinion among all the Powers now fighting together' (House of Commons, vol. 400, p. 783). See on this subject Stone, *The Atlantic Charter* (1943), pp. 144-148. In a Declaration of January 1, 1942, twenty five of the United Nations, including the Great Powers, formally 'subscribed to a common program of purposes and principles embodied in the Joint Declaration' of August 14, 1941: *A.J.*, 36 (1942), Suppl., p. 191. See also the Agreed Declaration by the President of the United States of America, the Prime Minister of the United Kingdom and the Prime Minister of Canada of November 15, 1945, relating to Atomic Energy (*U.N.T.S.*, 3, p. 131). *Quaere*, does registration with the United Nations impart to a Declaration of this kind

the complexion of an instrument creating legal rights and obligations?

³ Misc. No. 5 (1945), Cmd. 6598.

⁴ *A.J.*, 39 (1945), Suppl., p. 245.

⁵ See Briggs in *A.J.*, 40 (1946), pp. 376-383 and Pan, *ibid.*, 46 (1952), pp. 40-59. And see below, § 508a. Reference may also be made to the Declaration of June 5, 1945, by the British, American, Russian and French Governments, regarding the defeat of Germany and the assumption of supreme authority with respect to Germany (Cmd. 6648). The Declaration was addressed primarily to the German people and German authorities in view of the fact that there was at that time no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers. In a document (No. 4)—which is in itself a Declaration—attached to the principal Declaration, the Four Powers announced their intention to consult other States in the exercise of the supreme authority assumed over Germany.

Notification.

§ 488. Notification is the technical term for the communication to other States of certain facts and events of legal importance. But a distinction must be drawn between obligatory and voluntary notification.

Notification has been stipulated in several cases to be obligatory.¹ Thus, according to Article 2 of the Hague Convention concerning the Commencement of Hostilities, 1907, the outbreak of war must be notified to the neutral Powers; and the declaration of a blockade was also to be notified,² according to Article 11 of the unratified Declaration of London, 1909.

Notification frequently takes place voluntarily, because States cannot be considered subject to certain duties without knowledge of the facts and events which give rise to them. Thus it is usual to notify to other States changes in the headship and in the form of government of a State, the establishment of a Federal State, an annexation after conquest, the appointment of a new Secretary for Foreign Affairs, and the like. In the same category there must be included an explicit reservation of rights, such as the general warning issued in 1943 by some of the United Nations to the effect that they reserved their right to declare invalid transfers of property and interests situated in territories under enemy occupation.³

Protest.

§ 489. Protest is a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter. A protest serves the purpose of preservation of rights,⁴ or of making it known that the

¹ Thus, according to Article 34 of the General Act of the Berlin Congo Conference of 1885, which has now been abrogated (that is, as between States which ratified or acceded to the Convention of 1919, and except as regards the stipulations contained in Article 10 of the Convention of 1919, *L.N.T.S.*, 8, p. 27) by a Convention signed at St. Germain on September 10, 1919, notification of new occupations and the like on the African coast was obligatory. The obligation to notify is absent from the Convention of 1919. Thus, further, according to Article 84 of the

Hague Convention for the peaceful settlement of international differences, in case a number of States are parties to a treaty, and two of them, who are at variance concerning its interpretation, agree to have the difference settled by arbitration, they have to notify this agreement to all the other parties.

² See the unratified Declaration of London, 1909, Articles 11 (2), 16, 23, 25, and 26.

³ *M.P.C.* No. 1 (1943). *Cmd.* 4418.

⁴ See Ralston, §§ 215, 222, 660, 696, and above, § 156c. As to the protest of Abyssinia against a

protesting State does not acquiesce in, and does not recognise, certain acts.¹ A State can lodge a protest with another State against acts which have been notified to the protesting State, or which have otherwise become known. On the other hand, if a State acquires knowledge of an act which it considers internationally illegal and in violation of its rights, and nevertheless does not protest, this attitude implies a renunciation of such rights, provided that a protest would have been necessary to preserve a claim.² Thus in the *Fisheries* case between the United Kingdom and Norway the International Court of Justice attached considerable importance to the fact that Great Britain had failed to protest against the system of delimitation of territorial waters applied by Norway since 1869.³ It may further happen that a State at first protests, but afterwards either expressly⁴ or tacitly acquiesces in the act. In certain circumstances, a simple protest on the part of a State, without further action, is not in itself sufficient to preserve the rights in behalf of which the protest was made.⁵

§ 490. Renunciation is the deliberate abandonment of Renunciation. rights.⁶ It can be given *expressis verbis* or tacitly. If, for

British-Italian agreement see below, § 518a. The effect of failing to protest against the assumption by States of jurisdiction in a certain kind of case was discussed by the Permanent Court in the *Lotus* case, Series A, No. 10, pp. 23, 29, 98. As to protests against violations of International Law not directly affecting the protesting State see Wright in *A.J.* 32 (1938), pp. 526-535.

¹ See above, § 75c, on the principle and the policy of non recognition.

² See on this point Strupp, *Grundzüge*, p. 99; Cavaglieri in *Rivista*, 3rd ser., 5 (1926), p. 197; Kunz in *Strupp, Wort.*, ii. pp. 329, 330; Brühl in *Nordisk T.A.*, 3 (1932), pp. 75-93; Pflüger, *op. cit.*, pp. 194-219; Lauterpacht in *B.Y.*, 27 (1950), pp. 393-398; MacGibbon, *ibid.*, 30 (1953), pp. 293-319.

³ The Court said: 'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and

her prolonged abstention [from formulating reservations] would in any case warrant Norway's enforcement of her system against the United Kingdom.' *I.C.J. Reports* 1951, p. 139. But see the Dissenting Judgment of Judge McNair, *ibid.*, pp. 176-180.

⁴ Thus by the Declaration concerning Nam, Madagascar, and the New Hebrides, which was embodied in the Anglo French Agreement of April 8, 1904, Great Britain withdrew the protest which she had raised against the introduction of the customs tariff established at Madagascar after its annexation to France.

⁵ See below, § 539, concerning the withdrawal of Russia from Article 59 of the Treaty of Berlin, 1878, stipulating the freedom of the port of Batoum.

⁶ See Henningsen in *Strupp, Wort.*, iii. pp. 163, 164; Pflüger, *op. cit.*, pp. 249-287; Cavaglieri in *Rivista*, 2nd ser., 7 (1918), pp. 3-33, and below, § 537. Such renunciation may take place by way of the actual

instance, a State by occupation takes possession of an island which has previously been occupied by another State,¹ the latter tacitly renounces its rights if it does not protest as soon as it receives knowledge of the fact. Renunciation plays a prominent part in the amicable settlement of differences between States, either one or both parties frequently renouncing their claims for the purpose of coming to an agreement.² Mere silence on the part of a State does not imply renunciation; this occurs only when a State remains silent although a protest is necessary to preserve a claim.

admission of the facts underlying the claim of another State. Thus in the *Minquiers and Ecrehos* case between the United Kingdom and France, decided in 1953, the International Court of Justice considered as relevant the circumstance that in a letter written in 1819 by the French Minister of Marine to the French Foreign Minister and transmitted by the French ambassador to the Foreign Office in London, the Minquiers were stated to be 'possédé par l'Angleterre.' The Court rejected the French argument that that admission could not be invoked against France on the ground that it was made in the course of negotiations which did not result in agreement; the letter in question represented a statement of facts: *I.C.J. Reports*, 1953, p. 71. In the same case the Court attached import-

ance to the fact that the United Kingdom received no reply to her protest against the construction of a house on an island of the Minquiers group by a French citizen and that subsequently the construction of the house was stopped on the instructions of the French Government: *ibid.*

¹ See above, § 247.

² See vol. ii, § 6. See also *ibid.*, p. 877, n. 2, for an example of renunciation of claims coupled with an explicit statement of adherence to the opposed legal views held by the contracting parties. For a suggestion that the conduct of the United States subsequently to its declaration of war on Germany in 1917 amounted to acquiescence in some practices of the Allied Powers and to an abandonment of claims arising therefrom see Anderson in *A.J.*, 23 (1929), p. 384.

CHAPTER II

TREATIES

I

CHARACTER AND FUNCTION OF TREATIES

Vattel, ii. §§ 152, 153, 157, 163—Hall, § 107—Phillimore, ii. § 44—Hyde, ii. § 489—Fenwick, pp. 326-330—Hibert, pp. 179-189, 241-250—Bluntschli, § 402—Heffter, § 81—Despagnet, §§ 435, 436—Pradier-Fodéré, ii. §§ 888-919—Fauchille, §§ 816, 817—Rousseau, pp. 133-158—Rivier, ii. pp. 33-40—Nys, ii. pp. 497, 498, 522-530—Calvo, iii. §§ 1567-1584—Fiore, ii. §§ 976-982—Martens, i. § 103—De Louter i. §§ 24, 28—Gemma, pp. 207, 208, 212-214—Cruchaga, i. §§ 557-559—Suarez, i. §§ 78-81, 93—*Harvard Research* (1935, Part III.), pp. 686-705—Genet, iii. pp. 349-538—Anzilotti, pp. 352-358—McNair, Chapter 1—Scelle, ii. pp. 329-344—Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877)—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880)—Nippold, *Der völkerrechtliche Vertrag* (1894)—Triepel, *Völkerrecht und Landesrecht* (1899), pp. 27-90—Grosch, *Der Zwang im Völkerrecht* (1912), pp. 38-56, 138-143—Crandall, *Treaties: their Making and Enforcement*, 2nd ed. (1916)—Lammaach, *Das Völkerrecht nach dem Kriege* (1917), pp. 92-129—Satow, §§ 560-585—Verdross in *Strupp, Wort.*, ii. pp. 655, 656—Dupuis in *Hague Recueil*, 1924 (i.), pp. 322-349—Butler and Macconby, *The Development of International Law* (1928), ch. xvii.—Hoijer, *Les traités internationaux*, 2 vols. (1928)—Chailley, *La nature juridique des traités internationaux* (1932), pp. 3-72—Frangulis, *Theorie et pratique des traités internationaux* (1936)—Jessup, *A Modern Law of Nations* (1948), pp. 123-156—Pillaut in 46 *Clunet* (1919), pp. 593-602—Régade in *Revue de droit public et de la science politique*, 41 (1924), pp. 505-540—Crockar in *A.J.*, 18 (1924), pp. 38-55—Report by Mastny and Rundstein for League Codification Committee in *A.J.*, 20 (1926), Special Suppl., pp. 204-221—McNair in *B.Y.*, 11 (1930), pp. 100-118—Whitton in *Hague Recueil*, vol. 49 (1934) (iii.), pp. 175-240—Kraus, *ibid.*, vol. 50 (1934) (iv.), pp. 317-396—Kelsen in *Théorie du droit*, 10 (1936) pp. 253-292—Mann in *B.Y.*, 21 (1944), pp. 11-33—Kunz in *A.J.*, 39 (1945), pp. 180-197—Starke in *B.Y.*, 23 (1946), pp. 341-346—Jessup in *A.J.*, 41 (1947), pp. 378-405.

§ 491. International treaties are agreements, of a contractual character, between States, or organisations of States,¹ creating legal rights and obligations² between the Parties.³ Even before a Law of Nations, in the modern sense of the term, was in existence, treaties used to be

Con-
cep-
tion of
Treaties.

¹ See below, § 494a. ² See below, § 508a. ³ See below, § 520.

concluded between States.¹ Although in those time treaties were neither based on, nor were themselves a cause of, International Law, they were nevertheless considered sacred and binding, on account of religious and moral sentiment.

A treaty, being a contract, must not be confused with various documents having relation to treaties but not in themselves treaties—namely, a *mémoire*, a *proposal*, a *note verbal*, or a *procès-verbal*.² A *mémoire* (or memorandum) is a diplomatic note containing a summary exposition of the principal facts of an affair. A *proposal* is a document comprising an offer submitted by one State to another. A *note verbal* is an unsigned document containing a summary of conversations or of events, and the like. A *procès-verbal* is the official record or minutes of the daily proceedings of a conference and of the provisional conclusions arrived at, and is usually signed by representatives of the parties. The term *protocol* is used to denote either the same thing as a *procès-verbal* (which is undesirable), or, more correctly, an international agreement itself, though usually one of a supplementary nature or of a less formal and important character than a treaty.³

So-called
Law-
making
Treaties.

§ 492. Attempts at classification of the different kinds of treaties⁴ are of limited usefulness. But there is one distinction to be made which, though theoretically faulty, is of practical importance, and according to which the whole body of treaties is to be divided into two classes. In one class are treaties concluded for the purpose of laying down

¹ For the predominance of treaties, as compared with customary International Law, in medieval practice, see Schwarzenberger in *B.Y.*, 25 (1948), pp. 87-90.

² For the meaning of these and other terms connected with treaties see Vaughan Williams in *Hague Recueil*, 1923 (iii.), pp. 255-258; Satow, §§ 559-583; *Harvard Research* (1935, Part III.), pp. 686-705, 710-722; and Bittner, pp. 298-313.

³ By derivation, *protocol* (from the Low Latin and late Greek) means the 'first-glued' to a book, i.e. the flyleaf or register of the contents of a bundle of documents, and eventually the document itself. On the present

use of the term see Hyde, ii. § 514; Satow, §§ 651-671; Satow, *International Congresses* (1920), pp. 18-19; Vaughan Williams, *supra*, p. 256; Genet, iii. pp. 530-534. And see *ibid.*, pp. 476-538, on the various forms of international agreements other than treaties and conventions.

⁴ See Heffter, §§ 80-91; Bluntschli, §§ 442-445; Martens, i. § 113; Ullmann, § 82; Wheaton, § 268 (following Vattel, ii. § 160); Rivier, ii. pp. 106-118; Westlake, i. p. 294; Hatschek, p. 228; Rapisardi-Mirabelli in *R.I.*, 3rd ser., 4 (1923), pp. 653-667; Rousseau, pp. 133-141; McNair in *B.Y.*, 11 (1930), pp. 100-118; and many others.*

general rules of conduct among a considerable number of States. Treaties of this kind may be termed *law-making treaties*.¹ Into the other class fall treaties concluded for any other purpose. In a sense the distinction between law-making and other treaties is merely one of convenience. In principle, all treaties are law-making inasmuch as they lay down rules of conduct which the parties are bound to observe as law.² However, in addition to the fact that

¹ See also above, § 18. So-called law-making treaties have been concluded ever since International Law came into existence. It was not until the nineteenth century, however, that they came to acquire world-wide importance. Although at the Congresses at Munster and Osnabrück all the European Powers then existing, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which France, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands and the practical sovereignty of the 332 States of the German Empire, was not of world-wide importance, in spite of the fact that it contained various law-making stipulations. And the same may be said with regard to all other treaties of peace between 1648 and 1815. The first law-making treaty of world-wide importance was the Final Act of the Vienna Congress, 1815. But it must be particularly noted that not all of these are *pure* law-making treaties, since many contain other provisions besides those which are law-making.

The Final Act of the Vienna Congress (Martens, *N.R.*, 2, p. 379; see Angeberg, *Le Congrès de Vienne et les traités de 1815* (4 vols., 1863)), signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway, comprised law-making stipulations of world-wide importance concerning four points—namely, the perpetual neutralisation of Switzerland (Article 118, No. 11) (see above, § 98); free navigation on so-called international rivers (Articles 108-117) (see above, § 178); the abolition of the negro slave trade (Article 118, No. 15) (see above,

§ 340A); and the different classes of diplomatic envoys (Article 118, No. 17) (see above, § 364). In addition to the foregoing the following examples may be mentioned: the Treaties of London of 1831 and 1839 providing for the neutralisation of Belgium (see above, § 99); the Declaration of Paris of 1856 (see below, vol. ii. § 177); the Geneva Conventions of 1864, 1906, 1929 and 1949 for the amelioration of the conditions of the wounded in armies in the field (see below, vol. ii. §§ 118-124); the Final Act of the Hague Peace Conference of July 20, 1899 (see above, § 49); the Hague Conventions of 1907 (see above, § 50, and below, vol. ii. §§ 19, 68); the Covenant of the League of Nations; the Protocol of Signature of the Statute of the Permanent Court of International Justice, December 16, 1920 (see below, vol. ii. §§ 25ab-25ag); the General Treaty for the Renunciation of War (vol. ii. § 52i); the Charter of the United Nations. For a comprehensive list see Rühländ, *System der völkerrechtlichen Kollektivverträge* (1929). And see in particular Hudson's *International Legislation* (1931-1950), of which nine volumes have so far been published.

² In particular, in so far as the expression 'law-making treaties' is used as synonymous with 'international legislation' it must be remembered that the latter is merely a metaphor. There is as yet no international legislature proper in the international sphere except, perhaps, to the extent of some Members of the United Nations being bound to accept amendments of the Charter imposed by a qualified majority of the Members of the Organisation (see above, § 168s);

some treaties, on account of the large number of the parties thereto, acquire the complexion of legislative instruments, judicial practice has tended to recognise a type of treaty which, although contractual in origin and character, possesses an existence independent of and transcending the parties to the treaty. Thus in the case concerning the *Status of South-West Africa* the International Court of Justice held that the provisions of the Mandate for South West Africa—which was in the nature of a treaty between the Council of the League of Nations and South Africa—were not decisively affected by the fact that the League had ceased to exist. 'The international rules regulating the Mandate constituted an international status for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa.'¹ Similarly, in the *Reparation for Injuries* case,² the Court held that the provisions of the Charter of the United Nations invested the United Nations with an international status—an international personality with an effect transcending the group of States comprising the membership of the United Nations.³

Binding
Force of
Treaties.

§ 493. The question why international treaties have binding force always was,⁴ and still is, much disputed.⁵ Many writers find the binding force of treaties in the Law of Nature; others in religious and moral principles; others⁶ again in the self-restraint exercised by a State in becoming a party to a treaty. Some⁷ assert that it is the will of the contracting parties which gives binding force to their treaties.⁸ The correct answer is probably that treaties are

¹ *I.C.J. Reports*, 1950, p. 133. And see, in particular, the Separate Opinion of Judge McNair, pp. 155-157. See also above, p. 215, and below, p. 927.

² See below, § 522a.

³ See above, p. 22. And see as to so-called law-making treaties in relation to state succession Jenks in *B.Y.*, 29 (1952), pp. 105-144. See above, § 84.

⁴ For a historical account see Taube in *Hague Recueil*, vol. 32 (1930) (2), pp. 295-367, and Whitton, *ibid.*, vol. 49 (1934) (3), pp. 151-174.

⁵ Höfler, *Les traités internationaux*, i. (1928) pp. 185-245; Fraugulis,

Théorie et pratique des traités internationaux (1936), pp. 89-107.

⁶ So Hall, § 107; Jellinek, *Staatenverträge*, p. 31; Nippold, § 11.

⁷ So Triepel, *Völkerrecht und Landesrecht* (1899), p. 82; Blühdorn, *Einführung in das angewandte Völkerrecht* (1934), pp. 52-84.

⁸ Amongst other factors the theory of 'justifiable reliance' by one party upon the undertaking of the other party, which is believed by an increasing number of English and American lawyers to be the basis of the private law of contract, requires consideration here; see Williston,

legally binding, because there exists a customary rule of International Law that treaties are binding. The binding effect of that rule rests in the last resort on the fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of International Law.¹

II

PARTIES TO TREATIES

Vattel, ii. §§ 154-156, 206-212—Hall, § 108—Westlake, i. p. 290—Phillimore, ii. §§ 48, 49—Wheaton, §§ 265-267—Moore, v. §§ 734-747—Hyde, ii. §§ 494-511—Bluntschli, §§ 403-409—Fauchille, §§ 818, 818 (1), 820—Sibert, pp. 189-223—Pradier-Fodéré, ii. §§ 1058-1068—Rivier, ii. pp. 45-48—Nys, ii. pp. 499, 500—Calvo, iii. §§ 1616-1618—Cruchaga, i. §§ 561-565—Flore, ii. §§ 984-1000, and *Code*, §§ 748-754—Martens, i. § 104—Anzilotti, pp. 357-367—Rousseau, pp. 323-333, 340-355—Baty, pp. 408-423—McNair, Chapters 2, 3, 5, 6, 11, 12—Nippold, *op. cit.*, pp. 104-111—Crandall, *op. cit.*, §§ 1-5—Bittner, §§ 5-21—Verdross, pp. 47-53—Wohlmann, *Die Kompetenz zum Abschluss von Staatsverträgen* (1931)—Chailley, *La nature juridique des traités internationaux* (1932), pp. 167-236—Mirkine-Guetzévitch, *Droit constitutionnel international* (1933), pp. 95-177, and in *Hague Recueil*, vol. 38 (1931) (iv.), pp. 355-401—Vitta, *La validité des traités internationaux* (1940), pp. 33-158—Paul de Visscher, *De la conclusion des traités internationaux* (1943)—Mervyn Jones, *Full Powers and Ratification* (1946)—Huber, *Le droit de conclure des traités internationaux* (1951)—Schoen in *Z.V.*, 5 (1911), pp. 400-431—Weinschel in *Z.V.*, 15 (1930), pp. 469-473—Nisot in 59 *Clunet* (1932), pp. 872-876—Bleiber in *Z.V.*, 19 (1935), pp. 385-402—*Harvard Research* (1935, Part III.), pp. 706-710, 1126-1134, 1144-1161—Kaira in *Nordisk T.A.*, 7 (1936), pp. 39-67—Jessup in *A.J.*, 41 (1947), pp. 380-385. See also *Laws and Practices Concerning the Conclusion of Treaties* (U.N. Legislative Series, 1953).

Law of Contracts (1921), § 20, and Pound, *Introduction to the Philosophy of Law* (1922), ch. vi. (the 'injurious-reliance' theory).

¹ That assumption is frequently expressed in the form of the principle *pacta sunt servanda*, but it is not certain that this is the best formulation: see Anzilotti, pp. 42-57; Verdross, pp. 28-33; Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), and *Allgemeine Staatslehre* (1925), p. 175. And see *Harvard Research* (1935, Part III.), pp. 977-992; Chailley, *op. cit.*,

pp. 73-130; Scelle, ii. p. 337; Rousseau, pp. 355-365; Strupp, *Éléments*, i. p. 8; Whitton in *R.I. (Paris)*, 18 (1936), pp. 440-486, and in *International Conciliation* (Pamphlet No. 313, October 1935); Kunz in *A.J.*, 39 (1945), pp. 180-197. Cavaglieri in *Hague Recueil* (1929) (i.), p. 362, combines the two views. While admitting the fundamental nature of the rule *pacta sunt servanda*, he points out that the binding force of that rule has also been accepted by international custom. And see above, § 11 (n.), on the 'initial hypothesis.'

The
Treaty-
making
Power.

§ 494. A State possesses the treaty-making power only so far as it is sovereign. States which are not fully sovereign can become parties only to such treaties as they are competent to conclude. It is impossible to lay down a hard and fast rule defining the competence of all not-full sovereign States. Everything depends upon the special case. Thus, the constitutions of Federal States comprise provisions with regard to the competence, if any, of the member-States to conclude international treaties among themselves as well as with foreign States.¹ Thus, again, it depends upon the special relation between the suzerain and the vassal how far the latter possess the competence to enter into treaties with foreign States; ordinarily a vassal can conclude treaties concerning such matters as railways, extradition, commerce, and the like.² Similarly, protected States may

¹ According to Articles 7 and 9 of the Constitution of Switzerland the Swiss member-States are competent to conclude non-political treaties among themselves, and, further, such treaties with foreign States as concern matters of police, of local traffic, and of State economics. As to Germany and Soviet Russia, see above, § 89. According to Article 1, § 10, of the Constitution of the United States of America, the member-States are not competent to conclude treaties either among themselves or with foreign States. On the treaty-making power of the United States see Crandall, *op. cit.*, §§ 1-67; Hyde, *ii.* §§ 495-509 (with bibliography in note to § 497); Tucker, *Limitations on the Treaty-making Power under the Constitution of the United States* (1915); Wright, *The Control of American Foreign Relations* (1922); Anderson in *A.J.*, 1 (1907), pp. 636-670, and 14 (1920), pp. 400-402; Tansill in *A.J.*, 18 (1924), pp. 459-482; MacMaster in *J.C.L.*, 3rd ser., 2 (1920), pp. 189-195; Holt, *Treaties Defeated by the Senate* (1933); Dangerfield, *In Defense of the Senate. A Study in Treaty Making* (1933); Butler in *A.S. Proceedings*, 1929, pp. 176-183; McClendon in *American Historical Review*, 36 (1930-1931), pp. 768-775; Burdick in *Foreign Affairs (U.S.A.)*, 10 (1932), pp. 265-279; Scott in *A.S. Proceed-*

ings, 1934, pp. 2-34; Potter in *A.J.*, 28 (1934), pp. 456-474. And see below, § 497, as to Constitutional Restrictions. See also Szász in *Z.o.R.*, 14 (1934), pp. 459-486; Siotto Pintor in *R.G.*, 42 (1935), pp. 521-540. As to France, Dehouso, *La ratification des traités* (1935), pp. 124-151; Barthélemy et Durz, *Traité de droit constitutionnel* (1933). As to Belgium, Muyla in *R.I.*, 3rd ser., 15 (1934), pp. 451-491. As to Japan, Colegrove in *A.J.*, 25 (1931), pp. 270-297. As to Italy, Leibholz in *Z.V.*, 16 (1931-1932), pp. 353-376. As to Sweden, Bloch in *Z.d.V.*, 4 (1934), pp. 25-52. And see Arnold, *Treaty-making Procedure, a Comparative Study of the Methods obtaining in Different States* (1933).

² It seems probable that the League of Nations had the power of making treaties: see Schücking und Wehberg, p. 117; Verdross, p. 51; and Fischer Williams in *International Law Association's Thirty-fourth Report*, 1926, p. 688. It has been suggested that Mandates were in the nature of an agreement between the Council of the League and the mandatory. The treaty-making power of the United Nations is generally admitted. See generally on the treaty-making power of the United Nations § 168^a above and Parry in *B.Y.*, 26 (1949), pp. 108-140.

conclude treaties if so authorised by the Protecting State or the treaty establishing the protectorate.¹ An instrument is void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties.²

§ 494a. States can exercise their capacity to conclude treaties either individually or, when acting collectively, through public international organisations—i.e. organisations of States created by treaty. Thus the United Nations has concluded treaties with member States,³ with States which are not members,⁴ and with various specialised agencies which are themselves organisations of States. The latter, in turn, have concluded numerous agreements between themselves⁵ as well as with States.⁶ International practice prior to the establishment of the United Nations shows examples of international agreements concluded by public international organisations.⁷ There is no reason why the law governing treaties should not apply, *mutatis mutandis*, to agreements concluded by and between public organisations of States and why the experience of treaties should not be made available to the collective activities of States in their various manifestations. In this connection it may be noted

Treaty-Making
Power of
Organisations
of States.

¹ Thus Tunis and Morocco were separate parties to the International Sanitary Convention of June 21, 1926 (Hudson, *International Legislation*, 3 (1925-1927), p. 1903), and to the International Convention for the Protection of Industrial Property of June 2, 1934 (*ibid.*, 6 (1932-1934), p. 870).

² See Hall, p. 380. See also McNair, p. 139, and Hackworth, 5 (1943), p. 153. On the treaty-making power of non-dependent territories in the United Kingdom, see Fawcett in *B.Y.*, 26 (1949), pp. 86-107, and *I.L.Q.*, 3 (1950), pp. 449-451. On the so-called 'federal' and 'colonial' clause in connection with treaties concluded under the auspices of the United Nations see Liang in *A.J.*, 45 (1951), pp. 108-129. See also above § 89a. And see the instructive memorandum prepared by the Secretariat of the United Nations and published in *Laws and Practices Concerning the*

Conclusion of Treaties (U.N. Legislative Series (1953), pp. 121-125).

³ See, e.g., the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (*U.N.T.S.*, xi, p. 11).

⁴ See, e.g., the Agreement with Switzerland concerning the Privileges and Immunities of the United Nations (*U.N.T.S.*, i, p. 163).

⁵ See above, § 168r.

⁶ See above, § 168r.

⁷ Thus on June 28, 1937, an agreement, registered with the League of Nations, was concluded between Yugoslavia, Roumania and the International Commission of the Danube (*U.N.T.S.*, 140, p. 191); Hudson, *International Legislation*, 6, p. 47. On August 4, 1934, the Reparations Commission concluded a comprehensive agreement with Germany (*U.N.T.S.*, 41, p. 432).

that the exigencies of modern international intercourse have made necessary the admission to some non-political organisations of States—and the consequent recognition of a degree of international personality coupled with a measure of treaty-making power—of territorial units which are not fully sovereign States. This applies in particular to the membership of such important international organisations as the Universal Postal Union, the World Health Organisation and the International Trade Organisation.¹

Treaty-making Power exercised by Heads of States or their Governments.

§ 495. The treaty-making power of States is, as a rule, exercised by their Heads, acting either personally or through representatives appointed by them, or by their Governments. This means that treaties are declared to be concluded either as between Heads of States or, as is increasingly the practice, between Governments. Occasionally the treaty is concluded between States as such. The Holy Alliance of Paris, 1815, was concluded personally by the Emperors of Austria and Russia and the King of Prussia. And when, on June 24, 1859, the Austrian Army was defeated at Solferino, the Emperors of Austria and France met on July 11, 1859, at Villafranca, and agreed in person on preliminaries of peace. Yet, as a rule, Heads of States do not act in person, but authorise representatives to act for them. Such representatives receive a written commission, known as powers, or full powers, which authorise them to negotiate in the name of the respective heads of States. They also receive oral or written, open or secret, instructions. But, as a rule, they do not conclude a treaty finally, for all treaties concluded by such representatives are, in principle, not valid before ratification.² If they conclude a treaty by exceeding their powers or acting contrary to their instructions, the treaty is not a real treaty, and is not binding upon the State they represent.³ While, often, the treaty-making power of States

¹ See Fawcett in *B.Y.*, 26 (1949), p. 103, and in *Year Book of World Affairs*, 1951, p. 282.

² See below, § 510.

³ A treaty of such a kind is called a *sponsio*, or *sponsiones*. *Sponsiones* may become a real treaty, and binding upon the State, through the latter's approval. Nowadays, how-

ever, the difference between real treaties and *sponsiones* is less important than in former times, when the custom in favour of the necessity of ratification for the validity of treaties was not yet general. If nowadays representatives exceed their powers, their States can simply refuse ratification of the *sponsio*.

is exercised by their Heads, the constitutional practice of some States assigns it, so far as many matters are concerned, to their Governments. In such a case it is the Government, and not the Head of the State, which must ratify the treaty, in order to make it binding.¹

§ 496. For some non-political purposes of minor importance, certain minor functionaries are recognised as competent to exercise the treaty-making power of their States, which is, so to say, delegated to them. Such functionaries are *ipso facto*, by their offices and duties, competent to enter into certain agreements without the requirement of ratification.² Thus, for instance, in time of war, military and naval officers in command³ can enter into agreements concerning a suspension of arms, the surrender of a fortress, the exchange of prisoners, and the like. In the United States the Postmaster-General is authorised by statute to negotiate and conclude, by and with the advice of the President, 'postal treaties or conventions' and to interpret them with an effect binding upon all officers of the United States.⁴ As in other cases, treaties of this kind are valid only when these functionaries have not exceeded their powers.⁵

§ 496a. The treaty-making power of the members of the British Commonwealth of Nations must be regarded as inherent in them and directly exercised.⁶ In accordance

Minor Functionaries exercising Treaty-making Power

Members of the British Commonwealth and Treaty-making Power.

¹ Assuming that the treaty requires ratification. According to the British practice inter-governmental agreements—i.e. treaties concluded between Governments—do not require ratification unless they specifically provide for it (as they occasionally do: see, e.g., the Conventions of April 10, 1945, between Great Britain and the United States for the Avoidance of Double Taxation—Cmd. 6624 and 6625). See McNair, p. 86. And see below, § 509a, on Inter-Governmental Agreements.

² See Fauchille, § 824 (2). See, for example, the Convention of November 16, 1923, between the Norwegian and the South African Postal Administrations: *L.N.T.S.*, 60, p. 278. And see below, § 509a.

³ See below, vol. II, § 235, and

Grotius, iii. c. 22.

⁴ 5 U.S.C., section 372.

⁵ See also below, § 509a.

⁶ See Keith, *Responsible Government in the Dominions* (2nd ed., 1928), ii. pp. 840-928, 1252, 1253. On the general position of the British Dominions in International Law see above, §§ 94a, 94b. On their treaty-making powers see much of the literature cited above, §§ 94a, 94b, particularly Lewis in *B.Y.*, 1923-1924, pp. 168, 169; *ibid.*, 1925, pp. 31-43; and see also Tupper in *J.C.L.*, New Ser., vol. 17 (1917), pp. 5-18; MacKenzie in *B.Y.*, 1925, pp. 191, 192, in *A.J.*, 19 (1925), pp. 489-504 (Canada), in *Canadian Bar Review*, 15 (1937), pp. 436-454; Allin in *Michigan Law Review*, 24 (1928), pp. 249-276; Read in *Canadian Law*

with the Resolutions of the Imperial Conferences of 1923,¹ 1926,² and 1940,³ the Government of any part of the British Empire, when contemplating the negotiation of a treaty, should notify the Government of any other part of the Empire likely to be affected thereby, and the latter Government should promptly define any interest it may have in the negotiations. The treaty is made 'in the name of the King as the symbol of the special relationship between the different parts of the Empire' and states the parts of the Empire on behalf of which it is made and to which it therefore applies.⁴ The Resolutions of the Conferences of 1923, 1926, and 1930 do not distinguish between political and non-political treaties. In accordance with the Resolutions of 1926, 'full powers' to sign the treaty are issued on the advice of the Dominion Government concerned, not upon the advice of the Government of the United Kingdom in London.⁵ Thus the exercise of the treaty-making power of the Dominions cannot now be regarded as a delegation from any central Government; it is derived from their own status. While it was customary in the past to obtain from the Crown in London full powers for Dominion representatives with regard to treaties of a formal kind, the constitutional conventions of the British Commonwealth of Nations have altered as the result of the achievement of full international status by its members, and it is now customary for the

Review, 5 (1927), pp. 229-238, 302-310; Hurst in *Great Britain and the Dominions* (University of Chicago Press (1927)); Klarner, *Die Stellung der Dominions beim Abschluss völkerrechtlicher Verträge* (1931), pp. 74-103; McNair, Chapter 6; Stewart in *A.J.*, 32 (1938), pp. 467-487, and the same, *Treaty Relations of the British Commonwealth of Nations* (1939). See also Ollivier, *Problems of Canadian Sovereignty* (1945), pp. 82-98. And see above, § 94b.

¹ Cmd. 1987, pp. 13-15.

² Cmd. 2768, pp. 20-30.

³ Imperial Conference, 1930, *Summary of Proceedings*, Cmd. 3717, p. 28.

⁴ See Cmd. 2768 for a specimen form, and see the British communi-

cation to the Council of the League in *Off. J.*, 1927, p. 377, to the effect that the Governments of Great Britain and the Dominions would find it easier to sign and ratify treaties negotiated under the auspices of the League if they were expressed to be made between Heads of States than if they were expressed to be made between States themselves; and see Keith, *op. cit.*, pp. 1252, 1253.

⁵ For a discussion of the function of the latter Government in the matter of 'full powers' and the ratification of a Dominion treaty on the basis of the 1923 Resolutions see Harrison Moore in *J.C.L.*, 3rd ser., 8 (1928), at pp. 22-25; and see Keith, *op. cit.*, at p. 1252, and in *J.C.L.*, 3rd ser., 10 (1928), pp. 326, 327.

Governor-General to confer the necessary authority. With regard to less formal treaties the requisite authority is, as a rule, issued by the Minister of Foreign Affairs. India, which in 1950 became a Republic, no longer concludes treaties in the name of the Queen. In the matter of inter-governmental agreements, which have become increasingly frequent in recent times,¹ Full Powers are issued by the appropriate Minister of the Dominion, and the agreements are ratified by him. Since 1932 the Union of South Africa has possessed its own Great Seal. Canada passed in 1939 the Canadian Seals Act, which enables the Governor-General to ratify treaties concluded in the traditional form as between Heads of States. The result of all these developments has been to remove formal restrictions and delays in the full exercise of the treaty-making power by the Dominions.²

§ 497. Although the Heads of States are regularly, according to International Law, the organs that exercise the treaty-making power of the States, such treaties concluded by Heads of States, or other organs purporting to act on behalf of the State, as violate constitutional restrictions do not bind the State concerned. This is so for the reason that the representatives have exceeded their powers in concluding the treaties.³ Such constitutional restrictions, although

Constitutional Restrictions.

¹ See § 509a.

² See McNair, pp. 80-82, as to the operation of international agreements to which more than two members of the British Commonwealth of Nations are parties. See also R. Y. Jennings in *B.Y.*, 30 (1953), pp. 330-340.

³ See Nippold, *op. cit.*, pp. 127-164 and Bittner, §§ 23-26; see also Schoen, *op. cit.*, and in Strupp, *Wort.*, ii. pp. 658-662; Guggenheim, pp. 63-68; König, *Völkerbefragung und Registrierung beim Völkerbund* (1927), pp. 6-42; Chailley, *La nature juridique des traités internationaux* (1932) pp. 180-236. *Harvard Research* (1935, Part III), pp. 992-1009; Verdross, *op. cit.*, pp. 51-53; Paul de Visscher, *De la conclusion des traités internationaux* (1943); Mervyn Jones in *A.J.*, 35 (1941), pp. 462-481. Normally the contracting parties do not pay much attention to the question whether

each of them has complied with its constitutional requirements for the validity of the treaty and regard that as a domestic matter (see the Award in an arbitration between France and Switzerland of August 3, 1912, in *A.J.*, 6 (1912), p. 1000); but cases have occurred in which a State has repudiated a treaty duly signed and ratified on the ground of non-compliance with constitutional requirements: see Verdross, pp. 52, 53. See also the dispute between Iraq and Iran before the Council of the League in 1935. *Off. J.*, February 1935, pp. 113, 190, and November 1935, p. 1204; McNair, pp. 38-46; McNair's Introduction to Arnold, *Treaty Making Procedures* (1933), pp. 1-16; Dehousse, *La ratification des Traités* (1935), according to whom compliance with the constitutional provisions as to the treaty-making power is essential for the international validity of the

they are not of great importance in Great Britain,¹ play a prominent part in the constitutions of most countries.² Thus, according to Article 31 of the French Constitution of 1946, the President exercises the treaty-making power; but peace treaties and such treaties as concern commerce, international organisation, finance, and some other matters, as well as treaties which modify French law or involve cession of French territory, are not valid unless embodied in a law passed by the French Parliament.³ Again, according to Article 2, § 2, of the Constitution of the United States,

treaty, but not necessarily compliance with other constitutional provisions; Fitzmaurice in *B.Y.*, 15 (1934), pp. 113-137; Fairman in *A.J.*, 30 (1936), pp. 439-462; and writers referred to above. See also Jenks in *Canadian Bar Review*, 16 (1937), pp. 464-477, and Stewart in *A.J.*, 32 (1938), pp. 57-62, with regard to the validity of ratifications by Canada of certain International Labour Conventions following upon the judgment of the Judicial Committee of the Privy Council to the effect that Federal legislation passed to implement these Conventions was *ultra vires* (*Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326).

It must now be regarded as established by the practice of the International Court of Justice that a party to proceedings before the Court may, in certain circumstances, validly undertake far-reaching obligations as the result of a declaration of its agent, regardless of any constitutional restrictions. Thus, in the course of the argument before the Court in the case concerning the *Free Zones of Upper Savoy and the District of Gex*, the Swiss Agent declared on behalf of Switzerland that should the Zones be maintained his country would agree that, in the absence of an agreement with France, the terms of the exchange of goods between the Zones and Switzerland should be settled by experts; that their decisions should be binding upon both States; and that no ratification on the part of Switzerland would be necessary. The French Agent thereupon expressed doubts whether the Swiss declaration was binding in view of the require-

ments of Swiss constitutional law. The Court held that, 'having regard to the circumstances in which the declaration was made,' it was binding on Switzerland: Series A/B, No. 46, p. 170 (Judgment of June 7, 1932). In a number of cases the Court assumed jurisdiction by virtue of the argument or, generally, of the conduct of the representatives of the parties before the Court on questions not covered by a special or general agreement. See Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 56-58. And see Paul de Visscher, *op. cit.*, pp. 174-200, for a survey of other cases decided by the Court and other international tribunals. See also the *Lighthouses Case* between France and Greece, as reported in *Annual Digest*, 1933-1934, Case No. 36 (at pp. 84, 85).

¹ See Anson, *The Law and Custom of the Constitution* (3rd ed.), ii. (The Crown), Part II. (1908), at pp. 102-110; Atherley Jones in *Grotius Society*, 4 (1919), pp. 95-109; Halsbury, *Laws of England*, vi. § 679; McNair in *B.Y.*, 1928, pp. 59-68; Holdsworth in *L.Q.R.*, 58 (1942), pp. 175-183.

² See Crandall, *op. cit.*, §§ 33-154; Hyde, ii. §§ 495-509; Dickinson in *A.J.*, 20 (1928), pp. 444-452; Hackworth, iv. §§ 465-471, 514-517.

³ See Pruss in *A.J.*, 44 (1950), pp. 641-669, and above, § 21. As to the position of Germany prior to 1932 see Schmitz in *Z.d.V.*, iii. (1932), pp. 313-385. See also Meisner, *Vollmacht und Ratifikation bei völkerrechtlichen Verträgen nach deutschem Recht* (1934), and Schiffer and Wilcox in *A.J.*, 30 (1936), pp. 216-232.

the President can only ratify treaties—as distinguished from so-called executive agreements¹—with the consent of the Senate, given by two-thirds of the Senators present.

However, notwithstanding the general rule as stated above, the question of the effect of disregard of constitutional limitations is not free from difficulty. There is some force in the view that the security of international transactions may be jeopardised if the parties to a treaty cannot rely on the ostensible authority of the organs accepting binding obligations on behalf of their State and if they are compelled to probe into the provisions, often obscure and uncertain, of the constitutional law of the other contracting party or parties. Neither can a negotiating party be expected to assume the function of an arbiter of controversial questions of constitutional law of the other party or to question the authority of the organ representing it. On the other hand, due—and, probably, decisive—weight must be attached to the principle that acts done without or in excess of the authority conferred upon the organ of the State are not binding upon it. That principle must not, however, be allowed to operate so as to enable Governments to conduct themselves in a manner prejudicial to the sanctity of treaties and obligations of good faith. For these reasons, although a treaty is voidable, at the option of the State concerned, if it has been entered into in disregard of the limitations of its constitutional law and practice, that State must be deemed to have waived its right to assert the invalidity of the treaty if for a pro-

¹ These account for over one-half of the international engagements entered into by the United States since 1789. There has been an increasing tendency to assert that the machinery of Article 2, § 2, of the Constitution was never intended to be exclusive; that executive agreements, made with the concurrence of both Houses of Congress, possess the same international and domestic authority as treaties ratified with the consent of two-thirds of the Senate; and that there is no type of treaty which cannot be entered into by way of executive agreement. See McClure, *International Executive Agreements* (1941); Hackworth, v. pp. 390-433;

Levitan in *Illinois Law Review*, 35 (1940), p. 369; Catudal in *George Washington Law Review*, 10 (1942), p. 653; Quincy Wright in *A.J.*, 38 (1944), pp. 341-355, and in *International Conciliation*, May 1945, Pamphlet No. 411; Borchard in *A.J.*, 38 (1944), pp. 637-643; Herbert Wright, *ibid.*, pp. 643-650; McDougal and Lans in *Yale Law Journal*, 54 (1945), pp. 181-251 and 534-615; Borchard, *ibid.*, pp. 616-664. See also Dennison, *The Senate Foreign Relations Committee* (1942); Westphal, *The House Committee on Foreign Affairs* (1942); Colegrove, *The American Senate and World Peace* (1944). And see the literature in § 494 above.

longed period it has failed to do so, or if it has acted upon it, or has obtained advantage from it. Moreover, in cases in which a treaty must be held invalid on account of disregard of constitutional limitations of a contracting party, principle demands that that party must be responsible for any damage to the other contracting party in cases in which the latter cannot properly be expected to have had knowledge of the constitutional limitations in question.¹

Mutual
Consent of
the Con-
tracting
Parties.

§ 498. A treaty being a contract, mutual consent of the parties is necessary. Mere proposals made by one party, and not accepted by the other, are, therefore, not binding upon the proposer. Not binding are, lastly, so-called *punctationes*, mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty. But such *punctationes* must not be confused either with a preliminary treaty, or with a so-called *pactum de contrahendo*. A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later. Such preliminary treaty is a real treaty, and therefore binding upon the parties. A *pactum de contrahendo* requires likewise the mutual consent of the parties. It is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties.² The difference

¹ This is substantially the view of the large majority of writers. See Hyde, ii., p. 1385; McNair, p. 44, and in Introduction to Arnold, *Treaty-Making Procedure* (1933), p. 6; Harvard Draft Convention, Article 10; Paul de Visser, *De la conclusion des traités internationaux* (1943), p. 275; Mervyn Jones, *Full Powers and Ratification* (1948), p. 155; Verdross, *Völkerrecht* (2nd ed., 1950), p. 128; Guggenheim, *Hague Recueil*, 74 (1949) (i.), p. 236; Charles de Visser, *Théorie et réalité en droit international public* (1953), p. 302. For a penetrating though (perhaps unavoidably) inconclusive treatment of the subject see Balladore Pallieri in *Hague Recueil*, 74 (1949) (i.), pp. 469-512.

² See e.g. Article 2, para. 2, of the Treaty of March 2, 1936, between the

United States and Panama providing that should the utilisation of lands and waters additional to those already employed prove necessary for the operation of the Canal, the parties shall agree upon the required measures: *A.J.*, 34 (1940), Suppl., p. 140. On the obligation to enter into negotiations as distinguished from the obligation to reach an agreement see the Advisory Opinion of the Permanent Court of October 1931 in the *Case concerning the Railway Traffic between Lithuania and Poland: P.C.I.J.*, Series A/B, No. 42 p. 116. From a *pactum de contrahendo* there must be distinguished the assumption of an obligation to recognise future treaties and arrangements made by other States. This seems to be a clear legal obligation. Thus in Article 7 of the

between *punctationes* and a *pactum de contrahendo* is that the latter imposes an obligation on the parties to elaborate in a treaty an agreement already reached on certain points, whereas in the case of the former no binding agreement has been concluded.

§ 499. Real consent on the part of the representatives of a State concluding a treaty is a condition of its validity. Effect of Coercion.
A treaty concluded as the result of intimidation or coercion exercised personally against the representatives is invalid. However, with regard to the freedom of action of the State as such, International Law as it existed prior to the Covenant of the League, the Charter of the United Nations, and the General Treaty for the Renunciation of War,¹ disregarded the effect of coercion in the conclusion of a treaty imposed by the victor upon the vanquished State. This rule, although obnoxious to a general principle of law, and although challenged from time to time by writers and Governments,² was a necessary corollary of the admissibility of war as an instrument for changing the existing law. War was a legitimate means of compulsion, and consent given in pursuance thereof could not properly be regarded as

Peace Treaty of 1951 Japan undertook to recognise the full force of treaties concluded or to be concluded by the Allied Powers for terminating the war, as well as other arrangements made by them in connection with the conclusion of treaties of peace; *Treaty Series*, No. 33 (1952), Cmd. 8601. On the other hand, there was a *pactum de contrahendo* in the nature of a binding obligation, to be fulfilled in good faith, in the undertaking of Article 9 in which Japan bound herself to 'enter promptly into negotiations with the Allied Powers so desiring' for the conclusion of treaties in the matter of fisheries, commercial relations (Art. 12) and civil aviation (Art. 19). For an example of an undertaking to formulate a joint plan for an international conference to consider the negotiation of a multilateral agreement see Article 3 of the Anglo-American Agreement on Petroleum of September 24, 1945 (Cmd. 6883). For an example of a treaty laying down the principles upon which subsequent

treaties to be negotiated shall be based see Article 8 of the Treaty of January 11, 1943, between Great Britain and China providing for the relinquishment of extraterritorial rights in China. The Treaty provides that the parties shall enter into negotiations for the conclusion of a comprehensive modern treaty or treaties of friendship, commerce, navigation and consular rights, and that 'the treaty or treaties to be thus negotiated will be based upon the principles of international law and practice as reflected in modern international procedure and in the modern treaties which each of the High Contracting Parties have respectively concluded with other Powers in recent years' (*Treaty Series*, No. 2 (1943), Cmd. 6456).

¹ See below, vol. ii. § 52g.

² See Lauterpacht, §§ 73, 74. On the effect of this rule upon the equality of States see McNair in *Michigan Law Review*, 26 (1927) pp. 139-141, 149-151.

tainted with invalidity.¹ The position has now probably changed in so far as war has been prohibited by the Charter of the United Nations and the General Treaty for the Renunciation of War. A State which has resorted to war in violation of its obligations under these instruments cannot be held to apply force in a manner permitted by law. Accordingly, duress in such cases must, it is submitted, be regarded as vitiating the treaty.²

In so far as the victorious State was not bound by either of these instruments, or if resort to war on its part was not in violation of them, there is room for the continuance of the traditional rule disregarding the vitiating effect of physical coercion exercised against a State.³

Mistake
and Error
in Con-
tracting
Parties.

§ 500. Although a treaty was concluded with the real consent of the parties, it is nevertheless not binding if the

¹ For the distinction, in this connection, between voidable treaties and those tainted with 'absolute nullity' see Guggenheim in *Hague Recueil*, 74 (1949) (i.), pp. 194-236.

² The resulting impossibility, on the part of the defeated State, validly to give its consent to the termination of the war by a treaty, can, it would appear, be remedied in such cases only by a quasi-legislative act of third States expressly recognising the situation created by the treaty (see above, § 76i). This might best be done by the terms of the treaty being embodied in a general convention in the nature of an international settlement, in which the concurrence of a considerable number of third States would to some extent offer the assurance that the terms of the treaty are not unreasonable or unjust. And see above, § 241a, with regard to conquest. The fact that coercion does not as a rule vitiate a treaty of peace does not mean that in other cases no notice is taken of the fact that a Government acts under compulsion. On April 9, 1941, the United States concluded an agreement with the Danish Minister in Washington relating to the defence of Greenland and subsequently ignored the declaration of the Government of Denmark, then under German occupation, that the agreement was

void as concluded without its authorisation. It is believed that the action of the United States, though novel, was not improper. The Government of Denmark was not at that time a sufficiently free agent either to protect effectively the interests of Denmark abroad or to object to agreements made for that purpose on behalf of Denmark. For a criticism of the agreement see Briggs in *A.J.*, 35 (1941), pp. 506-513. For the text of the agreement see *ibid.*, Suppl., p. 129.

³ For a discussion on the subject see Atsasy, *Les vices de consentement dans les traités internationaux à l'exclusion des traités de paix* (1929); Tomšić, *La reconstruction du droit international en matière des traités* (1931); Vitta, *La validité des traités internationaux* (1940), pp. 102-140; Weinschel in *Z.V.*, 15 (1930), pp. 469-473; F. de Visscher in *R.I.*, 3rd ser., 12 (1931), pp. 513-537; Butler in *A.S. Proceedings*, 1932, pp. 45-48; Turlington, *ibid.*, pp. 49-53; Bleiber in *Z.V.*, 19 (1935), pp. 385-402; Cavaglieri in *Rivista*, 27 (1935), pp. 4-23; Verzijl in *R.I. (Paris)*, 15 (1936), pp. 324-330; *Harvard Research* (1935, Part III.), pp. 1148-1161; Schoen in *Z.V.*, 21 (1937), pp. 277-296; McNair, Chapter II (2); Briery in *Hague Recueil*, vol. 58 (1936) (iv.), pp. 203-210.

consent was given in error, or under a mistake produced by a fraud of the other contracting party. If, for instance, a boundary treaty were based upon an incorrect map or a map fraudulently altered by one of the parties, such treaty would by no means be binding.¹ Although there is freedom of action in such cases, consent has been given in circumstances which prevent the treaty from being binding.

III

OBJECTS OF TREATIES

Vattel, ii. §§ 160-162, 166—Hall, § 108—Phillimore, ii. § 51—Walker, § 30—Hyde, ii. §§ 490, 491, 493—Bluntschli, §§ 410-416—Heffter, § 83—Fauchille, § 819—Pradier-Fodéré, ii. §§ 1080-1083—Rousseau, pp. 766-814—Rivier, ii. pp. 57-63—Nys, ii. pp. 503, 504—Fiore, ii. §§ 1001-1004, and *Code*, §§ 760-763—Martens, i. § 110—De Louter, i. pp. 479-481—McNair, Chapter 10—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), pp. 59-60—Vitta, *La validité des traités internationaux* (1940), pp. 159-215—Nippold, *op. cit.*, pp. 181-190—Wright in *A.J.*, 11 (1917), pp. 566-579—Rousseau in *R.G.*, 39 (1932), pp. 133-192—Salvioli in *Hague Recueil*, vol. 46 (1933) (iv.), pp. 26-30—Pasching in *Z.o.R.*, 14 (1934), pp. 54-61.

§ 501. The object of treaties is always one or more Objects in
general of
Treaties. obligations, whether affecting all the parties or unilateral on the part of one only. Speaking generally, the object of treaties can be an obligation concerning any matter of interest for States. However, the Law of Nations prohibits some obligations from becoming objects of treaties, so that such treaties as consist of obligations of this kind are, from the very beginning, null and void.²

¹ See Weinschel in *Z.V.*, 15 (1930), pp. 449-469; Pasching in *Z.o.R.*, 14 (1934), pp. 33-47; *Harvard Research* (1935, Part III.), pp. 1126-1134, 1144-1148; Verzijl in *R.I. (Paris)*, 15 (1935), pp. 284-339; Charles de Visser, *op. cit.*, p. 300, McNair, Chapter 11 (3), p. 300. See also, with regard to maps, Sandifer, *Evidence before International Tribunal* (1939), pp. 156-164, and the *Island of Timor* case decided in 1914 between Portugal and the Netherlands (Scott, *Hague Court Reports* (1916), p. 356). Mistake as to, or ignorance of, law is irrelevant. See the observations of Judge Anzilotti in the *Eastern Greenland* case (*P.C.I.J.*, Series A/B, No. 53, p. 92). See also the passage in the award of Lord Asquith

in the *Abu Dhabi* arbitration in answer to the contention that the Sheikh when granting the concession was not acquainted with the rule that territorial waters form part of the territory of the State: 'Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoek or not'; *I.C.L.Q.*, 4th Series, vol. i. (1952), p. 253.

² The voidance *ab origine* of these treaties must not be confused with voidance of such treaties as are valid in their inception, but become afterwards void on some ground or other: see below. §§ 541-544.

Obligations as Limited to Contracting Parties.

§ 502. A treaty, other than a general or almost universal treaty of a law-making character enacted for the general good of the international community,¹ which purported to impose an obligation upon a third party would to that extent be null and void; for the general principle prevails that *pacta tertiis nec nocent nec prosunt*.²

Treaties Inconsistent with Former Treaty Obligations.

§ 503. Treaties, whether general or particular, lay down rules of conduct binding upon States. As such they form part of International Law. They are, in the first instance, binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations. This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker.³ It is incompatible with the unity of the law to recognise and enforce mutually exclusive rules of conduct laid down in a contract in cases in which such inconsistency is known to both parties. In view of the relatively small number and publicity of treaties, this rule applies with special force in the international sphere. The practice of States offers several examples of protest⁴ against treaties conflicting with pre-existing treaty obligations. Thus, when in 1878 Russia and Turkey concluded the preliminary Treaty of Peace of San Stefano, which was inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, Great Britain protested.⁵

¹ See below, § 522a.

² See Roxburgh, *International Conventions and Third States* (1917), and particularly ch. vii. for the exceptions to the general principle.

³ See above, § 241a, with regard to Conquest; § 499 (Effect of Coercion); and § 16700 (Article 20 of the Covenant).

⁴ See on this subject De Louter, i. p. 480; *Harvard Research: Treaties* (1935), pp. 1016-1129; Wright in *A.J.*, 11 (1917), pp. 576-579; Salvioi in *Rivista*, 12 (1918), pp. 229-241; Rousseau in *R.G.*, 39 (1932), pp. 140-162; Verzijl in *R.I. (Paris)*, 15 (1935), pp. 284-339 (in connection with the general question of validity of international juridical acts); Lauterpacht in *B.Y.*, 17 (1936), pp.

54-65; Sørensen in *Nordisk T.A.*, 9 (1938), pp. 150-173; Aufrecht in *Cornell Law Quarterly*, 37 (1952), pp. 655-700; Jenks in *B.Y.*, 30 (1953). See also Charles de Visscher, *Théories et réalités en droit international public* (1953), pp. 316-320.

⁵ See Martens, *N.R.G.*, 2nd ser., 3, p. 257, and above, § 132 (2). As to the British protest, in 1846, against the Treaty providing for the annexation of Cracow, see *British and Foreign State Papers*, 35, p. 1085, and, generally, *ibid.*, pp. 1042-1107. For a survey of some cases see Tobin, *The Termination of Multiparty Treaties* (1933), pp. 206-249. For decisions of the Central American Court of Justice concerning the Bryan-Chamorro

The so-called doctrine of non-recognition of treaties and situations inconsistent with previous treaties¹ must be regarded as based on the principle as stated above. The rigid application of that principle may lead to difficulties in cases in which the modification of a general convention by a new treaty is obstructed by a small number of the signatories of the former treaty. However, as every legal principle must be applied reasonably, it is submitted that the second treaty, although inconsistent with the first, would not be held by an international court to be invalid if it could be shown that the interests of the complaining State are not affected at all or that the degree to which they are affected is slight when related to the general advantage accruing from a new treaty.² Moreover, the principle formulated in this Section does not apply to subsequent multilateral treaties, such as the Charter of the United Nations (see below, Section 503a), partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or to such multilateral treaties as must be deemed to have been concluded in the general interest.

§ 503a. Article 103 of the Charter of the United Nations^{Treaties Inconsistent with the Charter of the United Nations.} lays down that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. This Article is both more precise and more far-reaching than the corresponding provisions of the Covenant of the League of Nations.³ It establishes the absolute supremacy of the obligations of the Charter and these are manifold in scope and go beyond the duties of observance and of common

Treaty between the United States and Nicaragua see *A.J.*, 11 (1917), pp. 228 and 729, and above, p. 307, n. 1. See also *P.C.I.J.*, Series A/B, No. 41 (*Austro-German Customs Union Case*).

¹ See above, § 75i.

² See *B.F.*, 16 (1935), pp. 162-166, with regard to the Dissenting Opinions of Judges Van Eysinga and Schücking in the *Oscar Chin* case between Belgium and Great Britain: *P.C.I.J.*, Series A/B, No. 63. See also Hudson

in *A.J.*, 24 (1930), p. 461 (with regard to treaties codifying International Law); Moscati in *Rivista*, 23 (1931), pp. 51-66, 199-215 (with regard to the abrogation of the neutralisation of Belgium); Fitzmaurice in *B.Y.*, 18 (1937), pp. 189-191 (concerning the Montreux Straits Convention of 1936). See also Rousseau, pp. 781-814.

³ See above, § 167oo. And see Kelsen, *The Law of the United Nations* (1950), pp. 111-121.

enforcement of the obligations of pacific settlement—over any other contractual agreement of the members whether past or future, and whether between members *inter se* or with States which are not members of the United Nations. It may be said that, to the extent of their inconsistency with the Charter, all such agreements are, for all practical purposes, void and unenforceable.¹ The Charter thus establishes a significant hierarchy in the system of conventional rules of International Law. It constitutes what may be called a 'higher law,' with a resulting limitation of the contractual capacity of the members of the United Nations.

Object
must be
physi-
cally
possible.

§ 504. An obligation to perform a physical impossibility² cannot be the object of a treaty. If perchance a State entered into a convention stipulating an obligation of that kind, no right to claim damages for non-fulfilment of the obligation would arise for the other party, such treaty being legally null and void.

Immoral
Obliga-
tions.

§ 505. It is a customarily recognised rule of the Law of Nations that immoral obligations cannot be the object of an international treaty.³ Thus, an alliance for the purpose of attacking a third State without provocation is, from the beginning, not binding. It cannot be denied that in the past many treaties stipulating immoral obligations have been concluded and executed, but this does not alter the fact that such treaties were legally not binding upon the contracting parties. It must, however, be taken into consideration that the question as to what is immoral is often controversial. An

¹ The main difficulty raised by this provision of the Charter arises in connection with treaties concluded with non-member States prior to the acceptance of the Charter. For it is not easy to see how the Charter, unless it is assumed to possess a legislative character binding directly States which have not subscribed to it (see below, § 522a), can derogate from their rights acquired by treaties concluded prior to its entry into force. In practice the difficulty will tend to disappear in proportion as the United Nations approach universality. With regard to treaties concluded with non-member States after the Charter

has entered into force, the legitimate rights of non-member States are not affected in view of their knowledge of the fact that the contractual capacity of the Members of the United Nations has been limited by Article 103 of its Charter. Such treaties also fall under the operation of the general rule of International Law relating to treaties inconsistent with the former obligations of the contracting parties. See above, § 503.

² See below, § 542.

³ See McNair in *Michigan Law Review*, 26 (1927), pp. 140-142; Verdross in *A.J.*, 31 (1937), pp. 571-577.

obligation which is considered immoral by some States may not necessarily appear immoral to the contracting parties.

§ 506. It is a recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty. If, for instance, a State entered into a convention with another State not to interfere in case the latter should command its vessels to commit piratical acts on the open sea, such treaty would be null and void, because it is a principle of International Law that it is the duty of every State to forbid its vessels to commit piracy on the high seas.¹ The same applies to treaties the execution of which involves the infliction of a legal wrong upon a third State.² On the other hand, there is nothing to prevent the parties from modifying, *inter se*, rules of customary International Law in a way which does not impair directly the rights of third States or which does not offend against paramount principles of international public policy. *Modus et conventio vincunt legem*. Thus there is nothing to prevent the contracting parties from waiving as between themselves all or some of the rules relating to diplomatic immunity or jurisdictional immunities of States generally.

IV

FORM AND PARTS OF TREATIES

Grotius, ii. c. 15, § 5—Vattel, ii. § 153—Hall, § 109—Westlake, i. pp. 290, 291—Wheaton, § 253—Moore, v. § 740—Hyd., ii. §§ 512-515—Bluntschli, §§ 417-427—Heffter, §§ 87-91—Fauchille, §§ 821-823 (2)—Pradier-Fodéré, ii. §§ 1084-1090—Rivier, ii. pp. 64-68—Nys, ii. pp. 504-507—Fiore, ii. §§ 1004-1006, and *Code*, §§ 764-768—Martens, i. § 112—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), p. 56—Cranfill, *op. cit.*, § 6—McNair, Chapters 1, 4—Satow, pp. 318-402, and *International Congresses* (Foreign Office Peace Handbook) (1920), pp. 20-32—Bittner, §§ 59-76—Report of Mastny and Rundstein for the League Codification Committee in *A.J.*, 20 (1926), Special Suppl., pp. 205-218—*Harvard Research* (1935, Part III.), pp. 722-739—Devaux in *R.I.F.*, i. (1936), pp. 299-309—Mervyn Jones in *B.Y.*, 21 (1944), pp. 111-122—*Laws and Practices concerning the Conclusion of Treaties* (United Nations Legislative Series, 1953).

¹ As to the effect of inconsistency with the terms of the Covenant under Article 20 see above, § 16700.

² See McNair, p. 113.

No
Necessary
Form of
Treaties.

§ 507. International Law contains no rules prescribing a necessary form of treaties. A treaty is, therefore, concluded as soon as the mutual consent of the parties becomes clearly apparent.¹ Such consent must always be given expressly or by unmistakable conduct, for a treaty cannot be concluded by mere tacit acquiescence.² But it matters not whether an agreement is made orally or in writing—though the importance of the questions regulated by treaty indicates the latter as the normal procedure. There have been rare instances of oral treaties. These include an oral treaty of alliance, secured by an oath, concluded in 1697 by Pillau between Peter the Great of Russia and Frederick III., Elector of Brandenburg.³ In the case between Norway and Denmark concerning the *Status of Eastern Greenland*, the Permanent Court of International Justice held in 1933 that an oral declaration given by the Minister of Foreign Affairs on behalf of his Government in answer to a request by the representative of a foreign State is binding upon the State to which the Minister belongs, provided that the subject-matter of the declaration falls within his province.⁴ However, in practice treaties take the form of a written⁵ document, signed by duly authorised representatives of the contracting parties.⁶

Acts, Con-
ventions,
Declar-
ations, etc.

§ 508. International compacts which take the form of written contracts are sometimes termed not only *agreements* or *treaties*, but *acts*, *conventions*, *declarations*, *protocols*, and the like. But there is no essential difference between them, and their binding force upon the contracting parties is the same, whatever be their name. The Declaration of Paris,

¹ As to the effect of non compliance by members of the League with the obligation to register treaties with the Secretariat under Article 18 of the Covenant see below, § 518a.

² Tacit acquiescence must not be confused with what in English law is sometimes called 'tacit consent,' i.e. a contract which is not made in writing or orally, but is inferred from conduct.

³ See Martens, I. § 112.

⁴ Series A/B, No. 53, p. 71. And see, for comment thereon, Garner in A.J., 27 (1933), pp. 493-497, who

cites some precedents. The Pan-American Convention on Treaties (see above, § 35, n.) lays down that the written form is an essential condition of treaties (Article 2). Some States, like Mexico and Turkey, became bound by the wide obligations of the Covenant simply by accepting the invitation to join the League without any formal document of adhesion having been executed.

⁵ Which includes printing.

⁶ As to choice of language see above, § 359, and Fauchille, §§ 815-816 (6), 822 (2).

and the Final Act of the Vienna Congress are as binding as any agreement which goes under the name of 'treaty' or 'convention.'¹ The term 'declaration'² often denotes a 'law-making treaty' of a general character in which the parties engage themselves to pursue in future a certain line of conduct.³ But such law-making treaties are quite as frequently styled 'conventions' as 'declarations.' Thus the Hague 'Convention' concerning the laws and usages of war was based upon the unratified 'declaration' concerning the laws and customs of war produced by the Brussels Conference of 1874.⁴ Special reference must also be made to treaties concluded in the form of exchanges of notes. They are often, though certainly not invariably, concluded for the regulation of matters of a technical character. Inasmuch as they are frequently stated to enter into force on signature, without the necessity of ratification, the form of 'exchange of notes' is particularly convenient where expeditious action is required for the conclusion and execution of agreements between States. On occasions they are made subject to ratification. There is no good reason for questioning their character as treaties.⁵

§ 508a. The decisive factor in ascertaining the legal nature of an instrument as a treaty is not its description—which, The Existence of Legal Obligations.

¹ On the part of the British Foreign Office see *Parl. Papers*, Misc. No. 5 (1909), Cmd. 4555, Proceedings of the International Naval Conference held in London, 1908-1909, p. 57. The attempt to distinguish between a 'declaration' and a 'convention' by maintaining that, whereas a 'convention' creates rules of particular International Law between the contracting States only, a 'declaration' contains the recognition, on the part of the best qualified and most interested Powers, of rules of universal International Law, does not stand the test of criticism. Thus the Declaration of Paris of 1856 had not been agreed to by the United States of America, or by many other States, at the time of its promulgation.

² Bittner, § 97, considers the real difference between 'declarations' and other treaties to lie in the fact that as a general rule the former are more

concise and omit many of the purely formal clauses as to full powers, ratifications etc., usually found in other treaties.

³ See above, § 487.

⁴ As to the distinction made in the United States between *treaties*, which can only be ratified by the President with the consent of the Senate, and *agreements*, which do not require such consent, see above, § 497. (See also Moore, v. § 752, and, in particular, Crandall, *op. cit.*, §§ 56-61; as regards the assertion that only such compacts require ratification as bear the title *treaties* or *conventions* see below, § 512.)

⁵ See on the subject Weinstein in *B.Y.*, 29 (1952), pp. 205-226. See also Fitzmaurice in *B.Y.*, 15 (1934), p. 120. At least one-third of the treaties registered with the United Nations are in the form of exchanges of notes.

as has been shown, varies considerably—but whether it is intended to create legal rights and obligations between the parties. Thus, by reference to that test, a ‘declaration’¹ may or may not be a treaty. In some cases, as in the Universal Declaration of Human Rights,² the absence of an intention to undertake a legal obligation appears clearly from the statements made by Governments prior to the adoption of the text of the instrument. In other cases the clauses of the instrument indicate with sufficient clarity that they are intended as formulating general statements of principle and policy rather than legal obligations.³ A difficult question arises in cases in which the terms of the undertaking leave to the parties a measure of discretion so wide as to raise doubts whether there exists a legal obligation. Thus, for instance, in the Declarations accepting the compulsory jurisdiction of the International Court of Justice—the so-called Optional Clause of Article 36 of the Statute of the Court—some States, such as the United States and France, have reserved for themselves the right to determine whether a dispute falls within their exclusive domestic jurisdiction and whether they are therefore bound to submit the dispute in question to the compulsory jurisdiction of the Court. In such cases, it is believed, the determination of the extent of the obligation of a State, although lying within the competence of the interested State, must take place in accordance with the legal duty to act in good faith. The fact that the interested State is the judge of the existence of the obligation is, although otherwise of considerable importance, not of decisive relevance for the determination of the legal character of the instrument.⁴

**Parts of
Treaties**

§ 509. Since International Law lays down no rules concerning the form of treaties, there exist no rules concerning the arrangement of the parts of written treaties. But the

¹ See above, § 508.

² See above, § 340n.

³ See, e.g., Fawcett in *Year Book of World Affairs*, 1951, pp. 286-289, with regard to the Havana Charter of the International Trade Organisation of 1948 and Mann in *B.Y.*, 26 (1949), pp. 284-285 with regard to certain

declarations of monetary policy. And see, generally, Fawcett in *B.Y.*, 30 (1953).

⁴ The same applies to treaties such as the North Atlantic Treaty of April 4, 1949; (see below, § 572), in which each party agrees to assist others by ‘such action as it deems necessary.’

following order is usually observed. A first part, the so-called *preamble*,¹ comprises the names of the Heads of the contracting States and their duly authorised representatives, and the motives for the conclusion of the treaty.² A second part consists of the principal provisions, in numbered articles. A third part—usually referred to as ‘final clauses’—consists of miscellaneous provisions concerning the duration of the treaty, its ratification, the accession of third Powers, and the like. The last part comprises the signatures of the representatives. But this order is by no means essential. Sometimes, for instance, the treaty itself does not contain the actual provisions upon which the contracting parties have agreed, such provisions being placed in an annex to the treaty. It has also happened in the past that a treaty has contained secret stipulations in an additional part, which have not been made public with the bulk of the stipulations³—a practice which must tend to disappear having regard to the requirement of registration and publication.⁴ It is a question of fact whether in any particular case an instrument referred to in a treaty forms, in the intention of the parties, an integral part of the treaty. In the *Ambatielos* case the International Court of Justice held that a Declaration annexed to a Treaty of 1926 between the United Kingdom and Greece and providing for the settlement by arbitration of disputes based on a Treaty of 1886 was, in the circumstances of the case, an integral part of the former treaty.⁵

§ 509a. Recent international practice has adopted, in addition to the traditional form of treaties—i.e. treaties negotiated and signed expressly on behalf of the Head of the State by virtue of Full Powers received from him—so-called inter-governmental and inter-departmental agree-

Inter-Governmental and Inter-Departmental Agreements.

¹ Paul You, *Le Préambule des Traité International* (1941), and in *R.I. (Geneva)*, 20 (1942), pp. 25-45; Rousseau, pp. 172-188. See also the *Asylum* case, *I.C.J. Reports*, 1950, p. 282.

² As to the authority of the preamble to the Charter of the United Nations see above, § 168a.

³ The matter is treated with all details by Pradier-Fodéré, ii. §§ 1088-1099.

⁴ See below, § 518a.

⁵ *I.C.J. Reports*, 1952, pp. 41-43. The main reason of the decision of the Court was the fact that in the instruments of ratification and registration the Treaty and the Declaration were treated as a whole. But see on the subject the Dissenting Opinions of Judges McNair (at p. 60) and Basdevant (at p. 70).

ments.¹ The former, concluded between the Governments of the Contracting Parties, are, in their legal effect, in the same category as ordinary treaties concluded on behalf of the State. They are not limited to matters of minor or transient importance.² The main reason for adopting this form of treaty is that it is attended by a smaller degree of formality and that, occasionally, it obviates certain inconveniences connected with the municipal law of the country concerned. Thus for a time some of the British Dominions attached importance to being able to conclude treaties without resorting to the somewhat cumbrous procedure of receiving authority for the issue of Full Powers under the Great Seal.³ In the United States that form of treaty does occasionally offer the advantage of a more speedy procedure than is permitted by an ordinary treaty requiring for its ratification the advice and consent of two-thirds of the Senate.⁴ However that may be, the international validity of such agreements is the same as that of ordinary treaties. The same applies to agreements made, with the authority of the Governments concerned, between government departments such as the Central Post Offices or various ministries.⁵ Often treaties provide expressly for inter-departmental arrangements of this nature.⁶

¹ For a detailed discussion of the subject see M. Jones in *B.Y.*, 21 (1944), pp. 111-122.

² See the Agreement of August 25, 1939, between the Government of the United Kingdom and the Polish Government regarding Mutual Assistance. Cmd. 6616 (1945), or the Four Powers Agreement of August 8, 1945, for the Prosecution and Punishment of Major War Criminals, Cmd. 6668 (1945). However, important treaties, multilateral and bilateral, are still, as a rule, concluded as between Heads of States. It will be noted that the opening passage of the Preamble to the Charter of the United Nations is: 'We, the peoples of the United Nations . . .'. The Preamble to the Constitution of the Food and Agriculture Organisation of the United Nations (see below, p. 994) begins: 'The Nations accepting this Constitution . . .'

³ A consideration which has tended to disappear with the full acquisition of liberty of action by the Dominions also in this respect. See above, § 496.

⁴ See above, § 498.

⁵ See e.g. the Agreement concerning Telecommunications concluded on December 15, 1936, between the Telegraph Administrations of Denmark, Finland, Iceland, Norway, and Sweden. Hudson, *Legislation*, vii, p. 492; or the Agreement between the Post Office Authorities of those countries of December 31, 1934, concerning postal exchanges: *ibid.*, vi, p. 305. And see above, § 496.

⁶ See e.g. an Agreement cited by M. Jones, *op. cit.*, p. 119, n. 4, between the British Air Ministry and the Austrian Federal Ministry of Commerce, based on Article 1, para. 2, of the Air Navigation Convention concluded between the two countries in 1933.

V

RATIFICATION OF TREATIES

Grotius, ii. c. 11, § 12.—Pufendorf, iii. c. 9, § 2.—Vattel, ii. § 156.—Hall, § 110—Westlake, i. pp. 290-292.—Phillimore, ii. § 52.—Twiss, i. § 214.—Moore, v. §§ 743-766.—Wharton, ii. §§ 131, 131a.—Wheaton, §§ 256-263.—Hyde, §§ 516-520.—Bluntschli, §§ 420, 421.—Sibert, pp. 223-233.—Fauchille, §§ 824-824 (7).—Rousseau, pp. 188-247.—Pradier-Fodéré, ii. §§ 1100-1119.—Nys, ii. pp. 507-515.—Rivier, ii. § 50.—Calvo, iii. §§ 1627-1636.—Fiore, ii. § 994, and *Code*, § 755.—Martens, i. §§ 105-108.—Scelle, ii. pp. 467-479.—Wicquefort, *L'ambassadeur et ses fonctions* (1680), ii. § xv.—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), pp. 53-56.—Nippold, *op. cit.*, pp. 123-125.—Wegmann, *Die Ratifikation von Staatsverträgen* (1892)—Crandall, *op. cit.*, § 3.—McNair, Chapters 7, 9, 13.—Satow, §§ 711-730.—Bittner, §§ 77-93.—Vexler, *De l'obligation de ratifier les traités régulièrement conclus* (1923).—Meissner, *Vollmacht und Ratifikation* (1934).—Debousse, *La ratification des traités* (1935).—Wilcox, *Ratification of International Conventions* (1935).—Frangulis, *Théorie et pratique des traités internationaux* (1936), pp. 39-82.—Mervyn Jones, *Full Powers and Ratification* (1946).—Camara, *The Ratification of International Treaties* (1949).—Genet in *R.G.*, 38 (1931), pp. 749-769.—McNair in *Hague Recueil*, vol. 43 (1933) (i.), pp. 297-302.—Fitzmaurice in *B.Y.*, 15 (1934), pp. 113-137.—*Harvard Research* (Part III., 1935), pp. 739-812.—Parry in *Grotius Society*, 36 (1950), pp. 149-190.—Blx in *B.Y.*, 30 (1953), pp. 352-380.

§ 510. Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives, and is commonly used to include the exchange of the documents embodying that confirmation.¹ Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is, as a rule, suspended until ratification is given.² The function of ratification is, therefore, to make the treaty binding; if it is refused, the

Concept-
tion and
Function
of Ratifi-
cation.

¹ See below, § 517b. For forms of ratification, British and other, see Satow, §§ 727-730, and *International Congresses* (Foreign Office Peace Handbook) (1920), pp. 131-134. For the meaning of 'ratification,' when applied to the Draft Conventions of the International Labour Organisation see above, § 340d.

² See Jones in *A.J.*, 29 (1935), pp. 61-65, who maintains that, with the exception of the United States, the practice of States and judicial

decisions support the view expressed in the text. But see *ibid.*, p. 61, n. 1, for a long list of writers, including Westlake, Hall, and Hyde, in whose view the treaty is binding from the date of its signature, the exchange of ratifications having a retroactive effect. The Pan-American Convention on Treaties of February 1928 (see above, § 35, n.) provides that treaties shall become effective from the date of ratification (Article 8). See also *Harvard Research* (1935, Part III.), pp. 719-812.

treaty falls to the ground in consequence. As long as ratification is not given, the treaty is, although concluded and not devoid altogether of certain effects,¹ not perfect. Some² maintain that, as a treaty is not binding without ratification, it is the latter which really contains the mutual consent and really concludes the treaty. Before ratification, they maintain, no treaty has been concluded, but a mere mutual proposal to conclude a treaty has been agreed to. But this opinion does not accord with the facts.³ For the representatives are authorised, and intend, to conclude a treaty by their signatures. Governments act, as a rule, on the view that a treaty is concluded as soon as their mutual consent is clearly apparent. They make a distinction between their consent, given by representatives, and their ratification, to be given subsequently; they do not confuse the two by considering their ratification to be their consent. It is for that reason that a treaty cannot be ratified in part,⁴ that no alterations of the treaty are possible through the act of ratification,⁵ that a treaty may be tacitly ratified by its execution, that it is always dated from the day when it was duly signed by the representatives, and not from the day of its ratification, and that there is no essential difference between such treaties as need, and such as do not need, ratification. Moreover, although there is no legal obligation

¹ See Nisot in 57 *Clunet* (1930), pp. 878-883, and *Harvard Research* (1935, Part III), pp. 778-787. In *Philippson and Others v. Imperial Airways Limited*, [1939] A.C. 332, the majority of the House of Lords held that the term 'high contracting party' used in a contract of carriage and referring to the Warsaw Convention of 1929 on Air Transport included Belgium, who had signed but had not ratified the Convention. It is probable that the decision was influenced by consideration of the special circumstances of a commercial contract. It appears that the British Government, in a communication addressed to the United States, dissociated itself from the ruling of the House of Lords. It said: 'His Majesty's Government are of the opinion that the ordinary meaning of High Contracting Party in a convention is to

designate a party who is bound by the provisions of a convention and therefore does not cover a signatory who does not ratify it.' The United States Department of State expressed its agreement with this view. Hackworth, iv. § 367 (p. 373). See also M. Jones in *L.Q.R.*, 56 (1940), pp. 399-404.

² See, for instance, Jellinek, *op. cit.*, p. 55; Wegmann, *op. cit.*, p. 11.

³ The matter is discussed by Rivier, *ii* pp. 74-76.

⁴ When in 1934 Ecuador, who was a signatory of the Treaty of Versailles but had not ratified the Treaty, decided to become a member of the League as an original member (see *Off. J.*, 1934, p. 1468) she ratified the Covenant without ratifying the Treaty of Versailles. But this must be regarded as exceptional.

⁵ See below, § 517a.

to ratify a treaty,¹ there are additional reasons why the signature of a treaty cannot be regarded as a mere formality. In signing a treaty a State exercises an influence upon many of its important procedural clauses, such as those relating to accession,² to reservations,³ to conditions of entry into force, and the like. Also, according to a widely accepted view, signatory States, even if they have not yet ratified a treaty, may validly exercise the right of objecting to reservations appended by any other State wishing to become a party to the treaty. It is occasionally maintained that ratification is a confirmation of the treaty as distinguished from confirmation of the signature expressing the consent of the parties.⁴ This view is probably inaccurate.⁵ Its indirect implication—which, as suggested above, is contrary to practice—is to reduce the legal value and effects of the signature.

§ 511. The *rationale* for the institution of ratification is partly that States require an opportunity of re-examining not the individual provisions, but the whole effect of the treaty upon their interests. These interests may be of various kinds. They may undergo a change immediately after the signing of the treaty by the representatives. They may appear to public opinion in a different light from that in which they appear to the Governments, so that the latter want to reconsider the matter. Another reason for ratification is that treaties on many important matters are, according to the constitutional law of most States, not valid without some kind of consent on the part of parliaments. Governments must, therefore, have an opportunity of withdrawing from a treaty, in case parliaments refuse their approval.⁶

Rationale for the Institution of Ratification.

¹ See below, § 514.

² See below, § 532.

³ See below, § 517a.

⁴ See, e.g., comment to Article 6 of the Harvard Research Draft.

⁵ See the observations of Judge Basdevant in his Dissenting Opinion in the *Ambatielos* case (Preliminary Objection), *I.C.J. Reports*, 1952, p. 69.

⁶ For the temporary British practice in 1924 of laying treaties

after signature and before ratification, on the table in both Houses of Parliament see Hansard, Commons, 1924, vol. 171, p. 2007; *B.Y.*, 1924, pp. 190-191. The practice was temporarily abandoned in December 1924 upon a change of Government (see Hansard, Commons, 1924-1925, vol. 179, col. 565; *B.Y.*, 1925, p. 188; and Scott in *A.J.*, 18 (1924), pp. 296-298). It was restored in 1929, but it is a practice which admits of ex-

Require-
ment of
Ratifica-
tion.

§ 512. But ratification, although necessary in principle, is not always essential. Although it is now a generally recognised customary rule of International Law that treaties regularly require ratification, even if this is not expressly stipulated, there are exceptions to the rule.¹ For treaties concluded by such State functionaries² as have, *ipso facto* by their office, the power to exercise within certain narrow limits the treaty-making competence of their State, do not require ratification, but are binding at once when they are concluded, provided that the respective functionaries have not exceeded their powers. Further, treaties concluded by Heads of States in person do not require ratification, provided that they do not concern matters in regard to which constitutional restrictions³ are imposed upon Heads of States. Again, it may happen that the parties provide expressly, for the sake of a speedy execution of a treaty, that it shall be binding at once without ratifications being necessary.⁴

exceptions whenever circumstances so require. The expression, 'Parliament has ratified' a certain treaty, though occasionally met with, is objectionable when used of a British treaty. Parliament, if invited by the Government to do so, may authorise the Government to ratify a treaty, but it is the King, upon the advice of his Ministers responsible for the parts of the Empire concerned, who ratifies a treaty. Legislation may be necessary to give effect to the treaty, but that is not ratification. Thus the title of the Treaty of Peace (Turkey) Act, 1924, is 'an Act to carry into effect a Treaty of Peace,' etc. See McNair in *B.Y.*, 1928, pp. 59-68. Article 27 of the French Constitution of 1946 provides that certain categories of treaties shall not become final until they have been ratified by virtue of a legislative act (*en vertu d'une loi*). It is not clear whether the language used refers to ratification (i.e. confirmation) by Parliament or to international ratification subsequent to confirmation by Parliament.

¹ Fauchille, § 824 (2), gives a number of illustrations of the exceptions which follow and of certain others. See also Dehoussie, *op. cit.*, pp. 82-117.

² See above, § 496.

³ See above, § 497.

⁴ Thus, Article 6 of the Alliance between Great Britain and Japan of 1902, Article 8 of the Alliance of 1905, and Article 6 of the Alliance of 1911, provided that the agreement 'shall come into effect immediately after the date of signature.' Again, the Treaty of London of July 15, 1840, between Great Britain, Austria, Russia, Prussia, and Turkey, concerning the pacification of the Turco-Egyptian conflict, was accompanied by a secret protocol (see Martens, *N.R.G.*, i. p. 163), signed by the representatives of the parties, according to which the Treaty was to be executed at once, without being ratified. For the Powers were, on account of the victories of Mehemet Ali, anxious to settle the conflict as quickly as possible. The Anglo-Polish Treaty of Alliance of August 25, 1939, the Anglo-Ethiopian Agreement of December 19, 1944, the Four Powers Agreement of August 9, 1945, concerning the prosecution and punishment of the major war criminals, and many other treaties concluded during or in connection with the Second World War, were declared to enter into force on the day of signature. Occasionally — as in the Soviet-Czech-Slovak Treaty of friendship, mutual assistance and post-war col-

The practice of dispensing, with ratification and expressly providing that the treaty shall enter into force upon signature has, in fact, become a prominent feature in the procedure of conclusion of treaties.¹ This applies in particular to exchanges of notes, which constitute about one-third of international agreements.² However, express renunciation of ratification is valid only if given by representatives duly authorised to make such renunciation. If the representatives have not received a special authorisation to dispense with ratification, their renunciation is not binding upon the States which they represent.

It has been asserted that 'apart from those compacts which bear the title *treaty* or *convention*, ratification is only required where it is provided for'³; but this assertion is too sweeping. Since *all* international compacts are contracts, and therefore treaties in the wider sense of the term, the title which a particular compact bears cannot decide the question whether it does, or does not, require ratification. The answer to the question depends upon the contents of the compact. Thus a protocol or declaration,⁴ or an exchange of notes, insofar

laboration concluded on December 12, 1943—the treaty is declared to enter into force immediately after its signature while being nevertheless subject to ratification (usually 'at the earliest possible date'). For a useful enumeration of cases in which, according to the British practice, ratification is unnecessary see McNair, pp. 86, 87. See also De Felice, *Gouvernements nationaux et accords internationaux* (1942), on international agreements brought into force without ratification.

¹ For some statistical data on the subject see Lauterpacht, *Report on the Law of Treaties* (International Law Commission, A/CN.4/83, 1953), p. 72. In some cases treaties, while providing for ratification, lay down that they shall enter into force provisionally on the date of signature. See, e.g., the Convention of October 29, 1947, between France and Belgium for Avoidance of Double Taxation: *U.N.T.S.*, 46, p. 117. And see Blix in *B.Y.*, 30 (1953), pp. 352-380.

² This is so apart from the fact that,

unless otherwise expressly provided, exchanges of notes do not in any case require ratification.

³ See Satow (2nd ed.), ii. § 606, p. 312. And see Fitzmaurice in *B.Y.*, 15 (1934), pp. 113-129, who gives reasons for the view that, in the absence of an express or implied provision to the contrary, a treaty does not, in the international sphere, require ratification. Probably the difference between this view and that advanced in the text above is less substantial than appears at first sight. For both views admit of implied exceptions, the result of which is, to a large extent, to reduce the divergence to a question of emphasis.

The Pan-American Convention on Treaties of February 1928 (see above, § 35) provides that treaties are binding only after ratification even if the full powers or the treaty itself do not contain this condition (Article 5).

⁴ In the *Ambatielos* case Judge McNair was prepared to hold, if necessary, that a Declaration which referred to the settlement of disputes, and which in his view did not form

as they merely add some minor point or record agreement on the interpretation of a clause in a treaty, do not require ratification unless this is specially stipulated.¹ The same applies with regard to agreements providing for a *modus vivendi* and the like, whatever title they may bear. However, apart from these exceptions, treaties require ratification unless they contain a provision to the contrary,² whatever title the instrument may bear.³

Length of
Time for
Ratifica-
tion.

§ 513. No rule of International Law prescribes the length of time within which ratification must be given, or refused. If this is not specially provided for by the contracting parties in the treaty itself, a reasonable length of time must be presumed to be mutually granted. A refusal to ratify must be presumed from the lapse of an unreasonable time without ratification having been effected.⁴ In most cases, however, treaties which require ratification now contain a clause stipulating that they are subject to ratification, and, occasionally, also prescribing the time within which ratification should take place. It is often provided that ratification shall take place as soon as possible.

Refusal of
Ratifica-
tion.

§ 514. Formerly⁵ it was occasionally maintained that ratification could not lawfully be refused unless the representatives had exceeded their powers or violated their secret instructions. This view is no longer held.⁶ It is contrary part of the ratified treaty, was binding, without ratification, upon the United Kingdom having regard to the practice of that country in this matter: *I.C.J. Reports*, 1952, p. 60.

¹ See McNair, pp. 85-87. Accessions and adhesions to treaties by third States (see below, §§ 532, 533) normally do not require ratification but they are sometimes expressly made subject to ratification; see below, p. 935.

² Which stipulation must be presumed if the Treaty provides that it shall enter into force immediately. See e.g. the Anglo-Ethiopian Agreement of December 19, 1944: Cmd. 6584 (1945).

³ In the *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder* the Permanent Court of International Justice held in September 1929 that the expression 'drawn up' used in

Article 338 of the Treaty of Versailles meant, with reference to a treaty, a convention duly signed and ratified. The Court pointed out that, unless there was in the treaty an express provision to the contrary, the contracting parties must have intended to abide by 'the ordinary rules of international law, amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of ratification': *Series A*, No. 23, pp. 17-21.

⁴ Whereupon, presumably, the treaty becomes stale and incapable of ratification.

⁵ See Grotius, ii. c. 11, § 12; Bynkershoek, *Quaestiones juris publici*, ii. 7; Wicquefort, *L'Ambassadeur*, ii. 15; Vattel, ii. § 156; G. F. von Marten, § 48.

⁶ See Hyde, ii. § 516; *Harvard Research* (1935, Part III.), pp. 769-778.

to practice and, probably, to the very notion of ratification. Some insist that a State is, except for just reasons, in principle *morally* bound not to refuse ratification. It is difficult, however, to see the value of such a moral, in contradistinction to a legal, duty. International Law in no case imposes a legal duty of ratification. A State refusing ratification will always have reasons for doing so which appear just to itself, although they may be insufficient in the eyes of others. In practice, ratification is given or withheld at discretion.¹ It is clear that a State which has earned for itself a reputation for arbitrarily refusing or delaying ratification may, in practice, find its contractual capacity somewhat impaired. However, while there is no legal obligation to ratify a treaty, the principle of good faith ---which is probably in itself part of the law and not merely a precept of political prudence---probably requires States : (a) to submit a treaty, which is subject to ratification, to the proper constitutional authorities with a view to ratification or rejection² ; (b) to refrain, prior to the legislative decision as to ratification, from acts intended substantially to impair the value of the undertaking as signed³ :

¹ Bittner, p. 261, n. 1047, gives many instances. As to the duty to submit treaties for ratification before legislative authorities see Nisot in 58 *CUNET* (1931), pp. 349-351, and above, § 340f. See also Article 4 of the Constitution of the Food and Agriculture Organisation of the United States. In 1930 the Council of the League appointed a Committee to inquire into the causes of the delay in the ratification of conventions concluded under its auspices. In its report (Doc. No. A. 10. 1930. V.), which was approved by the Assembly in the same year, the Committee recommended that the Secretary-General should request a State which had signed a convention but not ratified it within one year to declare its intention in the matter; that a similar inquiry should be addressed after five years to members of the League who had neither signed nor ratified the Convention; and that in the event of an insufficient number of ratifications, the Council should con-

sider the advisability of calling a new conference with a view to modifying the Convention, if necessary. See Wilcox, *The Ratification of International Conventions* (1935) pp. 145-158; and the same in *General Special Studies*, vi. No. 2 (1935).

² This is of necessity, an elastic obligation, which ought to be fulfilled by the Government concerned having regard to all the circumstances. It must be a somewhat nominal obligation in cases in which the views of the competent legislative authority are likely to coincide with those of the executive determined not to proceed with the treaty. It will be noted that under the Constitution of the International Labour Organisation (see above, § 340gd) Governments are also bound to submit to national authorities, for approval or rejection, conventions against which the representatives of those Governments voted at the Conference which adopted them.

³ See, to the same effect, Article 9 of the Havana Draft Convention and

(c) to ratify a treaty which it has signed and which has received the legislative approval necessary for ratification.¹ These obligations do not impair the right of States to refuse ratification to a treaty signed by them. But they prevent Governments from signing a treaty and subsequently conducting themselves as if they had no concern with it or as if their signature were a mere act of authentication.

Form of
Ratifica-
tion.

§ 515. No rule of International Law exists which prescribes a necessary form of ratification. Ratification can, therefore, be given tacitly as well as expressly. Tacit ratification takes place when a State begins the execution of a treaty without expressly ratifying it. It is usual for ratification to take the form of a document duly signed by the Heads of the States concerned, and their Secretaries for Foreign Affairs. It is usual to draft as many documents as there are parties to the Convention, and to exchange these copies between the parties.² Occasionally the whole of the treaty is recited *verbatim* in the ratifying documents, but sometimes only the title, preamble, date of the treaty, and the names of the signatory representatives are cited. As ratification is only the confirmation of an already existing treaty, the essential requirement in a ratifying document is merely that it should refer clearly and unmistakably to the treaty to be ratified. The citation of title, preamble, date, and names of the representatives is, therefore, quite sufficient to satisfy that requirement.

Who
effects
Ratifica-
tion.

§ 516. Ratification is effected by those organs which exercise the treaty-making power of the States. These organs are normally the Heads of the States or their Governments,³ but they can, according to the Municipal Law of some States, delegate the power of ratification for some parts of their territory to other representatives. Thus, the Viceroy of India was empowered to ratify treaties with

Angiotti, p. 372. See also the Case Concerning Certain German Interests in Polish Upper Silesia (P.C.I.J., Series A, No. 7, p. 30). And see *Magalidis v. Turkey* (Recueil des Décisions des Tribunaux Arbitraux Mixtes, 8, p. 390); *Schrager v. Workmen's Accident Insurance Institute*,

Annual Digest, 1927-1928, Case No. 274; *Kemeny v. Yugoslav State*, *ibid.*: Case No. 374.

¹ On French decisions and practice in this connection see *Preuss* in *A.J.*, 44 (1900), p. 649.

² See below, § 517b.

³ See above, § 495.

certain Asiatic monarchs in the name of the King of Great Britain and Emperor of India.¹

In case the Head of a State ratifies a treaty although the necessary constitutional requirements have not been previously fulfilled (as, for instance, where a treaty has not received the necessary approval from the Parliament of the said State), the question arises whether such ratification is valid, or null and void. The matter is discussed above, in § 497, in connection with constitutional limitations upon the treaty-making power. When the Head of the State has exceeded his powers, the State concerned cannot, as a rule, be held to be bound by the treaty.²

§ 517. It follows from the nature of ratification, as a Partial and Conditional Ratification. necessary confirmation of a treaty already concluded, that ratification must be either given or refused, no conditional or partial ratification being possible. That occasionally a State tries to modify a treaty while ratifying it cannot be denied; but conditional ratification is not ratification at all, but is equivalent to refusal of ratification coupled with a fresh offer which may or may not be accepted.³ Nothing, of course, prevents the other contracting party from entering into fresh negotiations in regard to such modifications; but such negotiations are negotiations for a new treaty,⁴ the original treaty having become null and void through its conditional ratification. On the other hand, no obligation exists for such

¹ As the result of the Resolutions of the Imperial Conference of 1923 (Cmd. 1897), reaffirmed by the Imperial Conference of 1926 (Cmd. 2768), the ratification of treaties imposing obligations on one self-governing part of the British Empire was to be effected by the King at the instance of the Government of that part.

² The conflict between the United States and France in 1831, frequently quoted in support of the opinion that such ratification is valid, is not in point. It is true that the United States insisted on payment of an indemnity stipulated for by a treaty which had been ratified by the King of France without having received the necessary approval of the French Parliament. But the United States

did not maintain that the ratification was valid; she insisted upon payment because the French Government had admitted that such indemnity was due to her. See Wharton, ii. § 131a, p. 20. For a comparative survey of the practice of various States see Rousseau, pp. 202-234.

³ See below, § 517a; Hyde, ii. § 519; and Fauchille, § 824 (6). In particular see Bittner, § 85, who criticises the statement in the text.

⁴ This is the correct explanation of the practice on the part of States, which sometimes prevails, of acquiescing, after some hesitation, in alterations proposed by a party to a treaty in ratifying it: see examples in Pradier-Fodéré, ii. § 1104, and Calvo, iii. § 1630.

party to enter into fresh negotiations, for conditional ratification is identical with refusal of ratification, whereby the treaty falls to the ground. Thus, for instance, when the Senate of the United States on December 20, 1900, in consenting¹ to the ratification of the Hay-Pauncefote Treaty, added amendments which modified it, Great Britain did not accept the amendments, and considered the Treaty to have fallen to the ground.

Quite particular is the case of a treaty to which a considerable number of States are parties, and which one of the contracting parties ratifies only in part. Thus France, in ratifying the General Act of the Brussels Anti-Slavery Conference of July 2, 1890, excepted from ratification Articles 21 to 23 and 42 to 61, and the Powers acquiesced in this partial ratification, so that France was not bound by these twenty-three articles.² Such so-called partial ratification takes place only if one or more provisions of the treaty which have been signed without reservation are exempted from ratification, or if an amending clause is added to the treaty during the process of ratification. It is therefore quite legitimate for a party who, in signing a treaty, made reservations against certain articles,³ to except those articles from ratification, and it would be incorrect to speak in this case of partial ratification.

It has been asserted⁴ that it is quite legitimate and that one ought not in this case to speak of conditional ratification—for a contracting party who wishes to secure a certain interpretation for certain terms and clauses of a treaty, to grant ratification upon the understanding only that they

¹ It is of importance to emphasize that the Senate of the United States, in proposing an amendment to a treaty before its ratification, does not, strictly speaking, ratify such treaty conditionally, since it is the President, and not the Senate, who possesses the power of granting or refusing ratification; see Willoughby, *The Constitutional Law of the United States* (1910), i. p. 462, n. 14. The President, however, according to Article 2 of the Constitution, cannot grant ratification without the

consent of the Senate, and so the proposal of an amendment to a treaty on the part of the Senate amounts to a proposal of a new treaty; but see Moore, v. § 748, p. 201. As to the dispute between Persia and Iraq before the Council of the League in 1935 see *Off. J.*, 1935, p. 217.

² See Martens, *N.R.G.* 2nd ser., 22, p. 280.

³ See below, § 517a.

⁴ See, e.g., the view expressed in the previous editions of this volume in Section 517.

should bear a particular interpretation.¹ In such cases, according to that view, ratification does not introduce an amendment or an alteration, but only fixes the meaning of otherwise doubtful terms and clauses of a treaty. However, it is clear that such interpretation, in order to be binding upon the other parties, must secure their assent. Otherwise it might be possible for a contracting party to modify substantially its obligations by means of its own interpretation of the provisions of the treaty.²

§ 517a. A State in signifying its consent to a treaty may wish not to be bound by a particular provision contained in it.³ This effect may be achieved in at least four ways: (i) by the insertion in the treaty itself of a stipulation that the particular provision shall not apply to the State making the reservation; this is not truly a reservation at all, but a substantive provision of the treaty; (ii) by a

¹ Thus when, in 1911, opposition arose in Great Britain to the ratification of the Declaration of London on account of the fact that the meaning of certain terms was ambiguous and that the wording of certain clauses did not agree with the interpretation given to them by the Report of the Drafting Committee, the British Government declared that they would only ratify upon the understanding that the interpretation contained in the Report should be considered as binding, and that the ambiguous terms concerned should bear that interpretation. In the end the Declaration was not ratified.

² In 1938 the United States of America signed a number of International Labour Conventions subject to 'understandings' which were made part of the ratification. It was stated that 'these understandings are deemed to be not reservations which would require the acceptance of the other Governments, but to be merely clarifications of definitions to show that the definitions accepted by the United States of America are in fact those that were intended by the Conference' (*Official Bulletin of the International Labour Office*, 22 (1938), pp. 128-136). See also Hackworth, 5 (1943), pp. 144-

153 on 'Understandings Short of Reservations.'

³ Hyde, *ib.* § 519; Fauchille, §§ 823 (1), 824 (6); Miller, *Reservations to Treaties* (1919); Kellogg in *A.J.*, 13 (1919), pp. 767-773; Malkin in *E.Y.*, 1920, pp. 141-162; Rapisardi-Mirabelli, *I limiti d'obbligatorietà delle norme giuridiche internazionali* (1922), pp. 135-141; Wright, *Conduct of Foreign Policy in the United States of America* (1922), pp. 45-53, 252-254; Huber, *Vertragsrecht und Sonderrecht unter den Staaten in Festschrift für Otto Gierke* (1911), pp. 817-850; Scheidtmann, *Der Vorbehalt beim Abschluss völkerrechtlicher Verträge* (1934); Von Crayen, *Die Vorbehalte im Völkerrecht* (1938); Moore, v. § 748, p. 201; Rousseau, pp. 290-300; McNair, Chapter 9; Wehberg in *Strupp, Wort.*, pp. 672, 673; and in *R.I.*, 3rd ser., 4 (1923), pp. 187-194; Schucking and Wehberg, pp. 175, 176; Baldoni in *Théorie du droit*, 4 (1929-1930), pp. 178-192; Genet in *R.I. (Genève)*, 10 (1932), pp. 95-114, 232-240, 306-319; Shatzky in *R.I.*, 3rd ser., 14 (1933), pp. 216-234; *Harvard Research* (1935, Part III.), pp. 843-912; Podesta Costa in *R.I. (Paris)*, 21 (1938), pp. 1-52; Sanders in *A.J.*, 33 (1939), pp. 488-499. And see below, p. 915, n. 3.

reservation attached to the signature of the treaty by its representatives, and duly recorded in a *procès-verbal* or protocol of signature; (iii) by a reservation attached to ratification and duly recorded; (iv) in the case of a treaty which is signed by some States and left open for accession by others, by a reservation attached to the accession and duly recorded.

Reservations raise an important question of principle because they modify the terms of the offer which a State in signing or ratifying or acceding to a treaty purports to accept. A reservation is upon analysis the refusal of an offer and the making of a fresh offer. Therefore in principle it seems necessary that the other party should assent to the reservation either expressly or by implication arising from acquiescence, and the preponderance of practice accords with this view.¹ It not infrequently happens that this assent is given in advance in the course of the sessions of the conference preceding a treaty, it being tacitly agreed that a State which declares a reservation at that time shall be allowed to renew its declaration on signing the treaty.

However, while the view as stated above is in accordance with both legal logic and the bulk of practice, it is not a view which conveniently—or perhaps reasonably—can be applied, without qualifications, to multilateral conventions of a law-making character. These are often characterised not by a nicely balanced reciprocity of rights and obligations—a balance likely to be disturbed by reservations appended regardless of the consent of the other Parties—but by the agreement of the parties to accept certain general principles of conduct. In the Advisory Opinion, given in 1951, on the *Reservations to the Convention on the Prevention and*

¹ Malkin, *op. cit.*, has analysed a number of instances of reservations and shows that those who are concerned with the machinery of treaty-making by their practice bear witness, perhaps unconsciously, to what must be the right principle, namely, that 'every reservation must be the subject of definite acceptance by the other signatories.' His article deals with multilateral treaties, but the

same principle seems to apply to bilateral treaties; it is the mechanical difficulty which is greater in the case of the former. See in particular a Report by the League Codification Committee on the 'Admissibility of Reservations to General Conventions' submitted to the Council in June 1927: League Doc. C. 357. M. 130. 1927. V. 16. See also Hudson in *A.J.*, 32 (1934), pp. 330-335.

Punishment of the Crime of Genocide, the International Court of Justice declined to act on the traditional view, which it did not consider to have acquired the character of a universally accepted practice, requiring the unanimous consent of all other contracting parties to a reservation appended by a State. It held: (a) that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as a party to the Convention if the reservation is compatible with the object and purpose of the Convention; (b) that if a party to the treaty objects to a reservation which it considers to be incompatible with the object and purpose of the treaty, it can consider that the reserving State is not a party to the treaty; and (c) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the treaty, it can consider that the reserving State is a party to the treaty.¹

Although the Opinion of the International Court of Justice was limited to the case of the Genocide Convention, it must be considered as having a distinct bearing upon the question of reservations in general. While the Opinion fails to provide a workable legal rule,² it gives expression to the view, which is gaining ground,³ that the principle of unanimous consent

¹ *I.C.J. Reports*, 1951, p. 29.

² In particular, unless jurisdiction is vested in some international organ to determine, with an effect binding all parties, whether a reservation is compatible with the object of a treaty, the test laid down by the Court is probably unworkable in practice. Its application may normally result in a situation in which a reserving State is a party in relation to some signatories but not in relation to others. This, in fact, is the result of the so-called American system formulated in a resolution adopted in 1938 by the International Conference of American States. For comments on the unsatisfactory operation of that system see Fitzmaurice, *op. cit.*, below pp. 20-22.

³ See Fitzmaurice in *I.C.L.Q.*, 2 (1953), pp. 1-27; Charles de Visscher, *Théories et réalités en droit international public* (1953), pp. 320-323; Julliy in

Friedenswarte, 51 (1952), pp. 254-275; Lauterpacht, *Report on the Law of Treaties* (International Law Commission, 1953, A/CN.4/63), pp. 101-142 and in *Grotius Society*, 39 (1953). See also Cox in *A.S. Proceedings*, 1952, pp. 26-35. In 1951 the International Law Commission adopted a Report on Reservations to Multilateral Treaties which was based substantially on the principle of unanimous consent (*A.J.*, 45 (1951), Suppl., p. 106). The General Assembly did not associate itself with the Report and it appeared that the majority of Members were not inclined to accept what had been hitherto considered the traditional view. See for the Resolution of the General Assembly of 1952, *A.J.*, 46 (1952), Suppl., p. 66. See also Liang, *ibid.*, 46 (1952), pp. 483-503. For a survey of the practice of the United Nations see Liang, *ibid.*, 46 (1950), pp. 117-128, and Schachter in *B.Y.*,

to reservations is not well-suited to the requirements of international intercourse characterised by multilateral conventions of a general character, and that it is impracticable and unwarranted to give one State (or a small number of States) the right to prevent another State from becoming a party to convention although all or most contracting parties consider the reservation appended by it to be compatible with the object of the convention. A more rational solution would seem to be to confer the power to decide on the admissibility of a reservation either upon some international judicial or administrative authority or upon the contracting parties themselves. These could act either through an organ created by them or by arriving at a decision themselves in the sense that a reservation should be regarded as admissible unless rejected by a substantial majority of the contracting parties.

Exchange
and
Deposit
of Rati-
fications.

§ 517b. The mere signing or sealing of an instrument of ratification by the parties to a treaty is not enough to make it binding upon them.¹ It is necessary that the instruments of ratification should be exchanged between them or deposited in some agreed place, and they do not take effect until they have been exchanged or deposited, unless the treaty stipulates that it shall come into operation upon the notification by a party that it has ratified it; whereupon the actual exchange or deposit will follow later. The exchange or deposit is usually recorded in a *procès-verbal*, and it is not uncommon for the treaty to stipulate the date of the *procès-verbal*, or of the first of the series of these instruments, as the date of the coming into force of the treaty for the States in respect of which the exchange or deposit of ratifications is thereby recorded. While some treaties require ratification by all the contracting parties before entering into force, others stipulate that a limited number of ratifications will be sufficient for the purpose

25 (1948), pp. 122-127. Instructive information on the entire subject will be found in the volume of *Pleadings, Oral Arguments, Documents*, in the *Genocide Convention Case*.

¹ Hall, 110; Hyde, ii. § 520;

Fauchille, § 824 (3); Bittner, §§ 87-93. Exchange or deposit of ratification is not unlike the 'delivery' which is necessary to give effect to an English deed after signing and sealing; see Blackstone, *Commentaries*, ii. 306.

Thus the various instruments adopted at the Hague Codification Conference in 1930¹ provided for entry into force after the deposit of ten ratifications.¹ The Charter of the United Nations lays down, in Article 110, that it shall come into force upon the deposit of ratifications by China, France, Russia, Great Britain, and the United States, together with a majority of the other signatory States.²

§ 518. The effect of the exchange or deposit of ratifications by the parties is to make a treaty binding. If one party executes an instrument of ratification, and the other does not, the treaty falls to the ground. But the question arises whether the effect of ratification is retroactive, so as to make a treaty binding from the date when it was duly signed by the representatives. No unanimity exists as regards this question.³ As in all important cases the treaties themselves stipulate the date from which they are to take effect, the question is chiefly of theoretical interest. The fact that ratification imparts the binding force to a treaty seems to indicate that ratification has normally no retroactive effect. Different, however, if the case in which the contrary is expressly stipulated in the treaty itself, and, again, the case where a treaty contains provisions to be executed at once, without waiting for the necessary ratification. Be this as it may, ratification makes a treaty binding only if the original consent was not given in error or under a mistake.⁴ If, however, the ratifying State, having discovered such error, ratifies the treaty nevertheless, such

Effect of
Ratifica-
tion.

¹ See above, § 310a. As to the functions of the depositary State or authority see Dehaussy in *R.O.*, 56 (1952), pp. 489-523.

² The same Article lays down that the ratifications shall be deposited with the Government of the United States, which shall notify all the signatory States of each deposit, and that after the requisite number of ratifications has been received that Government shall draw up a protocol of the deposit of ratifications and communicate copies thereof to all the signatory States. The Treaty of Peace with Germany of 1919 was stipulated to come into force on the

date of a *procès-verbal* recording the deposit of ratifications by Germany and any three of the Principal Allied and Associated Powers.

³ See above, § 510. Ratification was held to have a retroactive effect in the Arbitration between Chile and Peru in 1875 regarding a treaty of alliance of 1865: Moore, *International Arbitrations*, ii. p. 2091; but see the Award in the *Hoilo* case before the British-American Claims Arbitration Tribunal in *A.J.*, 20 (1926), pp. 382-384. See also the first *Mavrommatis* Judgment of the Permanent Court, Series A, No. 2, at pp. 34, 35, and Raleton, § 6.

⁴ See above, § 500.

ratification makes the treaty binding. The same applies with regard to a ratification given to a treaty although the ratifying State knows that its representatives have exceeded their powers by concluding the treaty. There still remains, however, the possibility that the ratifying organ may itself have exceeded its powers.

Accept-
ance of
Treaties.

§ 518a. After the Second World War a number of multi-lateral treaties, especially those establishing international organisations, provided in addition to, or in place of, the traditional methods of assuming treaty obligations—i.e. through signature, ratification, or accession—for so-called acceptance.¹ The apparent object of that innovation was to provide a method of entering into treaty obligations which is less formal, and, therefore, not requiring the same degree of participation of municipal legislative authorities as does, for instance, ratification. It is doubtful whether that particular object of 'acceptance' can be achieved consistently with the constitutional obligations of Governments. Apart from that object, it is not easy to see what purpose the formula of 'acceptance' is likely to further.²

VI

REGISTRATION AND PUBLICATION OF TREATIES

Fauchille, §§ 825-831 (2)—Hyde, *id.* §§ 491, 521—Hudson in *A.J.*, 19 (1925), pp. 273-292, *ibid.*, 28 (1934), pp. 546-552, and in *Harvard Law Review*, 38 (1925), pp. 936-938—Schücking und Wehberg, pp. 644-660—Sibert, pp. 235-240—Anzilotti pp. 374-392—Boelle, *id.* pp. 484-492—McNair, Chapter 14—*Harvard Research* (1935, Part III), pp. 912-918—Rousseau, pp. 302-322—König, *Volkebefragung und Registrierung beim Völkerbund* (1927), pp. 42-69—Dehouasse, *L'enregistrement des traités* (1929), and the same, *La ratification des traités* (1935), pp. 180-197—Schwab, *Die Registrierung der internationalen Verträge beim Völkerbund* (1929)—Frangulis,

¹ See, e.g., the Constitution of the International Monetary Fund (*U.N.T.S.*, 2, p. 39) and other instruments surveyed by Liang in *A.J.*, 44 (1950), pp. 342-349. In 1934 the United States of America assumed membership of the International Labour Organisation not by way of ratifying any international instrument but by way of accepting, following upon a Joint Resolution of Congress, the invitation extended to

it to become a member of the Organisation.

² In 1948 the Sixth Committee of the General Assembly, after considerable discussion, adopted a practically unanimous resolution expressing preference for the traditional method of signature followed by ratification as compared with the formula of acceptance (*Third Session, Official Records, Part I, Sixth Committee, 88th and the following meetings*).

Théorie et pratique des traités internationaux (1936), pp. 82-88—Rolin in *R.I.*, 3rd ser., 3 (1922), pp. 352-360—Kelsen, *The Law of the United Nations* (1950), pp. 696-706—Report of Adatci and Charles de Visscher in *Annuaire*, 30 (1923), pp. 47-63—Lambiris in *R.I.*, 3rd ser., 7 (1926), pp. 697-709—Memorandum approved by the Council of the League of Nations printed in *L.N.T.S.*, 1 (1920), pp. 8-13—Stieger in *Z.S.R.*, 8 (1928), pp. 121-133—Keydel in *R.I. (Geneva)*, 9 (1931), pp. 141-160—Shatzky in *R.I. (Paris)*, 11 (1933), pp. 559-577—Reitzer in *R.G.*, 44 (1937), pp. 67-89—Brandon in *B.Y.*, 29 (1952), pp. 186-204 and in *A.J.*, 47 (1953), pp. 49-69.

§ 518b. The widespread dissatisfaction provoked during the First World War by the publication of a number of secret treaties found expression in Article 18 of the Covenant of the League of Nations, which provided that

Registration of
Treaties
under the
Covenant.

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

The fact that up to July 1944 a total of 4,822 'treaties or international engagements' were registered under this Article and that 204 volumes containing treaties and agreements thus registered were published, indicates the scope and importance of its provisions. Its language was extensive. It included treaties and international engagements made by a member of the League whether with another member or with a non-member, and whatever particular form or label may have been given to them—'convention,' 'declaration,' 'exchange of letters,' and so forth¹; in fact,

¹ See Hudson, *A.J.*, 19 (1925), p. 277. In fact, however, certain international agreements were not registered: for instance, a military understanding of September 7, 1920, between the chiefs of staff of the French and Belgian armies, and certain financial arrangements entered into 'with a view to completing and liquidating the abnormal transactions rendered inevitable by the war' (see Hudson, *loc. cit.*, pp. 280-282). See also Schücking und Wehberg, p. 655.

Great Britain protested by a letter to the Secretary-General of the League upon learning of the registration by the Irish Free State of the 'Articles of Agreement' signed on December 6, 1921, between the British

Government and a delegation of Irish leaders which led to the creation of the Irish Free State: *L.N.T.S.*, 26, p. 9, and 27, pp. 449-450. See Baker, *op. cit.*, pp. 319-324. The British Commonwealth Merchant Shipping Agreement of December 10, 1931, which was the first formal agreement of all the members of the Commonwealth *inter se*, was registered with the Secretariat of the League on May 10, 1932, at the instance of South Africa. See *L.N.T.S.*, 129, p. 179; (1932), Cmd., 3994; Hudson, *Legislation*, v. p. 1153. Each Dominion has the right to register a treaty with a foreign State which affects that Dominion, certainly when it is the only part of the Empire

to quote the memorandum ¹ of the Secretariat approved by the Council of the League, the Article covered 'not only every formal Treaty of whatsoever character and every International Convention, but also any other International Engagement or Act by which nations or their Governments intend to establish legal obligations between themselves and another State, Nation, or Government.'

The following further points deserve mention :

(a) The functions of the Secretariat were conceived of as being purely ministerial, and registration did not confer any approval upon the contents of the treaty.²

(b) A number of treaties were registered by non-members of the League (for instance, Germany,³ before she became a member ⁴). In 1934 the United States agreed in the future to furnish the Secretary-General, for the purpose of registration and publication, with a certified copy of each international agreement to which they shall become a party.⁵

(c) It was not clear whether failure to register a treaty or other international engagement made it entirely void, or

affected (see the registration by Canada of the Halibut Fisheries Treaty of 1923 with the United States in *L.N.T.S.*, 32, p. 94), and probably in the case of any treaty signed and ratified by its Government. There are instances of the registration of a treaty between a Mandatory and its Mandated Area (*L.N.T.S.*, 47 (1926), p. 419, Great Britain and Iraq see above, § 94d), and of a treaty between two Mandated Areas (*L.N.T.S.*, 49 (1926), p. 9, Iraq and Syria and Lebanon). As a matter of convenience denunciations of treaties were included.

¹ *L.N.T.S.*, 1 (1920), pp. 8-13.

² In 1930 Peru proposed that Article 18 be amplified so as to make impossible the registration of treaties imposed by force as a result of a war undertaken in violation of the Pact of Paris: *Off. J.*, 1930, p. 78. The proposal was considered by the Committee for the Amendment of the Covenant so as to bring it into harmony with the Pact of Paris, but was rejected by the Committee: *Minutes of the Committee*, L. Doc. C. 160. M. 69. 1930. V., p. 81. Before

the Committee Lord Cecil stated that Article 18 'was inserted in order to secure publicity for international engagements, and was never intended to be used to censor, modify, or supervise them' *ibid.*, p. 84. The publication in the Treaty Series of the League of the notes exchanged between the British and Italian Governments regarding their respective spheres of influence in Abyssinia was accompanied by a reference to the correspondence between Abyssinia and the League and Great Britain and Italy arising from the exchange of those notes: see *L.N.T.S.*, 50, p. 231, and *Off. J.*, 1926, p. 1526: Cmd. 2792. See also McNair in *Michigan Law Review* (1927), pp. 131-152.

³ But entirely as a matter of courtesy, and on the understanding that the system of registration did not apply to her.

⁴ See *L.N.T.S.*, u. p. 60 (n.).

⁵ See Hudson in *A.J.*, 28 (1934), pp. 342-345. And see the same, *ibid.*, 22 (1928), pp. 852-856, and 24 (1930), pp. 752-757.

voidable at the instance of a party to it, or merely incapable of being cited and relied upon before the Assembly or Council of the League or the Permanent Court, or unenforceable pending registration.¹

Publication took the form of inclusion in the *League of Nations Treaty Series*, which began in 1920 and contained the texts of the treaties in the original languages, together with French and English translations if the original languages did not include French and English.

§ 518c. Article 102 of the Charter of the United Nations has adopted, with some changes, the provisions of the Covenant of the League of Nations on the subject. It lays down that every treaty and every international agreement ^{Registration of Treaties under the Charter.} ²

¹ Hyde, ii. § 491, suggests that in default of registration a treaty which ought to be registered is like a contract valid but unenforceable by action owing to non-compliance with a Statute of Frauds, such as is known to English or American law. If that is so, registration would cure the defect and make the treaty enforceable. The views of Adatci and Charles de Visscher, *Annuaire*, 20 (1923), p. 63, and Schötking und Wehberg, p. 657, do not in effect differ much from Hyde's. So far as concerned a treaty between two members of the League, the effect of non-registration was probably, in the first instance, unenforceability and not voidness; if registration did not occur within a reasonable time, the treaty probably became void. So far as concerned a treaty between a member and a non-member, it might seem that non-registration did not deprive the treaty of binding force, because the Covenant was *res inter alios acta*. However, there is room for the view that a treaty made with the deliberate intention to ignore the duty of registration fell within the category of treaties void because of their inconsistency with former treaty obligations (see above, § 503). Third States were not bound by Article 18, but they were bound by general rules of International Law in the matter of treaties.

See the *Pablo Nájera* case, *Annual Digest*, 1927-1928, Case No. 271, between France and Mexico, where it

was held that a State which was not a member of the League was not entitled to invoke the absence of registration as a reason for avoiding its international obligations. In 1933 the National Assembly of Salvador denounced the Treaty concluded in 1923 with the other four Central American Republics (see above, p. 132, n. 3) on the ground that it had not been registered. See Hudson, *A.J.*, 28 (1934), p. 551. In 1938 the Eighth International Conference of American States adopted a plan for the registration of treaties by the Pan-American Union. For details see Hudson in *A.J.*, 38 (1944), p. 98.

² In 1946 the First General Assembly laid down detailed rules concerning the registration and publication of treaties. They provide, among others, that registration shall not take place until the treaty or international agreement has come into force between two or more of the parties; that registration relieves all other parties of the obligation to register; that the United Nations shall register *ex officio* every treaty or agreement to which it is a party; that a specialised agency may effect registration in some cases: *Journal*, No. 75, January 15 1947, p. 946. On registration *ex officio* by the Secretariat see Schachter in *B.Y.*, 25 (1948), pp. 127-132. The term 'agreement' must be understood to include every contractual undertaking or arrangement.

entered into by any member of the United Nations after the Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. The same Article provides that no party to any such treaty or international agreement which has not been registered may invoke that treaty or agreement before any organ of the United Nations. The sanction, thus expressed, of non-registration within a reasonable time¹ is certainly of a drastic nature, although the implied distinction between the organs of the United Nations and other bodies is open to criticism² and although it is not clear whether a treaty which has not been registered may be relied upon, *proprio motu*, by an organ of the United Nations without having been invoked by the parties to it.³ However, for most practical purposes complete unenforceability is the sanction of non-registration. Effect is thus given to the conviction that secret treaties⁴ imposing upon peoples commitments of which they have no knowledge are contrary alike to the principles of democracy and to the requirements of international peace. It may be noted that the obligation of registration which rests upon members of the United Nations applies also to treaties concluded with non-member States. While the Charter cannot, in principle,⁵ impose direct obligations upon non-member States, the latter cannot,

¹ This follows from the expression 'as soon as possible.' Clearly a party to a secret treaty which has not been registered for a number of years would not be allowed to make the treaty enforceable by registering it at a moment when it suits it to do so.

² It is, for instance, difficult to see why the same treaty should be deemed to have a legal existence when invoked before a tribunal of the Permanent Court of Arbitration and be legally non-existent in a dispute before the International Court of Justice.

³ When, for instance, the International Court of Justice is concerned with the interpretation of a disputed provision of a registered treaty, can it take notice, on its own initiative, of another, hitherto unregistered, treaty between the parties the con-

tents of which have been published in the meantime by one of the parties or some other body or person? The answer to that question is probably in the negative.

⁴ As distinguished from negotiations not attended by full publicity. It is clear that purely military agreements and arrangements, concluded within the orbit of the general obligations of the Charter, may not be suitable for registration. However, these are not primarily intended as legal obligations the enforceability of which may be called into question as the result of non-registration. For an analysis of the terms 'treaty' and 'agreement' for purposes of registration under Article 102 see Brandon in *A.J.*, 47 (1953), pp. 49-69.

⁵ See below, § 522a.

having regard to the clear terms of Article 102, invoke an unregistered treaty before the organs of the United Nations. This is the reason why, according to the practice adopted by the United Nations, non-member States have been permitted to register treaties concluded by them.¹

VII

EFFECT OF TREATIES

Hall, § 114—Lawrence, § 134—Wharton, n. § 127—Wheaton, § 266—Hyde, ii. §§ 522-529—Bluntschli, §§ 415, 416—Sibert, pp. 250-261—Heffter, § 94—Guggenheim, pp. 88-93—Fauchille, §§ 832-832 (7)—Despagnet, §§ 447, 448—Pradier Fodéré, n. §§ 1151-1155—Mégnin, n. pp. 667-672—Rivier, ii. pp. 119-122—Calvo, iii. §§ 1643-1648—McNair, Chapters 28, 29—Rousseau, pp. 379-439, 452-484—Fiore, n. §§ 1008, 1009, and *Code*, §§ 773-783—Martens, i. §§ 65, 114—Scelle, i. pp. 366-377—Keith's Wheaton, pp. 519-522—Anzilotti, pp. 402-413—*Harvard Research* (1935, Part III), pp. 918-937—Nippold, *op. cit.*, pp. 151-160—Crandall, *op. cit.*, §§ 155-159—Roxburgh, *International Conventions and Third States* (1917)—Winkler, *Verträge zu Gunsten und zu Lasten Dritter im Völkerrecht* (1932)—Chailley, *La nature juridique des traités internationaux* (1932), pp. 240-328—Nauros, *Les traités internationaux devant les juridictions nationales* (1934)—Jessup, *A Modern Law of Nations* (1948), pp. 132-138—Wright in *A.J.*, 10 (1916), pp. 706-736, and 11 (1917), pp. 566-577—McNair in *B.Y.*, 9 (1928), pp. 59-68—Mestre in *Hague Recueil*, vol. 38 (1931) (iv.), pp. 264-302—Enriques in *Rivista*, 25 (1933), pp. 24-37—Kelsen in *R.G.*, 43 (1936), pp. 5-49—Kaire in *Acta Scandinavica*, 7 (1936), pp. 39-67—Scrimaleh in *Z.d.R.*, 21 (1941), pp. 190-216—Kunz in *A.J.* 41 (1947), pp. 119-126. And see literature cited at head of § 20 above, and, as to the treaty-making power, in §§ 494, 496a, and 497.

§ 519. A treaty concerns in the first place the contracting parties. The effect of the treaty upon them is that they are bound by its provisions, and that they must execute it in all its parts. If, however, a party to a treaty signs it with a reservation as regards certain Articles, such party is not bound by these Articles although it ratifies² the treaty.

Effect of
Treaties
upon Con-
tracting
Parties.

¹ Such right was envisaged at the time when the Charter was drafted (*Documents of the San Francisco Conference*, vol. 13, p. 706).

² See above, §§ 517, 517a, and Bittner, §§ 65-67. In general, as

stated by the International Court of Justice in the *Ambatielos* case, a treaty has no retroactive effect unless 'there is any special clause or any special object necessitating retroactive interpretation': *I.C.J. Reports*, 1952, p. 40.

Effect of
Treaties
upon the
Subjects
of the
Parties.

§ 520. The binding force of a treaty concerns in principle the contracting States only, and not their subjects.¹ As International Law is primarily a law between States only and exclusively, treaties can normally have effect upon States only.² This rule can, as has been pointed out by the Permanent Court of International Justice,³ be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise, if treaties contain provisions with regard to rights and duties of the subjects of the contracting States,⁴ their courts, officials, and the like, these States must take such steps as are necessary, according to their Municipal Law, to make these provisions binding upon their subjects, courts, officials, and the like.⁵ It may be that, according to the Municipal Laws of some countries, the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such as, for example, special statutes to be passed by the respective Parliaments.⁶

¹ On the question whether the failure of subjects to invoke a treaty can bring about its desuetude see Ralston, § 12, citing the Award in the *Yuille, Shortridge and Co. Arbitration* between Great Britain and Portugal in 1861, and Lapradelle-Politis, ii. p. 115.

² While that is true as a general principle, it has been held by the International Court that the intention of the contracting parties may show that the treaty is self-executing and itself confers rights upon the subjects of one State against the other State, enforceable in the former State's national courts: see Advisory Opinion as to *Jurisdiction of the Courts of Danzig* of March 3, 1928, Series B, No. 15. See also *McCandless v. United States*, ex rel. *Paul Diabo* in March 1928 before U.S. Circuit Court of Appeals for the Third Circuit: *Annual Digest*, 1927-1928, Case No. 363.

³ Series B, No. 15. See above, § 13a.

⁴ See above, § 289.

⁵ As regards Great Britain and the United States of America see above, § 497. See also *The Civilian War*

Rights Association v. The King (referred to above, p. 581) and *Administrator of German Property v. Knoop* [1923] Ch. 439. As to France see Revel, *La publication des lois* (1933). Basdevant in *Bulletin de la Société d'Études législatives*, 1933, pp. 127 et. seq. and above, §§ 21, 497.

⁶ See *McNair in B.Y.*, 1928, pp. 59-68. See also above, §§ 20-25. The matter is treated in detail by Wright in *A.J.*, 10 (1916), pp. 706-736, and by Noel, *De l'autorité des traités comparés à celle des lois* (1921). As to the enforcement of multipartite administrative treaties in the United States see Reiff in *A.J.*, 34 (1940), pp. 661-679. And see above, §§ 21, 497. See also Alons Evans in *B.Y.*, 30 (1953), on self-executing treaties, and in *A.S. Proceedings*, 1951, pp. 66-70; Turlington, *ibid.*, pp. 70-82. See also Dehouasse, *La ratification des traités* (1935) pp. 198-203 and Sibert, pp. 262-269. On the question as to how far a British court may refer to the terms of a treaty in interpreting a municipal enactment passed in order to give effect to it see below, § 553 (A.). On the question as to how

§ 521. As treaties are binding upon the contracting States, changes in the Government, or even in the form of government, of one of the parties can, as a rule, have no influence whatever upon the binding force of treaties.¹ Thus, for instance, a treaty of alliance concluded by a State with a constitutional government remains valid, although the ministry may change. No Head of a State can avoid the obligations of a treaty concluded by his State under the Government of his predecessor. When a monarchy turns into a republic, or *vice versa*, its treaty obligations normally remain the same. For all such changes, important as they may be, do not alter the person of the State which concluded the treaty. If, however, a treaty provision essentially presupposes a certain form of government, then a change from such form makes such provision void, because its execution has become impossible.²

Effect of
Changes
in Govern-
ment upon
Treaties.

§ 522. According to the principle *pacta tertiis nec nocent nec prosunt*, a treaty concerns the contracting States only; neither rights³ nor duties,⁴ as a rule,⁵ arise under a treaty

Effect of
Treaties
upon
Third
States.

far a treaty concluded by the United States and containing provisions the execution of which would violate the provisions of the Constitution relating to due process of law or just compensation is enforceable by courts see Cowles, *Treaties and Constitutional Law: Property Interference and Due Process of Law* (1941).

¹ Nevertheless, the recognition of a new Government, particularly when it is a revolutionary Government (see above, § 756), may necessitate an overhauling and confirmation (see below, § 551) of existing treaty relationships: see, for instance, the unratified Draft of Proposed General Treaty between Great Britain and the Russian Federal Soviet Socialist Republics in 1924, Cmd. 2215. See also the French decision cited below, § 546 (n.). And see McNair, Chapter 34.

² See below, § 542. Not to be confused with the effect of a change in the Government is the effect of a change in international status upon treaties, as, for instance, if a hitherto full sovereign State becomes half or part sovereign, or *vice versa*, or if a State merges entirely into another,

and the like. This is a case of succession of States, which has been discussed above, §§ 82-84; see also below, § 548.

³ In the case concerning *Certain German Interests in Polish Upper Silesia* the Permanent Court of International Justice held in 1926 that as Poland was not a party to the Armistice Agreement she was not entitled to avail herself of that instrument: Series A, No. 7, pp. 27-29. See also the Judgment of September 13, 1928, in the case of the *Factory at Chorzów*: Series A, No. 17, pp. 43-46. And see *Steiner and Gross v. Polish State*, decided on March 30, 1928 by the Upper Silesian Arbitral Tribunal, in which it was held that a Czecho-Slovak subject, i.e. a national of a State not a party to the Convention establishing the Tribunal, could bring an action against Poland, one of the two parties to the Convention: *Annual Digest*, 1927-1928, Case No. 287.

⁴ But see below, § 522a.

⁵ In the case of the *Free Zones of Upper Savoy and the District of Gex*, which was before the Permanent

for third States which are not parties to the treaty. But in some cases treaties have indeed an effect upon third States.¹ Such an effect is produced when a treaty touches previous treaty-rights of third States. Thus, for instance, a commercial treaty conceding more favourable conditions than have hitherto been conceded by the parties thereto has an effect upon all such third States as have previously concluded commercial treaties containing the so-called *most-favoured-nation clause*² with one of the contracting parties.³

The question arises whether in exceptional cases third States can acquire rights (and become subject to the duties connected therewith) by giving their express or implied consent to the stipulations of such treaties as were specially concluded for the purpose of creating such rights, not only for the contracting parties but also for third States. Thus, the Hay-Pauncefote Treaty between Great Britain and the

Court of International Justice from 1929 to 1932, the question arose whether Switzerland acquired rights under certain instruments and declarations made during the Congress of Vienna in 1815. The Court found that there was, with regard to the Gex zone, an actual agreement between Switzerland and the various Powers, including France. Accordingly, the Court did not find it necessary to consider whether the Gex zone was a stipulation in favour of a third party. But the Court added that although it could not be lightly presumed that stipulations in favour of a third State had been adopted in order to create a legal right in its favour, there was nothing to prevent contracting parties from effectively creating rights in favour of third parties. The Court pointed out that the question of the existence of a right acquired under a treaty between other States must be decided in each particular case: Series A/B, No. 46, p. 147. See also Order of August 19, 1929: Series A, No. 22, p. 20. For instances of provisions in treaties in favour of third States see Articles 109 (Denmark), 116 (Russia), and 368 (Switzerland) of the Treaty of Peace with Germany of 1919.

¹ The matter is exhaustively dis-

cussed by Roxburgh, *International Conventions and Third States* (1917); Winkler, *Verträge zu Gunsten Dritter* (1932); McNair in *Hague Recueil*, vol. 43 (1933) (i.), pp. 209-296; Brierly, *ibid.*, vol. 58 (1936) (iv.), pp. 221-229; Rousseau, pp. 452-484; and see Salvini in *Rivista*, 12 (1918), pp. 228-241, Scrimale in *Z.o.R.*, 21 (1941), pp. 190-216; Anzilotti, pp. 413-428; Ballardore Pallieri in *Hague Recueil*, 74 (1949) (i.), pp. 530-542. In Article 26 of the Peace Treaty of 1951 Japan agreed to conclude with any State which had signed or adhered to the United Nations Declaration of January 1, 1942 (*Treaty Series*, No. 5 (1942), Cmd. 6388), but which was not a signatory to the Treaty of 1951, a bilateral Treaty of Peace on the same or substantially the same basis as the Treaty of Peace of 1951. *Quaere*, did that Article confer a legal right upon any of those States?

² See below, § 580, but note the American interpretation of this clause.

³ On the question of the effect of some treaties on nationals of States which are not parties to those treaties see Capitant, *Les traités de droit privé dans leur application aux nationaux des tiers états* (1928). On the assignability of treaty rights see Mann in *B.Y.* 30 (1953), pp. 475-478.

United States of 1901, and the Hay-Varilla Treaty between the United States and Panamá of 1903, provide that the Panama Canal shall be open to vessels of commerce and of war of all nations, although Great Britain, the United States, and Panama only are parties.¹ Thus, further, Article 5 of the Boundary Treaty of Buenos Ayres of September 15, 1881, provides that the Straits of Magellan shall be open to vessels of all nations, although Argentina and Chile only are parties. The question must be answered in the negative. Nothing prevents the contracting parties from altering such a treaty without the consent of third States, provided the latter have not in the meantime acquired legal rights through the unanimous implied consent of all concerned.²

It has been asserted³ that if a treaty stipulates for a right for third States, and they make use of such a right, they thereby acquire a legal right for themselves so that the treaty cannot be abrogated without their consent. It is argued that, having accepted a right which was offered to them, they cannot be deprived of it against their will. This would be so if the contracting parties really intended

¹ See above, § 184.

² The case of treaties intended to make an 'international settlement' (see Roxburgh, *op. cit.*, pp. 51-60) would seem to be a case of unanimous implied consent. With regard to the Convention of 1856 between Great Britain, France, and Russia whereby Russia undertook not to fortify the Åland Islands (which was mentioned in the third edition as an instance of the point under discussion), it should be noted that the Committee of Jurists appointed by the Council of the League took the view (*Off. J.*, Special Suppl., No. 3, pp. 17-19) that this convention, embodying 'a settlement regulating European interests . . . constituted a special international status . . . for the Åland Islands,' and that 'until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them.' They were replaced by a Convention of October 20, 1921, between ten States, not including Russia; see above, § 205, and below, vol. II, § 72 (8), and Strupp, *Wärt.*, i. p. 22, for biblio-

graphy of Swedish, Finnish, and general literature upon the Åland Islands question. See also Suontausta in *Zeitschrift a.o.R.V.*, 13 (1951), pp. 741-752. It is particularly in connection with those treaty restrictions upon the use of State territory, which many writers (including the author, see above, §§ 203-208) call 'servitudes,' that parties other than the parties to the original treaty are likely to acquire an interest in their preservation: see McNair in *B.Y.*, 1925, pp. 111-127. In the Advisory Opinion on the *Status of South-West Africa* the International Court of Justice construed Article 22 of the Covenant of the League of Nations as creating 'an international status' for the mandated territories: *I.C.J. Reports*, 1950, p. 137. And see the Separate Opinion of Judge McNair for detailed reference to the report of the Commission of Jurists in the case of the Åland Islands: *ibid.*, pp. 153-154. See also above, § 84c.

³ Diena in *Z.I.*, 25 (1915), pp. 14-22.

to offer such a right to third States. But there is room for the view that if the contracting parties had intended to do so, they probably would have embodied a stipulation in the treaty according to which the third parties concerned could *accede* to it.¹

Indirect
Imposition
of
Obligations
upon
Non-
Parties

§ 522a. The rule that treaties cannot validly impose obligations upon States which are not parties to them follows clearly from the sovereignty of States and from the resulting principle that International Law does not as yet recognise anything in the nature of a legislative process by which rules of law are imposed upon a dissenting minority of States. However, in proportion as international society is transformed into an integrated community, a departure from the accepted principle becomes unavoidable, in particular in the sphere of preservation of international peace and security. The Covenant of the League of Nations, without expressly imposing obligations upon non-members in fact asserted the right of the League to compel them to assume some of the obligations of the Covenant with regard to the settlement of their disputes with members of the League.² It also asserted the right of active intervention of the League in disputes between non-member States.³ Article 2 of the Charter of the United Nations lays down that the Organisation shall ensure that States which are not members of the United Nations act in accordance with the principles of the Organisation so far as may be necessary for the maintenance of international peace and security. This is a

¹ A treaty between two States can never invalidate a stipulation in a treaty between one of the contracting parties and a third State, unless the latter expressly consents. If, for instance, two States have entered into a defensive alliance, and one of them afterwards concludes a treaty with a third State according to which all conflicts without exception shall be settled by arbitration, the previous treaty of alliance remains valid, even in the case of war breaking out between the third State and the other party to the alliance. See below, § 573. Therefore, when in 1911 Great Britain con-

templated entering into a treaty of general arbitration with the United States of America, according to which all differences should be decided by arbitration, she notified Japan of her intention, on account of the existing treaty of alliance, and Japan consented to substitute for the old treaty a new treaty of alliance, Article 4 of which stipulates that the alliance shall never concern a war with a third Power with whom one of the allies may have concluded a treaty of general arbitration.

² Article 17. See vol. II, § 25g.

³ *Ibid.*

mandatory provision which, upon analysis, constitutes a claim to regulate the conduct of non-members to the extent required for the fulfilment of the object of that Article. It cannot be admitted that the International Court of Justice or any other organ of the United Nations established under the Charter would be at liberty to hold that action taken in pursuance of Article 2 is contrary to International Law. Both the Covenant of the League of Nations and the Charter of the United Nations must therefore be regarded as having set a limit, determined by the general interest of the international community, to the rule that a treaty cannot impose obligations upon States which are not parties to it.¹ With regard to the Charter the International Court of Justice held, in effect, in the Advisory Opinion in the case concerning *Injuries to Officials of the United Nations*,² that one of the effects of the Charter was to confer upon the United Nations the right to bring an international claim also against States which are not members of the United Nations. It has also been suggested above that Article 102 of the Charter relating to registration of treaties produces indirect legal effects in relation to non-member States inasmuch as they cannot invoke before an organ of the United Nations a treaty to which they are a party and which has not been registered.³

¹ See Kunz in *A.J.*, 41 (1947), pp. 119-126; Jessup, *ibid.*, pp. 386-391. The obligation, it will be noted, is not a direct one. However, inasmuch as a legal rule is conceived as a precept of conduct enforced by external sanction, the difference is one of form rather than of substance. Article 14 of the Opium Convention of 1931, in fact, although not in law, imposes obligations upon States which are not parties to the Convention inasmuch as the parties are under an obligation to stop imports of certain drugs by non-parties who have exceeded the estimates of the maximum quantity of drugs allotted to them. See Staricoff in *J.C.L.*, 3rd ser., 18 (1936), p. 90. See also Kelsen in *Prager Juristische Zeitschrift*, 1934,

pp. 420-432, who points to cases such as that of Danzig in which the contracting parties imposed duties upon a future State created by treaty. See also the Resolution on German Assets in Neutral Countries included in the Final Act of the Paris Conference of October 21, 1945, on Reparations (Cmd. 6721, p. 13): 'The Conference unanimously resolves that the countries which remained neutral in the war against Germany should be prevailed upon by all suitable means to recognise the reasons of justice and of international security policy which motivate the various Powers in their efforts to extirpate the German holdings in neutral countries.'

² See above, pp. 22, 407.

³ See above, § 518b.

VIII

MEANS OF SECURING PERFORMANCE OF TREATIES

Vattel, ii. §§ 235-261—Hall, § 115—Lawrence, § 134—Phillimore, ii. §§ 54-63a—Bluntschli, §§ 425-441—Fauchille, §§ 835-835 (7)—Sibert pp. 268-307—Pradier-Fodéré, ii. §§ 1156-1169—Rivier ii. pp. 94-97—Nys, ii. pp. 516-520—De Louter, i. pp. 501-506—Rousseau, pp. 439-450—Calvo, iii. §§ 1638-1642—Fiore, ii. §§ 1018, 1019, and *Code*, §§ 780-796—Martens, i. § 115—Nippold, *op. cit.*, pp. 212-227—Crandall, *op. cit.*, § 7—Idman, *Le traité de garantie* (1913), pp. 10-40—Heyland, *Die Rechtsstellung der besetzten Rheinlande in Stier-Somlo's Handbuch des Völkerrechts* (1923), pp. 37-74—Satow in *Cambridge Historical Journal*, i. (1925), pp. 295-318—Wild, *Sanctions and Treaty Enforcement* (1934)—Frangulis, *Théorie et pratique des traités internationaux* (1936), pp. 189-206—Wright in *A.S. Proceedings*, 1932, pp. 101-119.

Some
Obsolete
Means.

§§ 523-525. Among the means to secure the performance of treaties are—in addition to the now obsolete recourse to oaths and hostages—charges, occupation of territory, guarantee, and, above all, the various means of enforcement by international action.

Oaths are a very old means of securing the performance of treaties, which was constantly made use of not only in antiquity and the Middle Ages, but also in modern times. For in the sixteenth and seventeenth centuries, all important treaties were still secured by oaths. During the eighteenth century, however, the custom gradually died out, the last example being the treaty of alliance between France and Switzerland in 1777, which was solemnly confirmed by the oaths of both parties in the cathedral at Solothurn.

Hostages are as old a means of securing treaties as oaths, but they have likewise, for ordinary purposes¹ at least, become obsolete, because they have practically no value at all. The last case of a treaty secured by hostages was the Peace of Aix-la-Chapelle in 1748, in which hostages were stipulated to be sent by England to France for the purpose of securing the restitution of Cape Breton Island

¹ Concerning hostages nowadays taken in time of war see below, vol. ii. §§ 258, 259.

to the latter. The hostages sent were Lord Sussex and Lord Cathcart, who remained in France until July 1749.¹

The pledging of movable property² by one of the contracting parties to the other for the purposes of securing the performance of a treaty is possible, but has not frequently occurred. Thus, Poland is said to have pledged her crown jewels once to Prussia.³ The pledging of movables is nowadays quite obsolete, although it might on occasion be revived.

§ 526. On the other hand, the practice of creating a charge upon some or all of the assets of a contracting State, and particularly upon its revenues, to secure payments due under a treaty is increasing⁴; for instance, Article 248 of the Treaty of Peace with Germany of 1919 and the 'Dawes Agreement' of August 1924,⁵ between the Reparation Commission and the German Government, relating to security for the payment by Germany of reparations.

§ 527. Occupation of territory, such as a fort or a whole province, as a means of securing the performance of a treaty, has frequently been made use of with regard to the payment of large sums of money due to a State under a treaty.⁶ Nowadays such occupation is often resorted to in connection with treaties of peace providing for the payment of a war indemnity, as well as for other reasons. Thus, the preliminary Peace Treaty of Versailles of 1871 stipulated that Germany should have the right to keep certain parts of France under military occupation until the final payment of the war indemnity of five milliard francs.

Again, the Treaty of Peace with Germany of 1919 provided that 'as a guarantee for the execution of the present treaty

¹ For an interesting account of how the taking of hostages frequently developed, through the so-called *custodes treugarum*, into treaties of guarantee, see Lutteroth, *Der Geisel im Rechtsleben* (1922), pp. 207-210. And see Wild, *op. cit.*, pp. 95-101.

² See Vattel, ii. § 241, and Phillimore, *ib.* § 55.

³ See literature cited above, § 155a.

⁴ *Parl. Papers*, Misc. No. 17 (1924); Omd. 2270; *A J.*, 19 (1925), Suppl., pp. 23-52.

⁵ See Robin, *Des occupations militaires en dehors des occupations de guerre* (1913), particularly pp. 471-482, 696-706, and other literature cited above, § 443.

⁶ For a pledge of immovable property see the case of Wismar, above, § 171 (3).

by Germany, the German territory situated to the west of the Rhine, together with the bridgeheads, will be occupied by Allied and Associated troops for a period of fifteen years from the coming into force of the present treaty.' ¹

Guarantee.

§ 528. A frequent means of securing treaties is the guarantee of other States not directly affected by them. Such a guarantee is in the nature of accession ² to the treaty guaranteed, and is a treaty in itself—namely, the promise of the guarantor, should occasion arise, to do what is in his power to compel the contracting party or parties to execute the treaty. In this category there must be included the various Minority Treaties concluded in and after 1919 and placed 'under the guarantee of the League of Nations.' ³ The guarantee of a treaty is only one species of guarantee in general, which will be discussed below, §§ 574-576a.

Enforcement by International Action.

§ 528a. Reference should also be made to (i) the economic and other sanctions contained in Article 16 of the Covenant of the League ⁴ and the various comprehensive measures of enforcement which form the subject-matter of Chapter VII of the Charter of the United Nations ⁵; (ii) the 'measures of an economic character' which members of the International Labour Organisation are authorised to take against a member which makes default in its obligations under Labour Conventions binding upon it ⁶; (iii) the embargo

¹ Article 428. See below, vol. II, § 277 (n.). For the Agreement on the Evacuation of the Rhineland of April 30, 1929, see Treaty Series, No 16 (1931), Cmd 3796. The Treaty of Peace with Japan of 1951 provided for the withdrawal from Japan of all occupying forces within ninety days of the treaty coming into force.

² See below, § 532.

³ See above, § 340d.

⁴ See below, vol. II, § 52e. Following upon the unilateral repudiation by Germany of the disarmament clauses of the Treaty of Versailles and the condemnation of her action by the Council of the League of Nations the latter appointed a Committee entrusted, *inter alia*, with the task of defining the economic and financial measures to be applied against States, whether members

of the League or not, endangering peace by the unilateral repudiation of their international obligations: *L.N. Monthly Summary*, April 1935, 15, p. 84. For the answer of the Committee to the effect that the Council may, in appropriate cases, recommend economic and financial measures see *ibid.*, p. 148. From sanction for the breach of a treaty there must be distinguished termination of advantages accruing under the treaty, or the nullity of acts constituting a violation of the treaty. The Preamble to the General Treaty for the Renunciation of War (which lays down that a State which breaks the treaty shall be deprived of its benefits) is an example of the former (see vol. II, p. 52 (n)).

⁵ See Articles 39-50.

⁶ See above, § 340g.

upon imports in relation to a country which has exceeded the estimate of dangerous drugs to be exported to it in accordance with the provisions of Article 14 of the Convention of 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs¹; (iv) the, somewhat limited, sanctions of Chapter VIII of the Havana Charter of the International Trade Organisation of 1948, the effect of which is to release Members from all or some of the obligations to the Member who has acted in violation of the Charter²; (v) the expulsion from or suspension of membership of various international organisations, a measure which often involves deprivation of rights under the treaty in question³; (vi) sanctions, of varying character, which may be imposed by the High Authority of the European Coal and Steel Community both upon States and upon individual enterprises.⁴

IX

PARTICIPATION OF THIRD STATES IN TREATIES

Hall, § 114—Wheaton, § 258—Heffter, § 88—Fauchille, §§ 823 (3), 833, 834—Pradier-Fodéré, II, §§ 1127-1150—Rivier, II, pp. 89-93—Rousseau, pp. 274-285—Calvo, III, §§ 1621-1626—Fiore, II, §§ 1025-1031—Martens, I, § 111—Scelle, II, pp. 379-383—Anzilotti, pp. 428-432—McNair, Chapter 8—*Harvard Research* (1935, Part III.), pp. 812-843—Zannini, *L'adesione ai trattati internazionali* (1946)—Kelgen in *Revue de droit*, 10 (1936), pp. 286-289.

§ 529. Ordinarily a treaty creates rights and duties between the contracting parties exclusively, according to the principle *pacta tertiis nec nocent nec prosunt*, which has already been discussed.⁵ Nevertheless, third States may be interested in such treaties, for the common interests of States are so interlaced that few treaties between single members can be concluded in which third States have not some kind of interest. But such an interest, all-important as it may be, must not be confused with participation of third States in treaties. Such participation can occur in

¹ See, for instance, below, p. 1003.

² See Jenks in *B.Y.*, 22 (1945) pp. 25-27.

³ See Fawcett in *Year Book of World Affairs*, 1951, p. 287.

⁴ See Articles 88-92 of the Treaty of April 18, 1951 (see above, § 898).

⁵ For a survey of these provisions

⁶ See above, § 522.

five different forms—namely, good offices, mediation, intervention, accession and adhesion.

Good
Offices
and Medi-
ation.

§ 530. A treaty may be concluded with the help of the good offices, or through the mediation, of a third State, whether these offices be asked for by the contracting parties, or be exercised spontaneously by a third State. Such third State, however, does not necessarily, either through good offices or through mediation, become a party to the treaty.¹

Interven-
tion.

§ 531. A third State may participate in a treaty in such a way that it interposes dictatorially between two States negotiating a treaty, and requests them to drop, or to insert, certain stipulations. Such intervention does not necessarily make the interfering State a party to the treaty. Instances of threatened intervention of such a kind are the protest of Great Britain against the preliminary peace treaty concluded in 1878 at San Stefano² between Russia and Turkey, and that of Russia, Germany, and France in 1895 against the peace treaty of Shimonoseki³ between Japan and China. In so far as such intervention amounts to a threat of force, it is prohibited by the Charter of the United Nations.

Accession.

§ 532. Accession is the formal entrance of a third State into an existing treaty, so that it becomes a party to the treaty, with all rights and duties arising therefrom. Such accession can take place only with the consent of the original contracting parties.⁴ Very often the contracting parties

¹ The difference between good offices and mediation is discussed below, vol. II § 9

² See above, § 135 (2)

³ See *R.G.*, II (1895) pp 457-463. Details concerning intervention have been given above, §§ 134-138; see also below, vol. II § 50. Note also intervention which takes the form of dictatorial insistence by State A, acquiesced in by State B by treaty, that certain treaties between States B and C shall be abrogated by State B; see Article 202 of the Treaty of Peace with Germany of 1919.

⁴ For a clear affirmation of the principle that there is no right of accession apart from the provisions of the treaty, see the case concerning *Certain German Interests in Polish*

Upper Silesia (P.C.I.J., Series A, No. 7, pp 28-29). Such consent may be given subsequent to the conclusion of the Treaty, as, for instance, in the North Atlantic Treaty of April 4, 1949 which provides, in Article 10 that the parties may, by unanimous agreement, invite any other European State possessing the necessary qualifications to accede to the Treaty (U.N.T.S., 34 p. 243). The General Agreement of October 30, 1947, on Tariffs and Trade lays down, in Article 33, that accession may take place, *inter alia*, by 'a government not party to this Agreement . . . on terms to be agreed between such government and the contracting parties' (U.N.T.S., 55, p. 194). This does not necessarily mean 'all the contracting parties'.

provide expressly that the treaty shall be open to the accession of a certain State or States. The so-called law-making treaties, such as the Declaration of Paris or the Geneva Conventions, for example, regularly provide that all such States as have not been originally contracting parties, shall have an opportunity of acceding. Unless otherwise provided in the treaty, accession may be effected any time after the treaty has been concluded or its text established (as in the case of a treaty adopted or approved by a Resolution of the General Assembly of the United Nations).¹

§ 533. Adhesion is occasionally defined as such entrance *A thesion.* of a third State into an existing treaty as takes place either with regard only to a part of the provisions, or with regard only to certain principles, laid down in the treaty. Whereas, according to some, through accession a third State becomes a party to the whole treaty, with all the rights and duties arising from it, through adhesion, as defined above, a third State becomes a party only to such parts or principles of the treaty as it has adhered to. However, whatever may have been the reasons which originally prompted the distinction between accession and adhesion, it no longer corresponds to practice. The two terms are used interchangeably.²

¹ It is occasionally maintained—as, for instance, in Article 9 (b) of the Harvard Draft Convention—that a State can accede to a treaty only after that treaty has entered into force. Many treaties contain provisions to that effect. See, e.g., the General Treaty for the Renunciation of War of August 27, 1928; the Geneva Conventions of 1949; the Convention of July 29, 1935, concerning the Régime of the Straits (Hudson, *Legislation*, 7, p. 399); and many others. However it is believed that the majority of treaties follow the opposite principle (see Lauterpacht, *Report on the Law of Treaties, International Law Commission*, A/CN.4/63, 1953, pp. 90-92). Many treaties might never enter into force but for the fact that accessions have brought the number of States up to that required by the treaty for its entering into force. In some cases accession is the only means for the

entry of a treaty into force—as in the case of the Convention on the Privileges and Immunities of the United Nations, approved by the General Assembly on February 13, 1946 (U.N.T.S. 1, p. 15), or the Convention on the Privileges and Immunities of the Specialised Agencies, approved by the General Assembly on November 21, 1947 (*ibid.*, 33, p. 261). Accessions and adhesions normally do not require ratification, but they are sometimes expressly made subject to ratification: see above, § 512, and Report made to the Council of the League and circulated to the Assembly in September 1927 (*Assembly Documents*, A. 12. 1927, V.).

² Although the French text uses the term 'adhésion,' the official English version speaks of 'accession.' On the question whether there is a substantial difference between the two terms see Satow, § 737; *Inter-*

X

EXPIRATION AND DISSOLUTION OF TREATIES

Vattel, ii. §§ 198-205—Hall, § 116—Westlake, i. pp. 295-297—Lawrence § 134—Wharton, ii. § 137a—Wheaton, § 275—Moore, v. §§ 770-778—Hyde, ii. §§ 538-551—Fenwick, pp. 350-359—Bluntschli, §§ 450-461—Heffter, § 99—Fauchille, §§ 845-860—Sibert, pp. 331-344—Pradier-Fodéré ii. §§ 1200-1218—Mérignhac, ii. p. 788—Rivier, ii. § 55—Nys, ii. pp. 531-535—Calvo, iii. §§ 1662-1668—Cruchaga, i. §§ 576, 577—Cavaglieri, pp. 341-348—Fiore, ii. §§ 1047-1052—Guggenheim, pp. 104-122—Nippold, *op. cit.*, pp. 235-248—Anzilotti, pp. 439-466—McNair, Chapters, 31-36, 39-43—Rousseau, pp. 487-630—Lauterpacht, *The Function of Law*, pp. 270-285—Soelle, ii. pp. 398-437—*Harvard Research* (1935, Part III.), pp. 1077-1126, 1161-1173—Hoijer, *Les traités internationaux* (1928), ii. 430-454—Schmidt, *Ueber die völkerrechtliche Clausula 'rebus sic stantibus'* etc. (1907)—Kaufmann, *Das Wesen des Völkerrechts und die Clausula 'rebus sic stantibus'* (1911)—Bonucci in *Z.V.*, 4 (1910), pp. 449-471—Crandall, *op. cit.*, §§ 178, 186—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 130-171—Lauterpacht, §§ 76-77—Lord Phillimore, *Three Centuries of Treaties of Peace* (1917), pp. 132-140—Rapisardi Mirabelli, *I limiti d'obbligatorietà delle norme giuridiche internazionali* (1922), pp. 115-133—Bertram, *Die Aufhebung der völkerrechtlichen Verträge* (1915)—Goellner, *La revision des traités sous le régime de la Société des Nations* (1925)—Tobin, *The Termination of Multilateral Treaties* (1933)—Hill, *The Doctrine 'rebus sic stantibus' in International Law* (1934)—Ceretti, *La Revisione dei trattati* (1934)—Frangulis, *Théorie et pratique des traités internationaux* (1936) pp. 120-188—Brierly in *Gratius Society*, 11 (1928), pp. 11-20—Woolsey in *A.J.*, 20 (1926), pp. 346-353—Garner, *ibid.*, 21 (1927), pp. 509-516—Fischer Williams, *ibid.*, 22 (1928), pp. 80-104—McNair in *Haque Recueil*, vol. 22 (1928) (2), pp. 465-535, and *ibid.*, vol. 43 (1933) (1), pp. 280-289—Soelle, *ibid.*, vol. 46 (1933) (4), pp. 469-482—Ray, *ibid.*, 48 (1931) (ii.), pp. 635-709—Genet in *R.G.*, 37 (1930), pp. 287-311—Garner in *Iowa Law Review*, 19 (1933-1934), 312-329—Fairman in *A.J.*, 20 (1935), pp. 219-236—Whitton in *R.I. (Paris)*, 18 (1936), pp. 440-486—Engels in *R.I.*, 3rd ser., vol. 20 (1939), pp. 529-558, 708-747—Jessup in *A.J.*, 41 (1947), pp. 394-401—Berger in *Österreichische Zeitschrift für öffentliches Recht*, 4 (1951), pp. 27-61. And see the extensive literature cited above, § 167o (n.), in connection with Article 19 of the Covenant.

Expiration and Dissolution in contradistinction to Fulfilment.

§ 534. A treaty may terminate in four different ways: it may expire, or be dissolved, or become void, or be cancelled.¹

national Congresses (Foreign Office Peace Handbook) (1920), p. 24; Fauchille, § 833 (2); and the Report of the League Committee on the 'Admissibility of Reservations to General Conventions' submitted to the Council in June 1927 (League Doc. C. 211. 1927. V.)

¹ The distinction made in the text between fulfilment, expiration, dissolution, voidance, and cancellation of treaties is, it appears, nowhere sharply drawn, although it would seem to be of some importance. Voidance and cancellation will be discussed below, §§ 540-544 and 545-549.

The grounds of expiration of treaties are, first, expiration of the time for which a treaty was concluded, and, secondly, occurrence of a resolute condition. Of grounds of dissolution of treaties there are three—namely, mutual consent, withdrawal by notice, and vital change of circumstances. In contradistinction to expiration, dissolution, voidance and cancellation, the performance of treaties does not terminate their binding force. A treaty whose obligation has been performed is as valid as before, although it is then of historical interest only.¹

§§ 535-536. All such treaties as are concluded for a certain period of time only, expire with the expiration of such time, unless they are renewed or prolonged for a further period. Such time-expiring treaties are frequently concluded, and no notice is necessary for their expiration, except when specially stipulated.

Expiration through Expiration of Time.

A treaty may, however, be concluded for a certain period of time only, but with an additional stipulation that the treaty shall, after the lapse of such period, be valid for another period unless one of the contracting parties gives notice in due time.²

§ 537. A treaty, although concluded for ever or for a period of time which has not yet expired, may nevertheless be dissolved by mutual consent of the contracting parties.³ Such mutual consent can be evidenced in three different ways.

Mutual Consent.

First, the parties can expressly and purposely declare that a treaty shall be dissolved; this is rescission. Or, secondly, they can conclude a new treaty concerning the same objects as those of a former treaty, without any reference to the latter, although the two treaties are in-

¹ In so far as it creates or transfers rights in rem (what Westlake called a *dispositive* treaty, e.g. a treaty of cession), it sets up a permanent state of affairs; in so far as it merely creates rights in *personam*, they are satisfied when due performance is given; in neither case (it is submitted) is it necessary to say that the validity of the treaty continues.

² E.g. the Washington Treaty of 1923 for the Limitation of Naval Armament. For instances of with-

drawal by notice see the British Denunciation of the Sixth Hague Convention (see below, vol. ii. § 1026, p. 335), and withdrawals from the League under Article 1 of the Covenant (see above, § 167b). And see Rapisardi-Mirabelli, *op. cit.*, pp. 61-84.

³ See the observations of Judge Read in the *Status of South-West Africa* case, *I.C.J. Reports* 1950, p. 167, in connection with the dissolution of the League of Nations.

consistent with each other. This is substitution, and in such a case it is obvious that the treaty previously concluded was dissolved by tacit mutual consent. Or, thirdly, if the treaty is one that imposes obligations upon one of the contracting parties only, the other party can renounce its rights.¹ Dissolution by renunciation is a case of dissolution by mutual consent, since acceptance of the renunciation is necessary.

With-
drawal by
Notice.

§ 538. Treaties, provided they are not such as are concluded for ever, may also be dissolved by withdrawal after notice by one of the parties. Many treaties² provide expressly for the possibility of such withdrawal, and as a rule contain details in regard to form, and period, in which notice is to be given for the purpose of withdrawal. But there are other treaties which, although they do not expressly provide for the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever, or are apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty, or a treaty of alliance not concluded for a fixed period only, can always be dissolved after notice, although such notice be not expressly provided for. Treaties, however, which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things, and, further, treaties concluded for a certain period of time only, are as a rule not terminable by notice, although they can be dissolved by mutual consent of the contracting parties. All treaties of peace, and all boundary treaties, belong to this class.

Vital
• Change
of Circum-
stances.³

§ 539. Although, as just stated, treaties concluded for a certain period of time, and such treaties as are expressly or impliedly made for the purpose of setting up an everlasting condition of things, cannot, in principle, be dissolved by

¹ See above, § 490. On the question of the legality of a renunciation of rights by one party to a multilateral convention when that renunciation operates to the detriment of another

party see Fauchille, § 850 (1).

² See above, § 535.

³ As to extinctive prescription, which is a different matter, see above, § 154c.

withdrawal of one of the parties, there is an exception to this rule. Vital changes of circumstances may be of such a kind as to justify a party in demanding to be released from the obligations of a treaty which cannot be abrogated by unilateral notice.¹ Many writers defend the principle² *conventio omnis intelligitur rebus sic stantibus*, and assert³ that all treaties are concluded under the tacit condition *rebus sic stantibus*. In substance—although it has on occasions been abused by providing a cloak for lawless violations of treaties—the doctrine *rebus sic stantibus*, when kept within proper limits, embodies a general principle of law as expressed in the doctrines of frustration, or supervening impossibility of performance, or the like. It is in this sense—and this sense only—that every treaty implies a condition that, if by an unforeseen change of circumstances an obligation provided for in

¹ Such a demand can, of course, only be made with regard to executory treaties. Executed treaties are beyond the reach of such a demand. Sometimes express provision is made in a treaty for the event of a material change of circumstances, e.g. in Article 21 of the Treaty of Washington of February 6, 1922, for the Limitation of Naval Armament: Misc. No. 1 (1922), Cmd. 1627; and see above, p. 937, n. 2. Note the point made by Fischer Williams, *op. cit.*, namely, that the true operation of a vital change of circumstances (when it does operate) is to produce, not an option to one party to withdraw from the treaty, but its automatic expiration. See also Genet in *R.G.*, 37 (1930), pp. 287-311.

² The principle dates back to the *glossatores*, and has found entrance into the doctrine of International Law by way of the doctrine of Municipal Law. See Pfaff, *Die Clausel 'rebus sic stantibus' in der Doctrin und der österreichischen Gesetzgebung* (1898); Bindewald, *Rechtsgeschichtliche Darstellung der Clausel 'rebus sic stantibus' und i' Stellung im Bürgerlichen Gesetzbuch* (1901). For an early formulation of the principle, in the sphere of International Law, by Spinoza, see Lauterpacht in *B.Y.*, 1927, at pp. 94-107, and see an early invocation of it by

Queen Elizabeth against the Netherlands, in Zouche, *Jus et Judicium Ferales*, ii. § 4, cited by Brierly, *op. cit.*, at p. 13, and Lauterpacht, p. 171 (n.)

³ See Bonucci in *Z.V.*, 4 (1910), pp. 449-471. Many writers agree to it with great reluctance only, and in a very limited sense, as, for instance, Grotius, ii. c. 16, § 25, No. 2, and § 27; Vattel, ii. § 296; Klüber, § 165. Some few writers, however, disagree altogether, as, for instance, Bynkershoek, *Quaest. Jur. public.*, ii. c. 10, and Wildman, *Institutes of International Law*, i. (1849) p. 175. See also Strupp, *Grundzüge*, p. 104, who maintain that the alleged instances of the application of the *clausula* are either cases of necessity (*Notstand*) or manifest breaches of law. A good survey of the practice of the States in the matter during the nineteenth century is given by Kaufmann, *op. cit.*, pp. 12-37. See also Foster, *The Practice of Diplomacy* (1906), pp. 299-305. Lammach in *Das Völkerrecht nach dem Kriege* (1917) maintains that the *clausula* is not, and has never been, a recognised rule of customary International Law, but he attempts to prove on pp. 159-171 that treaties of alliance and guarantee are not binding, or, at any rate, are concluded according to the principle *rebus sic stantibus* (p. 170).

the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand¹ to be released from the obligation concerned. Thus conceived, the doctrine *rebus sic stantibus* when treated as a legal doctrine embodies the same principle which the law of various countries has admitted as a ground for dissolution or discharge or unenforceability of a contract owing to a vital change of circumstances. But the operation of that principle is necessarily limited, for the simple reason that it is the function of the law to enforce contracts or treaties even if they become burdensome for the party bound by them. This explains why, in almost all cases in which the doctrine *rebus sic stantibus* has been invoked before an international tribunal, the latter, while not rejecting it in principle, has refused to admit that it could be applied to the case before it. Thus in the case of the *Free Zones of Upper Savoy and the District of Gex*, decided by the Permanent Court of International Justice on June 7, 1932, France maintained that with regard to the latter the change of circumstances had been so great as to justify the Court in holding that the provisions in question had lapsed. The Court found that the changes² relied upon by France had no reference to 'the whole body of circumstances—circumstances essentially governed by the geographical configuration of the Canton of Geneva and of the surrounding region—which the High Contracting Parties had in mind at the time that the free zones were created,' and that accordingly they could not be taken into consideration.²

¹ See, however, Fischer Williams, *op. cit.*, referred to above, p. 939.

² Series A/B, No. 46, p. 158. The *rebus sic stantibus* doctrine appears so far to have received very little consideration from international and other tribunals, the following references may be given to cases where the doctrine, or something like it, has come under discussion: (i) Decision of the Supreme Court of Switzerland upon a treaty in a dispute between the Cantons of Lucerne and Argau in 1882, *Entscheidungen des Schweizer Bundesgerichts*, viii (1882) p. 57 (cited by Kaufmann,

op. cit., p. 38); (ii) *Hooper v. United States* (1887), United States Court of Claims, 22 Ct. Cl. 408, Scott, *Cases*, p. 470; (iii) Award of the Hague Court of Arbitration in the *Interest on Indemnities* case between Russia and Turkey (Wilson, *Hague Arbitration Cases* (1915), pp. 313-315); the doctrine was not pleaded in this case, but an exception was pleaded based on *force majeure*; (iv) Advisory Opinion of the Permanent Court on the *French Nationality Decrees in Tunis and Morocco*, Series B, No. 4, p. 39; (v) Decision of the German *Staatsgerichtshof* of June 26, 1925.

It follows from the principles as stated above that the clause *rebus sic stantibus* does not give a State the right, immediately upon the happening of a vital change of circumstances, to declare itself free from the obligations of a treaty, but only entitles it to claim to be released from them by the other party or parties to the treaty. Accordingly, when a State is of the view that the obligations of a treaty have, through a vital change of circumstances, become unbearable, the proper course for it is first to

in a dispute between Prussia and Bremen, where the *clausula* was held to be applicable to treaties but was not applied in that particular case: *Bulletin de l'Institut Inter-médiaire Internationale*, 14 (1926), p. 289; *Juristische Wochenschrift*, vol. 54, p. 2478; *Annual Digest*, 1925-1926; (vi) *M.M. Rotherchild et Nons v Gouvernement égyptien* in *Gazette des Tribunaux Mixtes d'Egypte*, August 1925; 52 *Clunet* (1925), pp. 1090-1105, and 53 *Clunet* (1926), pp. 754-766; *Journal des Tribunaux Mixtes*, No. 486 of May 1, 1926; (vii) *In Canton of Thurgau v. Canton of St. Gallen*, the Swiss Federal Court refused, in February 1928, to apply the doctrine on the ground that the servant Canton failed to invoke it at an earlier stage and also because of the trifling character of the changed circumstances: *Annual Digest*, 1927-1928, Case No. 259; (viii) Judgments of the Permanent Court of International Justice of July 12, 1929, in the cases of the *Serbian and Brazilian Loans* in France. As under (iii) above, the doctrine was not pleaded *eo nomine*, but the exception of *force majeure* was invoked: Series A, Nos. 20-21, pp. 39 and 120; (ix) *Barca-Pakrac Railway Co. v. Yugoslavia*, where arbitrators appointed under a Resolution of the Council of the League held, on October 5, 1934, that Yugoslavia was entitled to invoke changed conditions with regard to the interpretation of a concessionary contract: *Annual Digest*, 1933-'34, Case No. 190. See also Lauterpacht, §§ 75-77, for a discussion of instances of invocation of the doctrine.

At the Conference which preceded the signing of the Treaty of Lausanne of 1923 Turkey based her claim

for the abolition of the system of capitulations in part on the *rebus sic stantibus* principle, which was also being pleaded on behalf of China for a similar purpose: see Woolsey in *A.J.*, 20 (1926), pp. 346-353. Other instances of the recognition by a treaty of a change of circumstances will be found in Article 31 of the Treaty of Peace of 1919 with Germany as to the abrogation of the neutralisation of Belgium (see above, § 99) and Article 435 of the same treaty (to which Switzerland is not a party) regarding the status of the neutralised zone of Savoy and the free zones of Upper Savoy and the Gex district, as to which see Waldkirch, *Artikel 435 des Versailles Vertrages in seiner rechtlichen Bedeutung* (1924), pp. 25-30, and above, § 207. For the Turkish Note of April 10, 1936, setting forth, without expressly invoking the *clausula rebus sic stantibus*, the reasons necessitating the revision of Article 18 of the Straits Convention, see *Off. J.*, 1936, p. 504. In December 1932 the French Chamber of Deputies invoked the principle *rebus sic stantibus* 'as recognised in public international law, treaties and conventions' in connection with the question of inter-allied debts: *Débat Parlementaire*, Chamber, p. 3585, *Z.6.V.*, 4 (1934), p. 145. In 1947 Egypt brought before the Security Council the question of the presence of British troops in Egypt in pursuance of the Anglo-Egyptian Treaty of 1936, which, it was alleged, 'cannot bind Egypt any longer, having outlived its purposes, besides being inconsistent with the Charter.' However, Egypt did not invoke the doctrine *rebus sic stantibus*. See Briggs in *A.J.*, 43 (1949), pp. 762-769.

approach the other party (or parties), and request it to agree to the abrogation of the treaty.¹ If the party or parties thus approached refuse to accede to the request—which ought to be coupled with an offer to submit any disputed issue to judicial determination—then the requesting State may be justified in declaring that it can no longer consider itself bound by the treaty. The refusal to submit the issue for judicial determination is in itself *prima facie* evidence either that the doctrine *rebus sic stantibus* has been invoked as a cloak for an intended breach of the law or that the State benefiting from the treaty is determined to take advantage of a treaty which has lost its legal reason of existence.

¹ See Lord Phillimore, *Three Centuries of Treaties of Peace* (1917), pp. 134-139, for a more detailed discussion of the same argument. As to various instances of revision of treaties by agreement in the nineteenth century see Elbe in *Zo F.*, 5 (1935), pp. 269-292, and Crutwell, *A History of Peaceful Change in the Modern World* (1937). See also Tobin in *A.J.*, 18 (1934), pp. 487-505. In the Treaty of December 20, 1928, between Great Britain and China, the parties abrogated all provisions of the existing treaties limiting the right of China to settle her national customs tariff and agreed that henceforth the principle of complete national tariff autonomy shall apply. Treaty Series, No. 10 (1929), Cmd. 3319. See also the Treaty between Great Britain and China of January 11, 1943, for the relinquishment of extraterritorial rights in China (Treaty Series, No. 2 (1943) Cmd. 6450).

A number of commercial treaties refer expressly to a change in circumstances as a reason for terminating the Treaty. Thus Article 32 (3) of the Treaty of Commerce of May 1, 1934 (*Reichsgesetzblatt*, Part II. of May 19, 1934), between Germany and Yugoslavia provides that should the economic situation on which both parties relied in concluding the Treaty undergo a fundamental change to the prejudice of one party, then the State in question may give three months' notice to terminate the Treaty instead

of two years' notice. See also Article 5 (2) of the Agreement regarding the Exchange of Goods between Germany and the Netherlands Indies of June 6, 1934 (*J.N.T.S.*, No. 4034). Article 19 of the Economic Agreement between Poland and Germany of November 4, 1935 (*Reichsgesetzblatt*, Part II. of November 16, 1935), goes so far as to provide for the right of denunciation, following upon abortive negotiations, in cases in which the expectations of either party, which underlay the conclusion of the Treaty, should remain unfulfilled or in which the economic measures taken by one party have a prejudicial effect upon the other. The most-favoured-nation Treaty between the United States and France of May 6, 1936 (*Journal Officiel de la République française*, May 13, 1936), provides in Article 12 (4 and 5) for the right of denunciation in case the application of the provisions of the Treaty shall become dangerous to the vital interests of one of the contracting parties. So also the Treaty with Holland of December 20, 1925 (*Handelsberichten* of January 16, 1936, No. 3, Annex). For a survey of revision clauses in treaties since the First World War see Wilson in *American Political Science Review*, 28 (1934), p. 941, and Engel, *Les clauses de révision dans les traités internationaux multilatéraux* (1937). For a survey of the revision clauses in some of the recent international organizations see Jenks in *B.Y.*, 22 (1946), pp. 65-68.

The principle that a State has no right to liberate itself from the obligations of a treaty¹ without having first asked the other party or parties for its release from them, was upheld when, in 1870, during the Franco-Prussian War, Russia declared her withdrawal from the provisions of the Treaty of Paris of 1856 which concerned the neutralisation of the Black Sea and imposed a restriction upon her in regard to men-of-war in that sea. Great Britain protested, and a conference was held in London in 1871. Although by a Treaty signed on March 13, 1871, this Conference, consisting of the signatory Powers of the Treaty of Paris—namely, Austria, Great Britain, France, Germany, Italy, Russia, and Turkey—complied with the wishes of Russia and abolished the neutralisation of the Black Sea, it adopted in a Protocol² of January 17, 1871, the following declaration: 'C'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment³ des parties contractantes, au moyen d'une entente amicale.' When on March 10, 1935, and March 7, 1936, Germany unilaterally repudiated, respectively, her obligations under Part V. (disarmament clauses) and Article 43 (demilitarisation of the Rhineland) of the Treaty of Versailles (see below, § 547, n. 4) the Council of the League of Nations, in condemning Germany's action, reiterated that declaration.⁴

In spite of this declaration, signed also by herself, Russia in 1886 notified her withdrawal from Article 59 of the Treaty of Berlin of 1878 stipulating the freedom of the port of Batoum.⁵ The signatory Powers of the Treaty of Berlin seem to have tacitly consented, with the exception of

¹ A rule which is stressed in the Preamble to the Covenant ('scrupulous respect for all treaty obligations') and to the Charter of the United Nations (establishment of conditions 'under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained').

² See Martens, *N.R.G.*, 18, p. 278.

³ Whatever be the merits of this declaration, it certainly goes too

far in declaring that a State can only free itself from the obligations of a treaty by agreement with the other party, for—see below, § 547—a State may cancel a treaty if the other party to it violates it.

⁴ *Off. J.*, 1935, p. 551; *Documents*, 1935, p. 98; Treaty Series, Germany, No. 2 (1936), Cmd. 5134.

⁵ See Martens, *N.R.G.*, 2nd ser., 14, p. 170, and Rolin-Jacquemyns in *R.J.*, 19 (1887), pp. 37-49.

Great Britain, who protested. Again, in October 1908 Austria-Hungary, in defiance of Article 25 of the Treaty of Berlin, 1878, proclaimed her sovereignty over Bosnia and Herzegovina, which hitherto had been under her occupation and administration, and simultaneously Bulgaria, in defiance of Article 1 of the same Treaty, declared herself independent.¹ Thus the value of the declaration of the Conference of London of 1871 had become doubtful again, until in the International Court of Justice an independent international court was created with jurisdiction, if given to it by the parties, to set aside a treaty obligation which has become oppressive as the result of a juridically relevant change of circumstances.²

XI

VOIDANCE OF TREATIES

See the literature quoted at the commencement of § 534.

Grounds
of Void-
ance

§§ 540-544. A treaty, although it has neither expired nor been dissolved, may nevertheless lose its binding force by becoming void.³ Such voidance may be the consequence of extinction of one of the two contracting parties, impossibility of execution, realisation of the purpose of the treaty otherwise than by fulfilment, and, lastly, extinction of the object of the treaty.

(1) All treaties concluded between two States become void through the extinction of one of the contracting

¹ See above, § 50; Martens, *N.R.G.*, 3rd ser., 2, pp. 656, 666, and Blochowski in *R.G.*, 17 (1910), pp. 417-449.

² For a number of other instances of the invocation of the *rebus sic stantibus* condition see Fauchille, § 853 (4) 853 (11) Brierly, *op. cit.*, suggests that, if a juridical basis is to be found for the *rebus sic stantibus* doctrine, it is worth while giving careful consideration to the English common law doctrine of frustration of the objects of a compact; upon which see MacKinnon, *The Effect of War on Contract* (1917), and McNair in *L.Q.R.*, 35 (1919), pp. 84-100, reprinted in *Some Legal Effects of War* (1920), pp. 78-98, and Fischer

Williams, *op. cit.* For a consideration of the doctrine *rebus sic stantibus* as a general principle of law see Lauterpacht, *The Function of Law*, pp. 270-285. On the question of revalorisation of inter-State debts in cases of drastic depreciation of currency see Mann in *B.Y.*, 26 (1949), pp. 286-291.

³ But such voidance must not be confused with the nullity of a treaty from its very beginning; see above, § 501. Sometimes treaty obligations are conditional upon the happening or non-happening of a certain event; for instance, Article 2 of the Rapallo Agreement between Germany and Russia of April 16, 1922; *L.N.T.S.*, vol. 16, p. 248.

parties,¹ provided that they do not devolve upon the State which succeeds to the extinct State. That some treaties devolve upon the successor has been shown above (§ 82); but many treaties do not. On this ground all political treaties, such as treaties of alliance, guarantee, neutrality, and the like, become void.

(2) All treaties the execution of which becomes impossible subsequently to their conclusion are thereby rendered void.² A frequently quoted example is that of three States concluding a treaty of alliance and, subsequently, war breaking out between two of them. In such a case, it is impossible for the third party to execute the treaty, and it becomes void.³ The impossibility of execution may be temporary only; in that case the treaty is not void but merely suspended.

(3) All treaties the purpose of which is realised otherwise than by fulfilment become void. For example, a treaty concluded by two States for the purpose of inducing a third State to undertake a certain obligation becomes void if the third State of its own accord undertakes the obligation before the two contracting States have had an opportunity of approaching it with regard to the matter.

(4) All treaties the obligations of which concern a certain object become void through the extinction of such object, for example, treaties concluded in regard to a third State when such State merges in another.

XII

CANCELLATION OF TREATIES

See the literature quoted at the commencement of § 534.

§ 545. A treaty, although it has neither expired, nor been dissolved, nor become void, may nevertheless lose its binding

Grounds
of Cancellation.

¹ See *Harvard Research* (1933, Part III.), pp. 1165-1168, and Hyde in *A.J.*, 26 (1932), pp. 133 ff.

² It is submitted that to differentiate this ground of voidance from the mere invocation of the *rebus sic*

stantibus principle, the cause must amount almost to physical impossibility.

³ See also above, § 521, and Hyde, *ib.* § 542.

force by cancellation. The causes of cancellation are four—namely, inconsistency with International Law created subsequently to the conclusion of the treaty, violation by one of the contracting parties, subsequent change of status of one of them, and war.

Inconsistency with subsequent International Law.

§ 546. Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through the progressive development of International Law they become inconsistent with the latter.¹ This is illustrated by the abolition of privateering by the Declaration of Paris of 1856, in consequence of which any previous treaties based on privateering as a recognised institution of International Law were *ipso facto* cancelled, provided that all the parties to such treaties were signatory States of the Declaration of Paris.² On the other hand, subsequent Municipal Law can have no derogating influence upon existing treaties.³ On occasions, indeed, subsequent Municipal Law does create for a State a conflict between its treaty obligations and such law. In such a case the State must endeavour to obtain its release by the other contracting party from these obligations.⁴ It is the duty of

¹ As regards inconsistency with the Charter of the United Nations see above, § 503a. And see above, § 506.

² This must be maintained in spite of the fact that Protocol No. 24 of the Congress of Paris (see Martens, *N.E.G.*, 15, pp. 768-769) contains the following: 'Sur une observation faite par MM. les Plénipotentiaires de la Russie, le Congrès reconnaît que la présente résolution, ne pouvant avoir d'effet rétroactif, ne saurait invalider les conventions antérieures.' This expression of opinion can only mean that previous treaties with such States as were not and would not become parties to the Declaration of Paris were not *ipso facto* cancelled by the Declaration.

³ See *Harvard Research* (1935, Part III.), pp. 1029-1044.

⁴ Municipal courts may have to apply the subsequent Municipal Law, although it conflicts with previous treaty obligations. See above, § 21. See also *The Cherokee Tobacco*, 11

Wall. 616; *Whitney v. Robertson*, 124 U.S. 190, *Boillier v. Dominguez*, 130 U.S. 238, Scott, *Cases*, pp. 458-462. See also *Moore*, v. § 774. It is the duty of municipal courts to interpret municipal legislation in such a manner as to avoid, if only possible, a conflict with the international obligations of the State. See above, § 23. Moreover, in some countries, such as France, the Constitution provides expressly that treaties validly ratified shall have precedence over any conflicting subsequent municipal legislation. See above, § 21a. In the United States, treaties—which are the supreme law of the land—override any conflicting subsequent legislation of the member-States though not of the United States. On the question whether, after a treaty ceases to be in force, the relevant Municipal Law continues to be effective or not, see Schöen in *Strupp, Wörl.*, II, p. 662, and *Renault et Société des usines Renault v. Société Roussaki Renault* before the

a State not to enact or maintain legislation which is contrary to International Law.

§ 547. Violation¹ of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion² of the other party to cancel it on this ground.³ There is no unanimity on this point, since some make a distinction between essential and non-essential provisions of the treaty, and maintain that only violation of essential provisions creates a right for the other party to cancel the treaty. Others oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential provisions, that the binding force of a treaty protects non-essential as well as essential provisions, and that it is for the injured party to consider for itself whether violation of a treaty, even in its least essential parts, justifies its cancellation.⁴ The case is clear when a treaty expressly

Violation by One of the Contracting Parties.

First Chamber of La Cour de Paris on January 28, 1926: *Annual Digest*, 1925-1926, Case No. 268. On the converse case of the effect of the repeal of a municipal law upon a treaty made to facilitate the execution of that treaty see Dickinson, referred to above, at p. 490, n. 1.

¹ See Myers in *A.J.*, 11 (1917), pp. 794-819, and 12 (1918), pp. 96-161, where a number of treaty violations are discussed.

² This was recognised in 1913 by the United States Supreme Court in *Charlton v. Kelly*, 229 U.S. 447; Scott, *Cases*, p. 415.

³ But not, of course, when one party's failure to perform is due to the illegal act of the other party which prevented performance: see the *Case concerning the Factory at Chorzów* before the Permanent Court in 1927, Series A, No. 9, at p. 31.

⁴ The correct view is probably that expressed by Hall, 8th ed., § 118, p. 409, and Hyde, ii. § 546, according to whom it is only a failure by one party to 'observe a material stipulation, a stipulation which is material to the main object, or, if there are several to one of the main objects' that justifies the other party in abrogating the whole treaty. (*Hooper v. United States* (1887) United States Court

of Claims, 22 Ct. Cl. 408; Hudson, *Cases*, p. 930, and *Karnuth v. United States* (1929) 279 U.S. 231, afford some authority for the view advocated in this note.) See also *Harvard Research* (1935, Part III.), pp. 1134-1144. The question is essentially one of interpretation of the treaty, and it is in accordance with principle that the party claiming the right to rescind should put himself in the position of being able to invoke the authority of an arbitral or judicial pronouncement in support of the proposed action. On March 16, 1935, Germany unilaterally denounced the provisions of Article 160 (Part V.) of the Treaty of Versailles, limiting the size of her armed forces, and of Article 173, which prohibited conscription in Germany. The reason given was that the other parties to the Treaty had not fulfilled the obligation to limit their armaments. For a legal analysis of the German thesis see Bruns in *Schriften der Akademie für deutsches Recht*, No. 3, 1934. But see Garner and Jobst III. in *A.J.*, 29 (1935), pp. 569-585. See *Documents*, 1935 (1), pp. 58-68, 93-116. See also International Conciliation (Pamphlet No. 310, May 1935). On March 7, 1936, Germany denounced the provisions of Articles 42 and 43 of the

provides that it should not be considered broken merely by violation of one or another part of it.

The right to cancel a treaty on the ground of its violation must be exercised within a reasonable time after the violation has become known. If the State possessing such a right does not exercise it in due time, it must be taken for granted that such right has been waived. A mere protest, such as the protest of Great Britain in 1886 when Russia withdrew from Article 59 of the Treaty of Berlin of 1878, which provided for the freedom of the port of Batoum, neither constitutes a cancellation nor reserves the right of cancellation.¹

Sub-
sequent
Change of
Status of
One of the
Contract-
ing
Parties.

§ 548. One cause which *ipso facto* cancels treaties is such subsequent change of status of one of the contracting States as transform it into a part of another State. As everything depends upon the merits of each case, no general rule can be laid down as regards the question when such change of status must be considered to have taken place, or, further, as regards the further question as to the kind of treaties cancelled by such a change.² Thus, for example, when a State becomes a member of a Federal State it is obvious that all its treaties of alliance are *ipso facto* cancelled, for in a Federal State the power of making war rests with the Federal State, and not with the several members. Changes in the government or in the constitution

Treaty of Versailles relating to the demilitarisation of the Rhineland and guaranteed by the Treaty of Locarno on the ground that it was incompatible with the Franco-Soviet Pact of May 2, 1935: *Off. J.*, 1936, p. 312. Germany refused to submit to the International Court or to any other tribunal the question of the compatibility of the two treaties. In both cases the Council of the League found finally that Germany committed a breach of International Law by unilaterally repudiating her treaty obligations. See *Off. J.*, 1935, p. 551; 1936, p. 340. As to the denunciation of the Locarno Treaty and Articles 42 and 43 of the Treaty of Versailles see Fenwick in *A.J.*, 30 (1936), pp. 265-270; Wright, *ibid.*, pp. 486-494;

Schmitt in *Deutsche Juristen-Zeitung*, 41 (1936), pp. 337-341; Freytagh-Loringhoven, *ibid.*, 403-408; Aall-Tjømø in *Z.V.*, 20 (1936), pp. 139-154; Stauffenberg in *Z.S.V.*, 6 (1936), pp. 215-234; Mathot in *R.I. (Paris)*, 17 (1936), pp. 534-559; Rousseau in *La paix par le droit*, 46 (1936), pp. 188-198; Wehberg in *Friedenswart*, 36 (1936), pp. 49-61. And see Misc. No. 3 (1936), Cmd. 5143, for the official German view.

¹ This was recognised in 1913 by the United States Supreme Court in *Charlton v. Kelly*, 229 U.S. 447; *Scott Cases*, p. 415. See also Kuns in *A.J.*, 30 (1936), pp. 393-399.

² See Moore, v. § 773, and above, § 82, p. 159, n. 2, and § 531.

of a State have, as such, no effect upon the continued validity of its international obligations.¹

§ 549. The effect of the outbreak of war between the War parties to a treaty upon the validity of that treaty is far from being settled, and is discussed in the second volume of this treatise.²

XIII

RENEWAL, RECONFIRMATION, AND REDINTEGRATION OF TREATIES

Vattel, ii. § 199—Hall, § 117—Taylor, § 100—Fauchille, §§ 836-839—Pradier Fodéré, ii. §§ 1191-1199—Rivier, ii. pp. 143-146—Calvo, iii. §§ 1637, 1666, 1669—Fiore, ii. §§ 1048, 1049, and *Code*, §§ 840-843.

§ 550. Renewal of treaties is the term used in connection with the prolongation, before their expiration, of such treaties as were concluded for a limited period of time. Renewal can take place through a new treaty, and the old treaty may then be renewed as a whole, or only in part. But the renewal can also take place automatically, since many treaties concluded for a certain period stipulate expressly that they are to be considered as renewed for another period, in case neither of the contracting parties has given notice.³ Renewal
of
Treaties.

§ 551. Reconfirmation is the term for an express statement, made in a new treaty, that a certain previous treaty whose validity has, or might have, become doubtful, is still, and remains, valid. Reconfirmation takes place after such changes of circumstances as might be considered to interfere with the validity of a treaty; for instance, after a war, as regards such treaties as have not been cancelled by the outbreak of war.⁴ Reconfirmation can be given to the whole of a previous treaty, or to parts of it only. Recon-
firmation

¹ See *Harvard Research* (1935, Part III), pp. 1045-1055. And see *ibid.*, pp. 1066-1077, on the effect of territorial changes.

² Vol. ii. § 99.

³ E.g. the Treaty of Washington of 1922 for the Limitation of Naval Armament.

⁴ As regards the practice at the end of the First World War see below, vol. ii. § 99.

Redintegration.

§ 552. Treaties¹ which have lost their binding force through expiration or cancellation, may regain it through redintegration. A treaty becomes redintegrated by the mutual consent of the contracting parties; this is, as a rule, given in a new treaty. Thus it is usual for treaties of peace to redintegrate all those treaties cancelled through the outbreak of war the provisions of which the contracting parties do not wish to alter.¹

XIV

INTERPRETATION OF TREATIES

Grotius, u. c. 16—Vattel, u §§ 262 322—Hall, §§ 111, 112—Phillimore, ii' §§ 64-95—Westlake, i pp. 293 294—Walker, § 31—Wheaton § 287—Moore, v. §§ 763, 764—Hyde u §§ 530 535—Fenwick, pp. 331-335—Schwarzenberger pp 193-209—Guggenheim, pp 122-132—Fauchille, §§ 840-844—Sibert, pp. 307 325—Pradier-Fodéré, u. §§ 1171-1189—Mérignhac, u. p. 678—Nys, u pp 520 522—Rivier u pp 122 125—De Louter, i. pp. 497 501—Rousseau, pp 637 764—Calvo, iii §§ 1649 1660—Suarez, i. §§ 106 110—Fiore, u §§ 1662 1046, and *Code*, §§ 797 821—Cavaglieri, pp 93 103—*Harvard Research* (1935 Part III), pp. 937-977—McNair, Chapters 15 27—Foster, *The Practice of Diplomacy* (1906) pp 284 297—Crandall, *op cit*, §§ 160 171—Verdross in *Strupp, Wbri.*, u. p. 663—Ralston, § 26 39—Yü, *The Interpretation of Treaties* (1927)—Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933)—Jökl, *De l'interprétation des traités normatifs* (1936)—Frangula, *Théorie et pratique des traités internationaux* (1936), pp 107-120—Hyde in *A.J.* 3 (1900), pp 46 61, and 24 (1930), pp. 1-19—Pic in *R.G.*, 17 (1910), pp. 5 35—Ruegger in *Z.I.*, 28 (1919-1920), pp. 426 502—Diaz in *R.G.*, 32 (1925) pp 429-442—Ehrlich in *Hague Recueil*, vol 24 (1924) (iv.), pp. 5 139—McNair in *Hague Recueil*, vol 43 (1933) (i.), pp 251 279—Fairman in *Grotius Society*, 20 (1934), pp 123 139—Wilson in *A.J.*, 33 (1939), pp 541-545—Lauterpacht in *B.Y.*, 26 (1949), pp. 86-107—Fitzmaurice, *ibid.* 28 (1951), pp. 1-28—Lauterpacht and others in *Annuaire*, 43 (1) (1950), pp 366-460, and 44 (1) (1952), pp 197 224

Authentic Interpretation, and the Com-promise Clause.

§ 553. There are no precise rules of customary or conventional International Law concerning the interpretation

¹ As regards the practice at the end of the First World War see below, vol. ii, § 99.

of treaties. Grotius and the later authorities applied the rules of Roman Law respecting interpretation in general to the interpretation of treaties. On the whole, such application is correct, in so far as those rules of Roman Law are expressive of common sense.¹ In regard to interpretation given by the parties themselves, and which overrides general rules of interpretation, there are different ways open to them. They may either agree informally upon the interpretation, and execute the treaty accordingly; or they may agree upon an interpretative declaration² or protocol annexed to the treaty; or they may make a supplementary treaty, and provide therein for such interpretation of the previous treaty as they choose. In the latter case, one speaks of 'authentic' interpretation, by analogy with the authentic interpretation of Municipal Law, given expressly by a statute. Many treaties, especially those of a multilateral character, contain clauses providing for obligatory judicial or arbitral settlement of disputes arising out of contested interpretation and application of the provisions of the treaty.³

§ 554. It is of importance to enumerate some rules of

Rules of Interpretation which commend themselves.

¹ Westlake, i. p. 293, after saying that 'the important point is to get at the real intention of the parties, and that inquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence,' goes on to contrast the English methods of construing private contracts and acts of parliament with the less literal kind of interpretation best suited for treaties. See Oppenheim, *The Future of International Law* (1911) (English translation in 1921, §§ 32-49), on some national divergences in the interpretation of treaties. As to the attitude of English courts with regard to resort to the terms of a treaty in the interpretation of municipal legislation giving effect to that treaty, see *Ellerman Lines, Limited v. Murray (The Croxteth Hall)* [1931] A.C. 126, and *McNair in Annual Digest*, 1929-1930, Case No. 222 (n.), and in *B.Y.*, 12 (1931), p. 183, and 13 (1932), pp. 120-122, 163, who is of the view that,

on the balance of available authority, it is permissible to resort to the treaty if the language of the Statute is ambiguous. See also the observations of Greer, L.J. in *Grein v. Imperial Airways* (1936) 55 Ll. L.R. 318. And see Mann in *L.Q.R.*, 62 (1946), p. 278.

² See e.g. the Treaty for the Advancement of Peace between the United States and Holland of February 13, 1928, *A.J.*, Suppl., 22 (1928), p. 116.

³ Normally an interpretation by an international tribunal only binds the parties who have referred their dispute to the Tribunal: but Article 62 of the Statute of the International Court of Justice enables an interested third State to intervene in the proceedings, and Article 63 enjoins the Registrar in the case of the construction of a convention to notify all the parties to the Convention; a State which exercises its right to intervene in the proceedings is equally bound by the judgment.

interpretation¹ which commend themselves on account of their suitability.²

(1) All treaties must be interpreted according to their reasonable, in contradistinction to their literal, sense.³

(2) The terms used in a treaty must be interpreted according to their usual meaning in the language of everyday life, provided that they are not expressly used in a certain technical meaning, or that another meaning is not apparent from the context.⁴

(3) It is taken for granted that the contracting parties intend something reasonable and something not inconsistent with generally recognised principles of International Law,⁵ nor with previous treaty obligations towards third States. If,

¹ The whole matter of interpretation of treaties is dealt with in an admirable way by Phillimore, ii. §§ 64-95; see also Moore, v. § 763, Wharton, ii. 133, and Hyde, ii. §§ 530-535. There is a preliminary rule that 'it is not allowable to interpret what has no need of interpretation': Vattel, ii. § 263; but it is a rule which often begs the question.

The, at times, questionable character of the usefulness of the rules of interpretation is well illustrated by a comparison of the rule postulating that, in case of doubt restrictions upon State sovereignty cannot be presumed (see below, p. 953, n. 5), with the rule of liberal interpretation according to which 'when a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred': *Nielsen v. Johnson* (1929), 279 U.S. 47, *Annual Digest*, 1929-1930, Case No. 238. A provision enlarging the rights of one party restricts the sovereignty of the other. In an extradition treaty an interpretation 'liberal' to the requesting State is not necessarily 'liberal' to the person affected. See Hudson's observations on *Factor v. Laubenheimer* (1933), 290 U.S. 276, in *A.J.*, 28 (1934), p. 302. On the interpretation of and the law applicable to treaties relating to financial transactions between States see Mann in *B.Y.*, 21 (1944), pp. 11-33.

² On the violation of treaties in consequence of defective drafting see Myers in *A.J.*, 11 (1917), pp. 538-565.

³ An interesting example illustrating this rule is the following, which is quoted by several writers: In the interest of Great Britain, the Treaty of Peace of Utrecht of 1713 provided, in Article 9, that the port, and the fortifications, of Dunkirk should be destroyed, and never be rebuilt. France complied with this provision; but at the same time began building an even larger port at Mardyck, a league off Dunkirk. Great Britain protested on the ground that France, in so acting, was violating the reasonable, although not the literal, sense of the Peace of Utrecht; France in the end recognised this interpretation, and discontinued the building of the new port.

⁴ The ambiguity attending words used in the computation of time, e.g. 'day,' 'year,' 'month,' is discussed by Deak in *A.J.*, 20 (1926), pp. 502-515.

⁵ For a clear statement to the effect that treaties must be interpreted by reference to general customary International Law see the award in *The Kronprinz Gustaf Adolf: Annual Digest*, 1931-1932, Case No. 205. See also Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934) pp. 12, 15.

therefore, the meaning of a provision is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable,¹ the consistent meaning to the meaning inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States.²

(4) The whole of the treaty must be taken into consideration, if the meaning of any one of its provisions is doubtful; and not only the wording³ of the treaty, but also its purpose, the motives which led to its conclusion, and the conditions prevailing at the time.⁴

(5) The principle *in dubio mitius* must be applied in interpreting treaties. If, therefore, the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous for the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.⁵ However, in applying this rule of interpretation regard must be had to the fact that the assumption of obligations constitutes the primary purpose of the treaty, and that, in general, the parties must be presumed to have

¹ See Advisory Opinion of the Permanent Court, Series B, No. 1, at pp. 23, 24.

² On this last point see Wright in *A.J.*, 11 (1917), pp. 566-579.

³ For an example of the importance of the punctuation used see Hunter Müller in *A.J.*, 29 (1935), pp. 118-123, with reference to the interpretation of Article 2 of the Webster-Ashburton Treaty of 1842 by the Supreme Court of the United States in *Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox, Ltd.* (1934), 291 U.S. 138.

⁴ See *The Vryheid* (No. 1) (1778), 1 English Prize Cases, at p. 15.

⁵ In its Advisory Opinion upon the *Frontier between Turkey and Iraq*, Publications of the Court, Series B, No. 12, at p. 25, the Permanent Court admitted the soundness of the principle that 'if the wording of a treaty provision is not clear, in

choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted.' Thus in the Advisory Opinion of December 11, 1931, concerning the *Access of Polish War Vessels to the Port of Danzig*, the Court held that as Poland claimed special rights and privileges for her war vessels in the Port of Danzig which could be exercised only in derogation of the rights of Danzig, the Polish claim must be established on a clear basis: Series A/B, No. 43, p. 142. See also Series A/B, No. 46, p. 167 (*Free Zones* case). And see Ralston, § 30, and McNair, Chapter 20. The Supreme Court of the United States has declined to agree to the proposition that treaties with Indians must be construed favourably to the latter with a view to remedying injustices: *Shoshone Indians v. United States*, *A.J.*, 39 (1945), p. 818.

intended the treaty to be effective rather than ineffective (see below, (12)).

(6) Previous treaties between the same parties, and treaties between one of the parties and third parties, may be referred to for the purpose of clarifying the meaning of a provision.¹

(7) If two meanings of a provision are admissible according to the text of a treaty, such meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it.

(8) If two meanings of a provision are admissible, that which is least to the advantage of the party for whose benefit the provision was inserted in the treaty should be preferred.²

(9) The maxim *expressio unius est exclusio alterius* has been followed in the interpretation of treaties by international tribunals in a number of cases.³

(10) If it is a matter of common knowledge that a State upholds a meaning of a term which is different from the generally accepted meaning, and if nevertheless another State enters into a treaty with the former in which such term is made use of, that meaning must prevail which is upheld by the former. If, for instance, States conclude commercial treaties with the United States of America in which the most-favoured-nation clause⁴ occurs, the particular meaning which the United States attributes to this clause must prevail.

(11) If the meaning of a provision is ambiguous, and one of the contracting parties, at a time before a case arises for the application of the provision, makes known what meaning it attributes to it, the other party or parties cannot, when a case for its application does occur, insist upon a different meaning unless it has previously protested

¹ For instance, by the Permanent Court in Advisory Opinion, Series B, No. 6, at pp. 25, 26, 38, and in Judgment, Series A, No. 7, at pp. 25 *et seq.*

² For instances see Ralston, § 30; and Award of Mixed Claims Commission, United States and Germany, in the *Lucania* cases, *A.J.*, 18 (1924),

p. 373, where other illustrations are given.

³ For instances see *A.J.*, 19 (1925), pp. 602, 603; McNair, Chapter 18. Upon the relevance to treaties of the *ejusdem generis* rule of construction see McNair in *B.Y.*, 1924, pp. 181-182, and Chapter 19.

⁴ See below, § 580.

and proposed the necessary steps to secure an authentic interpretation of the ambiguous provision. When, in 1911, it became obvious that Germany and other continental States attributed to Article 23 (h) of the Hague Regulations respecting the Laws and Usages of War on Land a meaning different from the one preferred by Great Britain, the British Foreign Office made the British interpretation of this article known.¹

(12) It is to be taken for granted that the parties intend the provisions of a treaty to have a certain effect, and not to be meaningless. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective.² On the other hand, the circumstance must be borne in mind that on occasions the absence of a full measure of effectiveness is the direct result of the intention of the parties in the sense that they were unable to agree on a more complete degree of efficacy of the provisions of the treaty.³ Of this the Advisory Opinion of the International Court of Justice in the case of the *Interpretation of the Peace Treaties* provides an instructive example.⁴

¹ See Oppenheim, *The Future of International Law* (1911) (English translation in 1921, §§ 35-38), and *The League of Nations* (1919), p. 48. See also the Judgment of the International Court of Justice in the *Anglo-Iranian Oil Co.* case, in which it held that an Iranian Law showing, in effect, the Iranian Government's understanding of a Declaration made by Iran, was relevant as interpreting the intention of the Iranian Government: *I.C.J. Reports*, 1952, p. 107. The Law had not been communicated to the United Kingdom. However, the Court attached importance to the fact that the Law had been published and had been available for examination by other Governments during a period of some twenty years.

² See Releton, § 32, and the Advisory Opinion of the Permanent Court on the *European Danube Commission*, Series B, No. 14, at p. 27. See also *Competence of the International Labour Organisation to Regulate the Work of Employers* (Series B, No. 13, p. 18); *Reparation for Injuries* case,

I.C.J. Reports, 1949, pp. 179, 184; *Corfu Channel* case, *ibid.*, p. 24. And see generally Lauterpacht in *B.Y.*, 26 (1949), pp. 48-85. In the *Anglo-Iranian Oil Co.* case the Court admitted in principle that a treaty should be interpreted in such a way that a reason and meaning can be attributed to every word in the text. However, it was of the view that that rule did not apply to a text which was not the result of negotiations between two or more States but which was in the nature of an unilateral declaration in which one party included, *ex abundante cautela*, apparently superfluous words: *I.C.J. Reports*, 1952, p. 105. There may be some disadvantage in applying different rules of interpretation to a treaty and an unilateral declaration relied upon by the parties to which it is addressed.

³ See Lauterpacht in *B.Y.*, 26 (1949), pp. 75-82; Charles de Visscher, *Théorie et réalité en droit international public* (1953), pp. 303-311.

⁴ See above, p. 741, n.

(13) All treaties must be interpreted so as to exclude fraud, and so as to make their operation consistent with good faith.¹

(14) The rules commonly applied by the courts for the interpretation and construction of Municipal Laws are only applicable to the interpretation and construction of treaties, and in particular of law-making treaties, in so far as they constitute general rules of jurisprudence. If they are rules sanctioned by the Municipal Law, or by the practice of the courts, of a particular country only, they may not be applied.²

(15) Unless the contrary is expressly provided,³ if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts,⁴ each party is only bound by the text in its own language.⁵ Moreover,

¹ For a refusal of the Permanent Court of International Justice to attach decisive importance to the system of numbering of paragraphs see *Peter Pázmány University* case of December 15, 1933, Series A/B, No. 61, p. 247.

² On the interpretation of treaties by the Permanent Court of International Justice see Hudson, *The Permanent Court of International Justice* (1934), pp. 543-573; Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), *passim*; Wilson in *A.S. Proceedings*, 1930, pp. 39-46. As to English courts see McNair in *Hague Recueil*, vol. 43 (1933) (i.), pp. 251 *et seq.* As to the Supreme Court of the United States see Tennant in *Michigan Law Review*, 30 (1931-1932), pp. 1016-1039.

As to the competence of English courts to interpret treaties see the observations of Russell J. in *Stoeck v. Public Trustee* [1921] 2 Ch. 67, 71; *In re Ning Yi-Ching and Others* (1939) 56 T.L.R. 3; McNair, Chapter 15.

As to France see Naurio, *Les traités internationaux devant les juridictions nationales* (1934), pp. 159-232; Mestre in *Hague Recueil*, vol. 38 (1931) (iv.), pp. 264-302; Niboyet in *Mélanges Carré de Malberg* (1933), pp. 401-415; and Note in *Annual Digest*, 1929-1930, Case No. 233. See

also Duez, *Les actes de gouvernement* (1935). The practice of French courts is not quite uniform, but it seems that the courts are disinclined to interpret treaties raising political issues even if this interpretation is necessary in order to determine private rights.

As to the United States see Jaffé, *Judicial Aspects of Foreign Relations* (1933), pp. 71 *et seq.*

³ The Treaty of Peace of 1919 with Germany is in French and English; and it is expressly provided that both texts are authentic. The Treaties of Peace of 1919 with Austria, Bulgaria, and Hungary are in French, English, and Italian; but it was expressly declared that the French text shall prevail, except in the League of Nations and Labour Parts. As to the Charter of the United Nations see above, p. 772. See also above, § 359, and Scott, *Le Français, langue diplomatique moderne* (1924). On the question of the revision, with regard to the language used, of multilingual treaties, see Liang in *A.J.*, 47 (1953), pp. 263-272.

⁴ See Foster, *The Practice of Diplomacy* (1906).

⁵ See, however, the Permanent Court in Advisory Opinion, Series B, No. 10, at p. 18. And see Hudson, *International Legislation*, vol. v. p. 16, and in *A.J.*, 26 (1932), pp. 368-372. See also *Harvard Research* (1935, Article 19); Joki, *op. cit.*, pp. 56-72.

a party cannot claim the benefit of the text in the language of the other party.

(16) The conduct of the parties subsequent to the conclusion of the treaty may in some cases be resorted to as a means of interpretation, especially with regard to the obligations of the party as acknowledged by its conduct.¹

§ 554a. It is a well-established rule in the practice of international tribunals that so-called preparatory work (*travaux préparatoires*)—i.e. the record of the negotiations preceding the conclusion of a treaty, the minutes of the plenary meetings and of committees of the Conference which adopted a convention, the successive drafts of a treaty, and so on—may be resorted to for the purpose of interpreting controversial provisions of a treaty.² The Permanent Court of International Justice and its successor have frequently affirmed the usefulness of preparatory work. They have as a rule confined its admissibility as evidence to cases in which the treaty is 'not clear.'³ However, the finding whether a treaty is clear or not is not the starting-point, but the result of the process of interpretation, and the Court itself has in fact had resort to preparatory work even when in its view the

Preparatory Work
in the In-
terpreta-
tion of
Treaties.

Ehrlich, *op. cit.*, pp. 90-101. As to treaties in three languages see the judgment of the Polish Supreme Court in *Archdukes of the Habsburg-Lorraine House v. Polish State Treasury*, of June 16, 1930: *Annual Digest*, 1929-1930, Case No. 235

¹ See *Corfu Channel case*, *I.C.J. Reports*, 1949, p. 25; *Status of South-West Africa case*, *ibid.*, 1950, p. 135; *Admission of Members to the United Nations* (General Assembly case), *ibid.*, 1950, p. 9. However, it must be noted that the conduct of the parties may have been in disregard of the provisions of the treaty. Thus viewed, the rule as stated amounts to a large extent to the application of the principle of estoppel (see p. 350, n. 2).

² Yu, *The Interpretation of Treaties* (1927), *passim*; Wright, *Manifests under the League of Nations* (1930), pp. 353-364, and in *A.J.*, 23 (1929), pp. 94-105; Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), pp. 22-60, 95-140; Lauter-

pacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 35-42, the same in *Hague Recueil*, vol. 48 (1934) (ii), pp. 713-815, and in *H.L.K.*, 48 (1935), pp. 549-591; Spencer, *Interprétation des traités par les travaux préparatoires* (1935); *Harvard Research, Treaties* (1935), Article 19; Jokl, *De l'interprétation des traités normatifs* (1936), pp. 114-153; McNair, Chapter 25; Ehrlich in *Hague Recueil*, vol. 24 (1928) (iv.), pp. 116-131; Fachini in *A.J.*, 23 (1929), pp. 745-752; Brown, *ibid.*, pp. 819-821. Hyde, *ibid.*, pp. 824-828, the same, *ibid.*, 24 (1930), pp. 13-17, 27 (1933), pp. 502-506, 29 (1935) pp. 479-482; Müller in *Iowa Law Review*, 17 (1932), p. 206-222, 366-373; Fairman in *Grotius Society*, 20 (1934), pp. 123-139.

³ See e.g. Series A/R, No. 50, p. 378; but see the Dissenting Opinion of Judge Anzilotti, *ibid.*, p. 383, and comment thereon by Hyde in *A.J.*, 27 (1933), pp. 502-506.

treaty was 'clear.'¹ The deliberation and publicity accompanying the successive stages of the negotiation and conclusion of treaties are such as to render this kind of evidence of particular value.²

§§ 555-568i. [Omitted.]

¹ The warning sounded by the Court must be regarded as a formal concession to the objections raised from time to time to the use of preparatory work. These have been voiced in particular on the ground that its use is contrary to Anglo-American methods. See *e.g.* P.C.I.J., Series C, No. 2, p. 197, and No. 10, p. 20; *Fachiri, op. cit.* The objection is not, it is believed, well founded. English and, in particular, American courts do not hesitate to resort to preparatory work for the purpose of interpreting treaties. See Lauterpacht in *H.L.R.*, 48 (1935), pp. 562-571, and in *Annuaire*, 43 (1950) (1.), pp. 377-402

and 44 (1952) (1.), pp. 207-216.

² This is particularly obvious in cases in which a committee of a Conference formally puts on record an interpretative understanding which, for one reason or another, it does not wish to include in the treaty. See *e.g.*, with regard to withdrawal from the United Nations, § 168*d* above. See also above, § 168*k*, on the interpretative statement of the Sponsoring Powers at the San Francisco Conference in the matter of the voting procedure in the Security Council. And see Robinson, *Human Rights in the Charter of the United Nations* (1946), pp. 7-10.

CHAPTER III

IMPORTANT GROUPS OF TREATIES

I

ALLIANCES

Grotius, ii. c. 15 -Vattel, iii §§ 78-102 -Wheaton, §§ 278-285—Hefter, § 92—
 —Fauchille, §§ 871-881- Mérygnac, ii. p. 683—Nys, iii. pp. 531-534—
 Pradier-Fodéré, ii. §§ 934-967—Rivier, ii. pp. 111-116—Calvo, iii. §§ 1587-
 1588—Fiore, ii. § 1094, and *Code*, §§ 898-904—Martens, i. § 113—Rolin-
 Jaquemyns in *R.I.*, 20 (1888), pp. 5-35—Erich, *Ueber Allianzen*
und Allianzverhältnisse nach heutigem Völkerrecht (1907)—Lammasch,
Das Völkerrecht nach dem Kriege (1917), pp. 159-171—Kunz, *Staaten-*
verbindungen (1929), pp. 350-373—*Traité de Garantie, d'Alliance, de*
Collaboration politique, de Non agression et de Neutralité conclus après la
guerre. Edited and annotated by Gretschaninow (1936)—Freytagh-
 Loringhoven, *Die Regionalstrategie* (1937)—Rehm in *Z.I.*, 28 (1915)
 pp. 118-162—De Orue y Arregui in *Hague Recueil*, vol. 53 (1935) (iii.),
 pp. 7-93—Liang in *Grotius Society*, 31 (1945), pp. 216-231.

§ 569. Alliances, in the strict sense of the term, are treaties of union between two or more States, for the purpose of defending each other against an attack in war, or of jointly attacking third States, or for both purposes. The term 'alliance' is, however, often used in a wider sense, and it comprises in such cases treaties of union for various purposes. Thus, the so-called 'Holy Alliance,' concluded in 1815 between the Emperors of Austria and Russia and the King of Prussia, and afterwards joined by almost all the sovereigns of Europe, was a union for such vague purposes that it cannot be called an alliance in the strict sense of the term.

History relates numerous alliances between States. The Triple Alliance¹ between Germany, Austria, and Italy made in 1879 and 1882, renewed in 1912, and denounced

¹ See Singer, *Geschichte des Dreibundes* (1914).

by Italy in 1915, the alliance between Russia and France made in 1899, and that made between Great Britain and Japan in 1902 and renewed in 1905 and 1911,¹ are instructive examples. The period after the First World War witnessed the conclusion of a considerable number of alliances,² most of which, however, did not stand the test of events.³ On the other hand, the British-Polish Agreement of Mutual Assistance of August 25, 1939, was directly acted upon when Great Britain declared war on Germany on September 3 of that year. Various alliances were concluded during the Second World War. Among these were the Treaty of Alliance—in terms of a defensive nature—between Germany, Italy and Japan of September 27, 1940,⁴ the Treaty of Alliance of January 29, 1942, between Great

¹ The Anglo-Japanese Alliance was the subject of a joint Declaration by the two States of July 8, 1920 (*L.N.T.S.*, i. p. 24), stating that if continued after July 1921 it must be in a form consistent with the Covenant of the League. It was replaced by the Quadruple Pacific Treaty concluded at Washington on December 13, 1921, whereby those two States and France and the United States of America agreed to respect the *status quo* 'in the region of the Pacific Ocean' (*L.N.T.S.*, 25, p. 184, and Cmd. 1627). See Chung-fu Chang, *The Anglo-Japanese Alliance* (1931).

² As to the compatibility of alliances with the Covenant of the League see below, § 571.

³ Amongst the alliances made since the end of the First World War may be mentioned those between Czecho-Slovakia and Yugoslavia of August 14, 1920 (*L.N.T.S.*, 6, p. 210; 13, p. 232), which was renewed on August 31, 1922; between Czecho-Slovakia and Roumania of April 23, 1921 (*ibid.*, 6, p. 216; 13, p. 82); between Roumania and Yugoslavia of June 7, 1921, these three creating what is called 'the Little Entente' (see Toynbee, *Survey*, 1920-1923, pp. 287-303; *Survey*, 1924, pp. 440-456; and Wheeler-Bennett and Langermann, *The Problem of Security* (1927), pp. 187-189. The three 'Little Entente' Treaties are printed in Toynbee,

Survey, 1920-1923, pp. 505-508); between Poland and Roumania of March 3, 1921 (*L.N.T.S.*, 7, p. 78; see also the Treaty of Guarantee of January 15, 1931, *ibid.*, vol. 115, p. 171), between Czecho-Slovakia and France of January 25, 1924 (*ibid.*, 23, p. 164); a Military Convention between Belgium and France of September 7, 1920 (*ibid.*, 2, p. 128); the Treaty of Alliance between Great Britain and Iraq of June 30, 1930 (see above, § 94d); the Treaty of Mutual Assistance between Czecho-Slovakia and Soviet Russia of May 16, 1935 (*Documents*, 1935 (1), p. 138), the Treaty of Mutual Assistance between France and Soviet Russia of May 2, 1935 (see *Documents*, 1935 (1), pp. 116-140). And see, on the controversy concerning the compatibility of those treaties with the Treaty of Locarno, *ibid.*, pp. 264-273; Gouyet in *R.J. (Paris)*, 15 (1935), pp. 388-423; Fenwick in *A.J.*, 30 (1936), p. 265-270; *B.Y.*, 17 (1936), pp. 167-171; the Treaty of Alliance between Great Britain and Egypt of August 26, 1936 (see above, § 91 (n.)). For a list of treaties of alliance and guarantee after the First World War see Haggood in *A.J.*, 30 (1936), Suppl., p. 164.

⁴ The parties undertook to assist one another if one of them were attacked 'by a Power not at present involved in the European War or in the Sino-Japanese War'—an oblique reference to the United States.

Britain, Soviet Russia and Iran,¹ and the Treaty of Alliance of May 26, 1942, between Great Britain and Soviet Russia.² The treaties concluded after the Second World War are referred to below in §§ 571-572.

§ 570. Subjects of alliances are said to be full sovereign ^{Parties to} States only. However, alliances have been concluded by ^{Alliances.} States under suzerainty.³ A neutralised State can conclude an alliance for the purpose of defence, whereas the entrance into an offensive alliance on the part of such State would involve a breach of its neutrality.

§§ 571-572. As already mentioned, an alliance may be ^{Different} offensive or defensive, or both. All three kinds may be either ^{Kinds of} general alliances, in which case the allies are united against ^{Alliances.} any possible enemy whatever, or particular alliances against one or more particular enemies. Alliances, further, may be either permanent or temporary; in the latter case they expire at the end of the period of time for which they were concluded. The capacity of States to enter into alliances may be limited by a general engagement to which they are parties. Thus States bound by the General Treaty for the Renunciation of War⁴ or any similar general undertaking not to resort to war cannot lawfully enter into an offensive alliance. All alliances which were inconsistent with the Covenant of the League of Nations were *ipso facto* abrogated, as between members of the League, by Article 20 of the Covenant, in which members undertook not to enter into any new engagements inconsistent with the Covenant and to take immediate steps to procure their release from any such obligations already assumed. However, international engagements for securing the maintenance of peace were declared valid.⁵ The position is essentially the

¹ *United Nations Agreements* (ed. by Schnapper, 1944), p. 262.

² Cmd. 6368 (1942). The Treaty was concluded, in the first instance, for twenty years.

³ Thus, the Convention of April 16, 1877, between Roumania, which was then under Turkish suzerainty, and Russia, concerning the passage of Russian troops through Roumanian territory in case of war with Turkey, was practically a treaty of alliance

(see Martens, *N.R.G.*, 2nd ser., 3 p. 182). Thus, further, the former South African Republic, although, at any rate according to the views of the British Government, a half sovereign State under British suzerainty, concluded an alliance with the former Orange Free State by Treaty of March 17, 1897 (see Martens, *N.R.G.*, 2nd ser., 25, p. 327).

⁴ See vol. ii., §§ 52*fe et seq.*

⁵ Article 21. And see above, § 167*on.*

same under the Charter of the United Nations. While the latter lays down in unequivocal terms the supremacy of the Charter over any other treaty obligations of its Members,¹ it provides, in Article 52 (1), that—

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

In fact, the Charter imposes upon the Members of the United Nations the duty to utilise such regional arrangements and agencies for settling local disputes before referring them to the Security Council, and lays down that the latter shall encourage the use of such agencies and arrangements for that purpose.² An important regional agreement is that concluded on September 2, 1947, at Rio de Janeiro, between

¹ See above, § 503a.

² *Ibid.* See Liang in *Grotius Society*, 31 (1945), pp. 216-231. See also on various kinds of regional agreements Freytagh-Loringhoven in *Hague Recueil*, vol. 56 (1936) (ii.), pp. 589-671, and Saba, *ibid.*, 80 (1952) (i.), pp. 639-716. The parties to an alliance may create permanent organs for co-ordinating their foreign policy, and they may undertake substantial obligations for that purpose. The States composing the so-called Little Entente (Czechoslovakia, Roumania and Yugoslavia)—an alliance which is now merely of historical interest—formed, by a Statute adopted on February 16, 1933, a Permanent Council composed of the Ministers for Foreign Affairs of those countries. See *Documents*, 1933, pp. 415-423; 1934, pp. 364-390, 402-404; Crane, *The Little Entente* (1931); Bruns in *Z.d.V.*, 3 (1933), p. 556; Hobza in *R.I.*, 3rd ser., 14 (1933), pp. 235-253; Radovanovitch in *R.G.*, 40 (1933), pp. 716-778. Küster in *Z.I.*, 50 (1935), pp. 1-14. On the Little Entente, Baltic Entente, and Balkan Entente see Sereni in *Rivista*, 28 (1936), pp. 172-208. See also, as to the defunct Balkan Entente between Turkey, Greece, Yugoslavia, and Roumania, Toynbee, *Survey*, 1930, pp. 145-156; *ibid.*, 1931, pp. 324-353,

and 1934, pp. 508-535; *Documents*, 1934, pp. 298-303; Pétravitch, *L'Union et la Conférence Balkaniques* (1934); Kaslauskas, *L'Entente Baltique* (1930); Spiropoulos in *Z.I.*, 46 (1932), pp. 193-209, and in *Nordisk T.A.*, 4 (1933), pp. 25-39; Caloyanni in *Grotius Society*, 18 (1933), pp. 97-108. Vulcan in *R.G.*, 41 (1934), pp. 419-440; *Z.d.V.*, 4 (1934), pp. 319-330; Girard in *R.I. (Paris)*, 13 (1934), pp. 258-265; Radovanovitch in *R.I.*, 3rd ser., 16 (1935), pp. 648-735; *Z.d.V.*, 5 (1935), p. 133. As to the defunct Baltic Entente see *Documents*, 1934, pp. 187-191; Toynbee, *Survey*, 1934, pp. 404-415; Kaasik in *R.G.*, 41 (1934), pp. 631-647; *A.J.*, 30 (1936), Suppl., p. 174. And see, generally, on the juridical status of the Baltic since the nineteenth century, Pusta in *Hague Recueil*, vol. 52 (1935) (ii.), pp. 109-189, and, until the nineteenth century, Taihe, *ibid.*, vol. 53 (1936) (iii.), pp. 441-527. For the Pact of the Arab League of March 22, 1945, see *A.J.*, 39 (1945), Suppl., pp. 266-272. See also Ireland in *A.J.*, 39 (1945), pp. 797-800; Mouskhéli in *R.G.*, 50 (1946), pp. 112-158; Khaduri in *A.J.*, 40 (1946), pp. 756-777; and *Bulletin of State Department*, 16 (1947), pp. 963-970.

the members of the Pan-American Union. In that Treaty, which extends the provisions of the Act of Chapultepec of 1945,¹ the Parties undertake to endeavour to settle their controversies before referring them to the United Nations. In Article 3 of the Treaty the Parties agree that an armed attack by any State against an American State shall be considered to be an attack against all the American States. Each Contracting Party undertakes to give assistance in meeting the attack (without, however, being obliged, against its will, to employ its armed forces). On the request of the State attacked, and pending the decision of the 'Organ of Consultation'² created by the Treaty,³ each Contracting Party may determine the measures which it should adopt in order to fulfil this obligation. The Brussels Treaty of Economic and Cultural Collaboration and Self-Defence of March 17, 1948,⁴ the North Atlantic Treaty of April 4, 1949,⁵ and the proposed Treaty of May 27, 1952, establishing the European Defence Community⁶ are, in a sense, alliances. So is a system of collective security, such as the Charter of the United Nations, in which the parties undertook to lend assistance for the collective repression of an attack directed against any of them.

§ 573. *Cusus fœderis* is the event upon the occurrence of *Cusus fœderis* which it becomes the duty of one of the allies to render the promised assistance to the other. Thus, in the case of a defensive alliance, the *cusus fœderis* occurs when war is declared or commenced against one of the allies. Treaties of alliance very often define precisely the event which shall be

¹ See above, p. 318.

² This is composed of the Ministers for Foreign Affairs of the Parties to the Treaty. Its decisions require for their validity a vote of two thirds of the members. The Governing Body of the Pan-American Union may act provisionally in its place. In particular, the 'Organ of Consultation' is to be convened and to decide on necessary measures if the integrity, sovereignty or independence of any American State should be threatened by an act of aggression not amounting to an armed attack or by any situa-

tion that might endanger the peace of America.

³ The Treaty applies when the attack, in the sense of Article 3, takes place within the territory of an American State or within the region bounded by the Treaty and including Canada and Greenland. Neither Canada nor Denmark (which exercises sovereignty over Greenland) are parties to the Treaty.

⁴ See vol II, § 52aa. See also Goodhart in *Hague Recueil*, 79 (1951) (n.), pp. 187-235.

⁵ *Ibid.*

⁶ See above, p. 187.

regarded as the *casus fœderis*. But many alliances have been concluded without such precise definition, and, consequently, disputes have arisen later between the parties as to the *casus fœderis*.¹ While generally it is for the State concerned to decide, in good faith and with a sense of legal obligation, whether a *casus fœderis* has arisen and whether it is bound to render assistance, a collective treaty of alliance, such as the Charter of the United Nations, may confer upon an organ created by it the competence to determine whether the *casus fœderis* has arisen and to what extent assistance is due.

II

TREATIES OF GUARANTEE AND OF PROTECTION

Vattel, ii. §§ 235-230—Hall, § 113—Phillimore, ii. §§ 56-63—Heffter, § 97—Fiore, *Code*, §§ 792-796—De Louter, i. pp. 519-529—Fauchille, §§ 882-893 (9)—Mérignhac, ii. p. 681—Nys ii. pp. 516-520—Pradier-Fodéré, ii. §§ 969-1020—Rivier, ii. pp. 97-105—Calvo, iii. §§ 1584, 1585—Martens, i. § 115—McNair, Chapter 26—Neyron, *Essai historique et politique sur les garanties* (1777)—Erich, *Ueber Allianzen und Allianzverhältnisse nach heutigem Völkerrecht* (1907)—Quabbe, *Die völkerrechtliche Garantie* (1911)—Grosch, *Der Zuang im Völkerrecht* (1912), pp. 66-75—Idman, *Le traité de garantie* (1913)—Sanger and Norton, *England's Guarantee to Belgium and Luxemburg* (1915)—Laffmasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 159-171—Bussmann, *Der völkerrechtliche Garantievertrag*, etc. (1927)—Freytagh-Loringhoven, *Die Regionalverträge* (1937)—Zietzschmann, *Die völkerrechtliche Garantie seit den Locarnoverträgen* (1938)—Erich in *Z.V.*, 7 (1913), pp. 452-476—Satow in *Cambridge Historical Journal*, 1 (1925), pp. 295-318—Headlam-Morley, *ibid.*, 2 (1927), pp. 151-170—Zwaardomaker in *Z.V.*, 23 (1930), pp. 301-316. See also above, § 167m.

Concep-
tion and
Objects of
Treaties
of Guar-
antee.

§ 574. Treaties of guarantee are conventions by which one of the parties engages to do what is in its power to secure a certain object to the other party. Guarantee treaties may be mutual or unilateral. They may be concluded by two States only, or by a number of States jointly. In the latter case, the various guarantors may give their *guarantee severally, or collectively, or both. And the

¹ Thus, during the First World War, Italy declined to recognise that a *casus fœderis* had occurred under the Triple Alliance (see *A.J.*, 8 (1914), Suppl., p. 268), and Greece refused

to recognise that a *casus fœderis* had occurred under the Greeco-Serbian Treaty of 1913 (see *A.J.*, 12 (1918), p. 312).

guarantee may be for a certain period of time only, or permanent.

The possible objects of guarantee treaties are numerous.¹ It suffices to give the following chief examples: the performance of a particular act on the part of a certain State, such as the discharge of a debt² or the cession of territory; certain rights belonging to a State; the undisturbed possession of the whole, or a particular part, of its territory; a particular form of constitution; a certain status, such as permanent neutrality or neutralisation,³ or independence,⁴ or integrity⁵; a particular dynastic succession; the fulfilment of a treaty concluded by a third State; or the pacific settlement of disputes.⁶

¹ The important part that treaties of guarantee play in politics may be seen from a glance at Great Britain's guarantee treaties. See Munro, *England's Treaties of Guarantee*, in *Law Magazine and Review*, 6 (1881), pp. 215-238.

² See Meyer-Balding in *Z.I.*, 26 (1916), pp. 387-426, and the literature there quoted.

³ See above, § 95. See also the Convention of October 10, 1921 (*L.N.T.S.*, 9, p. 212; Treaty Series, No. 6 (1922); *A.J.*, 17 (1923), Suppl., pp. 1-6) between ten States regarding the non fortification and neutralisation of the Åland Islands, and in particular Article 7 as to utilising the machinery of the League for giving effect to the guarantee; see Charles de Visscher in *R.I.*, 3rd ser., 2 (1921), pp. 580-585, below, vol. II, § 72 (8), and Strupp, *Wort.*, I, p. 22 for bibliography.

⁴ Thus Great Britain, France and Russia by the Treaty with Greece of July 13, 1863, guaranteed Greece as 'a monarchical, independent, and constitutional State' (Martens, *N.R.G.*, 16, pt. II, p. 79); for the bearing of this Treaty upon the action of the Allies in regard to Greece during the First World War see Garner, II, §§ 464-473, and I in *A.J.*, 11 (1917), pp. 46-73, 327-357; *ibid.*, 12 (1918), pp. 312-337, 562-588, 796-812; Headlam-Morley, *Studies in Diplomatic History* (1929), pp. 126-145; Strupp in *Z.V.*, 16 (1931-1932),

pp. 103-138, 237-274, 377-460; and below, vol. II, § 323, p. 557, n. 1. The United States of America guaranteed the independence of Cuba by the Treaty of Havana of May 22, 1903 (Martens, *N.R.G.*, 2nd ser., 32, p. 79); of Panama by the Treaty of Washington of November 18, 1903 (Martens, *N.R.G.*, 2nd ser., 31, p. 599); and of Haiti by Article 14 of the Treaty of Port-au-Prince of September 16, 1915 (see *A.J.*, 10 (1916), Suppl. p. 234).

⁵ Thus the integrity of Norway was guaranteed by Great Britain, Germany, France, and Russia by the Treaty of Christiania of November 2, 1907 (see Martens, *N.R.G.*, 3rd ser., I, p. 14, and 2, p. 9), a condition of this integrity being that Norway did not cede any part of her territory to any foreign Power (see Morgenskiærne in *L.Q.R.*, 31 (1905), pp. 389-396). But by a note of January 8, 1924, addressed to three of her guarantors Norway denounced this treaty, on the ground (it is understood) of its incompatibility with her obligations under the Covenant of the League (see *R.G.*, 31 (1924), p. 299, and *L.N.T.S.*, 23, p. 64). In the Peace Treaty with Italy of 1946 the Parties agreed that the integrity and independence of the Free Territory of Trieste shall be assured by the Security Council of the United Nations (Article 21 of the Treaty and Article 2 of the Permanent Statute of the Territory).

⁶ See below, p. 967, n. 4 (Locarno).

Effect of
Treaties
of Guar-
antee.

§ 575. The effect of guarantee treaties is the imposition of the duty upon the guarantors to do what is in their power in order to secure the guaranteed objects. The nature of compulsion to be applied by a guarantor for that purpose depends upon the circumstances. But the duty of the guarantor to render, even by force, the promised assistance to the guaranteed State depends upon many conditions and circumstances. Thus, first, the guaranteed State must request the guarantor to render assistance. Thus, secondly, the guarantor must at the critical time be able to render the required assistance. When, for instance, its hands are tied through waging war against a third State, or when it is so weak through internal troubles or other factors that its interference would expose it to serious danger, it is not bound to fulfil the request for assistance. So too, when the guaranteed State has not complied with previous advice given by the guarantor as to the line of its behaviour, it is not the guarantor's duty to render assistance.

Effect of
Collective
Guaran-
tee.

§ 576. In contradistinction to treaties constituting a guarantee on the part of one or more States severally, the effect of treaties constituting a *collective* guarantee on the part of several States requires special consideration. On July 4, 1867, Lord Derby maintained¹ in the House of Lords, concerning the collective guarantee by the Powers of the neutralisation of Luxemburg, that, in case of a collective guarantee, each guarantor had only the duty to act under the treaty if all the other guarantors were ready to act likewise; that, consequently, if one of the guarantors themselves should violate the neutrality of Luxemburg, the duty to act according to the treaty of collective guarantee would not accrue to the other guarantors. This opinion, although, apparently,² approved by Viscount Grey, the then

¹ *Hansard*, 3rd ser., vol. 188, cols 968-974; see Sanger and Norton, *op. cit.*, pp. 77-90, and Satow, *International Congresses* (Foreign Office Peace Handbook) (1920), pp. 134-140. Satow examines the matter in *Cambridge Historical Journal*, 1 (1925), pp. 296-316.

² *Misc. No. 6* (1914), Cmd. 7467, No. 148. The statement in question was made by Sir Edward Grey on August 2, 1914. It is not quite certain whether it was intended to endorse fully Lord Derby's interpretation.

British Secretary of State for Foreign Affairs, at the outbreak of the First World War in 1914, is hardly correct.¹ There ought to be no doubt that, in a case of collective guarantee, one of the guarantors alone cannot be considered bound to act according to the treaty of guarantee. For a collective guarantee can only have the meaning that the guarantors should act in a body. But if one of the guarantors himself violates the object of his own guarantee, the body of the guarantors remain, and it is certainly their duty to act against such faithless co-guarantor. If, however, the majority,² and therefore the body of the guarantors, were to violate the very object of their guarantee, the duty to act against them would not accrue to the minority.³

Different, however, is the case in which a number of States have *collectively and severally* guaranteed a certain object. Then, not only as a body but also individually, it is their duty to interfere in any case of violation of the object of the guarantee.⁴

¹ See Hall, § 113. Bluntschli, § 440; Quabbe, *op cit*, pp 149 159, and Hatschek, pp 257 258.

² See against this statement Quabbe, *op. cit.*, p 158.

³ See *Annuaire*, 25 (1912), p 638.

⁴ The mere fact that a number of States guarantee a certain object to another State in one and the same treaty does not make the guarantee a *collective* guarantee; for a guarantee is collective only when it is expressly stated to be so, by the use of the terms 'collective' or 'joint' or the like. In the Treaty of Alliance of January 29, 1942, between Great Britain, Soviet Russia and Iran the first two States 'jointly and severally' undertook to respect the territorial integrity, sovereignty, and political independence of Iran. *United Nations Agreements* (ed. by Schnapper, 1944), p. 262.

See above, § 92. The so called 'Locarno Pact' proved of considerable importance in the history of Europe after the First World War and special reference may therefore be made to the part of the Pact containing the Treaty of Mutual Guarantee concluded between Great Britain, Belgium, France, Germany

and Italy, dated October 16, 1925. In that Treaty all the parties 'collectively and severally guarantee . . . the maintenance of the *status quo* resulting from the frontiers between Germany and Belgium, and between Germany and France, and the inviolability of the said frontiers . . .'; further Germany and Belgium, and also Germany and France, mutually undertook 'that they will in no case attack or invade each other or resort to war against each other' (apart from certain excluded circumstances); further, Germany and Belgium, and Germany and France, undertook definite obligations with regard to the pacific settlement of disputes that might arise between them (see below, vol II § 254a). The mutual renunciation of resort to armed force and the undertaking as to the peaceful settlement of disputes were also placed under the guarantee of all the contracting parties (Articles 4 and 5), and the Council of the League was made the arbiter of the question whether or not there had been a breach of the mutual renunciation of resort to armed force (Article 4). The Treaty was to remain in force until a year after the Council, by at least a two-

Pseudo-
Guaran-
tees.

§ 577. Different from real guarantee treaties are such treaties as declare the policy of the parties with regard to the maintenance of their territorial *status quo*. Whereas treaties guaranteeing the maintenance of the territorial *status quo* engage the guarantors to do what they can to maintain such *status quo*, treaties declaring the policy of the parties with regard to the maintenance of their territorial *status quo* do not contain any legal engagements, but simply state the firm resolution of the parties to uphold the *status quo*. In contradistinction to real guarantee treaties, such treaties declaring the policy of the parties may fitly be called pseudo-guarantee treaties, but although their political value is very great they have scarcely any legal importance. For the parties do not bind themselves to pursue a policy for maintaining the *status quo*; they only declare their firm resolution to that end. Further, the parties do not engage themselves to uphold the *status quo*, but only to communicate with one another, in case the *status quo* is threatened, with a view to agreeing upon such measures as they may consider advisable for the maintenance of the *status quo*.¹

thirds majority, 'decides that the League of Nations ensures sufficient protection' to the parties (Article 8). On March 7, 1936, Germany in effect denounced the Treaty on the ground that the Treaty of Mutual Assistance, concluded on May 2, 1935, between France and Soviet Russia was incompatible with the obligations of the Treaty of Locarno. Treaty Series, No. 28 (1926), Cmd. 2764, and *Parl. Paper*, Misc. No. 11 (1925), Cmd. 2525; *A.J.*, 20 (1926), Suppl., pp. 21-33, *L.V.T.S.*, 54, p. 249; Macartney, *Survey*, 1925, n. pp. 1-66, 439-452. See also Toynbee, *Survey*, 1924, pp. 1-64; Fenchille, §§ 893 (1)-893 (9); Strupp, *Das Werk von Locarno* (1926); Webberg, *Die Sicherheitspakte* (1926); Blumhagen, *in Grotius Society*, 12 (1926), pp. 79-112; Locarno, *Eine Dokumentensammlung*, edited by Berber (1936); and literature cited below, vol. II, § 25a.

tions which were of considerable diplomatic importance before the First World War.

(1) The declarations (see Martens, *N.R.G.*, 2nd ser., 35, p. 692, and 3rd ser., I, p. 3) exchanged on May 16, 1907, between France and Spain on the one hand, and, on the other hand, between Great Britain and Spain, concerning the territorial *status quo* in the Mediterranean.

(2) The declarations (see Martens, *N.R.G.*, 3rd ser., I, pp. 17, 18) concerning the maintenance of the territorial *status quo* in the North Sea, signed at Berlin on April 23, 1908, by Great Britain, Germany, Denmark, France, Holland and Sweden, and concerning the maintenance of the territorial *status quo* in the Baltic, signed at St. Petersburg, on the same date, by Germany, Denmark, Russia and Sweden.

¹ To this class of pseudo-guarantee treaties belonged two sets of declara-

See also a declaration as to the *status quo* in the Pacific Ocean, namely, the Quadruple Pacific Treaty

III

TREATIES OF NEUTRALITY

Vattel, iii. § 107—Hall, § 208—Fauchille, § 1443—Kleen, *Lois et usages de la neutralité* (1898-1900), i. §§ 8, 11, 17—Schücking und Wehberg, pp. 687-689—Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 224-368—Jessup in *A.S. Proceedings*, 1933, pp. 134-142.

§ 577a. By the term 'treaty of neutrality' is not meant a league amongst neutral States for the mutual defence of their neutrality, such as has sometimes been formed in the past during or in view of a war, for instance, in the case of the Armed Neutralities of 1780 and 1800¹ or the League of Neutrals during the Franco-Prussian War of 1870-1871,² and was under discussion during the First World War. The term denotes a treaty between two States whereby they mutually agree that, if one of them is attacked by a third State, the other will maintain an attitude of neutrality towards the conflict. A considerable number of such treaties were concluded by States members of the League of Nations.³ The general position with regard to the United Nations is discussed below, in volume ii. of this treatise.⁴

IV

COMMERCIAL TREATIES

Moore, v. §§ 765-769—Hyde, i. § 482, ii. §§ 536, 537—Fauchille, § 928 (4)—Pradier-Fodéré, iv. §§ 2005-2033—Flare, ii. §§ 1065-1077, and *Code*, §§ 853-864—Guggenheim, pp. 96-100—De Loutch, i. pp. 532-537—Suarez, i. §§ 206-214—Anzilotti, pp. 432-439—Scelle, ii. pp. 383-395—McNair, Chapter 27—Herod, *Favoured Nation Treatment* (1901)—Calwer, *Die*

of December 13, 1921, between the United States of America, the British Empire, France, and Japan; Treaty Series, No. 6 (1921), Cmd. 2037, and *A.J.*, 16 (1922), Suppl., pp. 60-64; and the Political Agreement between France and Poland of February 19, 1921, *L.N.T.S.*, 18, p. 11.

¹ See below, vol. ii. §§ 289, 290.

² See Fauchille, § 895.

³ See e.g. the Treaty between Italy and Yugoslavia of January 27, 1924 (*L.N.T.S.*, 24, p. 33); the

Treaty between Italy and Soviet Russia of September 2, 1933 (*Documents*, 1933, p. 233); the various treaties concluded by the Baltic States (Estonia, Lithuania, Latvia and Finland) with Russia (see for a discussion of these treaties Rutenberg in *A.J.*, 29 (1935), pp. 598-615); and many others referred to by Barandon, *Le système juridique de la Société des Nations pour la prévention de la guerre* (1933), p. 346.

⁴ Vol. ii. §§ 292c-292i on 'Neutrality and the Charter of the United Nations.'

- Meistbegünstigungs in den Vereinigten Staaten von Nord-Amerika* (1902) — Glier, *Die Meistbegünstigungs-Klausel* (1906) — Barclay, *Problems of International Practice and Diplomacy* (1907), pp. 127-142 — Hornbeck, *The Most-Favoured-Nation Clause* (1910), and in *A.J.*, 3 (1909), pp. 394-422 619-647, and 798-827 — Teubner, *Die Meistbegünstigungsklausel* (1913) — Hepp, *Théorie générale de la clause de la nation la plus favorisée* (1914) — Crandall, *op. cit.*, §§ 172-177 — Culbertson, *International Economic Policies* (1925) — Isay, *Meistbegünstigungs- und Gleichberechtigungsklauseln* (1922) — Riedl, *La clause de la nation la plus favorisée* (1923) — the same, *Dérogations à la clause de la nation la plus favorisée* (1931) — Bonhoeffer, *Die Meistbegünstigung im modernen Völkerrecht* (1930) — Ito, *La clause de la nation la plus favorisée* (1930) — Ebner, *La Clause etc* (1931) — Travers, *Le droit commercial international*, v (1932) — Loridan, *La clause etc* (1935) — Rist, *Le passé et l'avenir de la clause de la nation la plus favorisée* (1936) — Hawkins, *Commercial Treaties and Agreements Principles and Practice* (1951) — Nohle in *Hague Recueil*, 1924 (II) pp. 295-462 (with a bibliography) — Visser in *R.I.*, 2nd ser. 4 (1902) pp. 66-87 159-177, and 270-280 — Oppenheim in *L.Q.R.*, 24 (1908), pp. 328-334 — Lederle and Springer in *Z.I.*, 27 (1918), pp. 154-176 and 314-322 — Isay in *Z.V.* 12 (1922-1923) pp. 276-289 — McClure in *A.J.*, 19 (1925) pp. 689-701 — Report by Wickersham for League Codification Committee on *Most Favoured Nation Clause*, *A.J.*, 22 (1928), Special Suppl., pp. 134-153 — S. Basdevant in *Répertoire* III, pp. 466-512 — Møller in *Nordisk T.A.*, 1 (1930) pp. 37-42 — Peckhardt, *ibid.*, pp. 88-95 — Bailey in *Economica*, 1932, pp. 89-115 164-179 — Nolde in *Hague Recueil*, vol. 39 (1932) (I) pp. 5-126 — the same in *R.I.* 3rd ser. 14 (1933) pp. 185-215 and in *Annuaire* 38 (1934) pp. 414-466 — Sørensen in *Revista* 24 (1932) pp. 53-82 201-226 405-427 — Amery in *Revue économique internationale* 1935 (Oct-Dec), pp. 277-306 — Swamer in *Z.o.R.*, 16 (1936) pp. 265-297 — Schwarzenberger in *B.I.* 22 (1915) pp. 96-121

Com-
mercial
Treaties
in
general

§ 578. Commercial treaties are treaties concerning the commerce and navigation of the contracting States, and concerning the subjects of these States who are engaged in commerce and navigation. Incidentally, however, they also contain clauses concerning consuls and various other matters. They are concluded either for a limited or for an unlimited number of years, and either for the whole territory of one or both parties, or only for a part of such territory. All full sovereign States are competent to enter into commercial treaties, but it depends upon the special case whether half and part sovereign States are likewise competent.¹

¹ Although competent to enter into commercial treaties, a State may, by an international compact, be restricted in its freedom with regard to its commercial policy. Thus, according to the Convention of September 10, 1912, revising the General Act of the Berlin Congo Conference

of February 26, 1885, all the States which have possessions in the Congo district must grant complete freedom of commerce to the signatory States and to those States, members of the League, which adhere to it (*L.N.T.R.*, 8, p. 21 and above, p. 467 (n.)).

The details of commercial treaties are, for the most part, purely technical, and are, therefore, outside the scope of a general treatise on International Law.¹ There are, however, two points of great importance which require discussion—namely, the meaning of coasting-trade and the meaning of the most-favoured-nation clause.

§ 579. See below.²

§ 580. Most of the commercial treaties of the nineteenth century contain a stipulation usually referred to as the most-favoured-nation clause.³ The wording of this clause is by no means the same in all treaties, and its general form has therefore to be distinguished from several others which are more specialised in their wording. According to the most-favoured-nation clause in its general form, all favours which either contracting party has granted in the past, or will grant in the future, to any third State

Meaning
of Most-
favoured
Nation
Clause.

¹ The following instances, some of which are of purely historical importance, of the policy of the 'open door' in economic matters may be mentioned (a) certain provisions in the A mandates (see above, § 94c), and as to the B mandates in Article 22, paragraph 5, of the Covenant; (b) Article 7 of the Tangier Statute of 1923 (Treaty Series No. 23 (1924); see below, vol. II § 72 (9)), (c) Article 3 of the Treaty regulating the status of Spitzbergen, February 9, 1920 (Treaty Series, No. 18 (1924); see below, vol. II § 72 (6)); (d) the Nine Power Treaty of February 6, 1922, signed at Washington 'relating to principles and policies to be followed in matters concerning China' (Treaty Series, No. 42 of 1923. *A.J.*, 16 (1922), Suppl., pp. 64-74; *Taohi in R.I.*, 3rd ser., vol. 15 (1934), pp. 555-623). (e) Article 23 (e) of the Covenant of the League ('equitable,' which does not necessarily mean equal, 'treatment for the commerce of all members of the League'); (f) Article 76 (d) of the Charter of the United Nations (equal treatment in Trust territories for all members of the United Nations—subject to the interests of the inhabitants of these territories). See also the Final Report of the Economic

Conference held by the League at Geneva in May 1927, C.E.I. 44.11)

² § 579 The respective meanings of the term coasting-trade (or cabotage) in International Law generally and in commercial treaties have already been mentioned above, § 187. They are discussed in some detail by the author in the third edition of this volume, and in *L.Q.R.*, 24 (1908), pp. 328-334.

³ Different from most-favoured-nation treatment is 'national treatment,' which means that the nationals 'of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were nationals of the second contracting party.' That is, it prevents 'discrimination against the nationals of the contracting parties, in any way, in regard to the points stipulated in the treaty.' Wickersham, *op. cit.* The most-favoured-nation clause is not necessarily restricted to matters of commerce and navigation. See the Exchange of Notes of May 21-25, 1929, between France and Great Britain laying down that the clause applies equally to the legal relations brought about by the law of landlord and tenant: Treaty Series, No. 23 (1929), Cmd. 3390.

must be granted to the other party. But the meaning of this clause in its general form became controversial when the United States of America began to conclude commercial treaties embodying it. Whereas, in former times, the clause was considered obviously to have the effect of causing all favours granted to any one State *at once and unconditionally* to accrue to all other States having most-favoured-nation treaties with the grantor, the United States contended that these favours could accrue to such of the other States only as *fulfilled the same conditions under which these favours had been allowed to the grantee*.¹ It was, therefore, the general practice until 1923 for the most-favoured-nation clause when occurring in the commercial treaties of the United States to be not in the general form, but in what is called its conditional, qualified, or reciprocal form. In this form it provides that all favours granted to third States shall accrue to the other party unconditionally, in case the favours have been allowed unconditionally to the grantee, but only under the same compensation, in case they have been granted conditionally. But the United States adhered to the view that, even if a commercial treaty contains the clause in its general, and not qualified, form, it must always be interpreted as though it were worded in its qualified form, and the Supreme Court of the United States has confirmed² this interpretation.

The conditional form raises many difficulties of interpretation. It is not easy, for example, to say what amounts to a reciprocal compensation of the same or equal value; for a concession which is valuable when made by one State may be of less value or even valueless if made by another. More-

¹ An interpretation which is reminiscent of the Anglo-American doctrine of consideration in contracts. The author (see 4th edition, § 580) regarded the American interpretation as unjustifiable, but pointed out that European writers of the authority of Martens (ii. p. 225) and Westlake (i. p. 294) approved of it. See also Fleischmann in *Liszt*, § 32, i. (4) c., and Hatzidakis, p. 264.

² See *Bartram v. Robertson*, 122

U.S. 116, and *Whitney v. Robertson*, 124 U.S. 190; Hudson, *Cases*, p. 698. See also Hyde, i. § 482, ii. §§ 536, 537 (with ample bibliography), McClure in *A.J.*, 19 (1926), pp. 689-701, and Wickersham, *op. cit.* See, on the other hand, the interesting decision of the United States Supreme Court of the Territory of Hawaii, of December 18, 1920 in *Hawaiian Trust Co. v. Smith*, 31 Hawaii, 196; *Annual Digest* 1920-1930, Case No. 251.

over, the conditional form is open to the grave objection of being unfair to countries which have very few, or very low duties, and which are thus less favourably situated for negotiating than those which possess heavy or numerous duties. As a result, however, of the recommendations of the American Tariff Commission of 1919 and of the Tariff Act of 1922, the commercial policy of the United States of America in this respect underwent an important change.¹ A large number of *modi vivendi* concluded with different countries provided for reciprocal most-favoured-nation treatment in the unconditional form.²

It is usual, however, even in the unconditional form of the most-favoured-nation clause, to except from its operation certain special situations, such as a Customs Union or local traffic in frontier zones. The exception clauses sometimes

¹ See Wickersham, *op. cit.*, and McClure, *op. cit.*

² See *A.J.*, 20 (1926), Suppl., pp. 4-21. As to some pronouncements of the Government of the United States in 1934 declaring the most-favoured-nation clause in its unconditional form to be the ultimate objective, and the Trade Agreement between the United States and Russia of July 13, 1935, see Anderson in *A.J.*, 29 (1935), pp. 653-656. See also Catudal in *A.J.*, 35 (1941), pp. 41-54, for a survey of decisions upholding the unconditional form of the clause as provided in treaties. See, in particular, *John T. Bill Co. v. United States*, *A.J.*, 35 (1941), p. 160; *Annual Digest*, 1938-1940, Case No. 197. For an interesting qualification see *The Yulu*, where a United States Circuit Court of Appeals held on June 16, 1934, that the benefits of the most-favoured-nation clause cannot be invoked in respect of illegitimate trade: *Annual Digest*, 1933-1934, Case No. 21. The International Court of Justice has had occasion in a number of cases to interpret the effect of the most-favoured-nations clause. See, e.g., the *Anglo-Iranian Oil Co. case*, *I.C.J. Reports*, 1952, pp. 108-110; the *Ambatielos case*, *ibid.*, 1953, pp. 20-22; and the case concerning *Rights of Nationals of the United*

States in Morocco *ibid.*, 1952, pp. 197-199, 204-206 in which the Court affirmed the principle that the benefits arising from the operation of the most-favoured-nation clause in a particular case cease with the termination of the treaty with the third party.

It is not possible in a general treatise on International Law to enter into the details of the history, the different forms, the application, and the interpretation of the most-favoured-nation clause. Readers must be referred for further information to the works and articles quoted above, before § 578. See also Moore, v. §§ 765-769, Crandall in *A.J.*, 7 (1913), pp. 708-723, and particularly Wickersham, *op. cit.* As to the treaties concluded by Soviet Russia see Korovin in *A.J.*, 22 (1928), pp. 754-762. See also *International Economic Reconstruction and The Improvement of Commercial Relations between Nations* (both published in 1936 by the Joint Committee of the Carnegie Endowment and the International Chamber of Commerce, and containing articles on the recent developments in the most-favoured-nation clause); Bailey in *Economica*, 1932, pp. 89-115, 160-179. See generally on conventional regulation of tariffs Janne in *Hague Recueil*, vol. 21 (1928) (i.), pp. 113-185; Lhomme in *R.G.*, 38 (1931), pp. 62-90.

also exclude concessions made to countries standing in special ethnic, historical, geographical, or other relationships. The system of tariff preferences between members of the British Commonwealth is excluded from the operation of the most-favoured-nation clause on the ground that relations between them are not international but domestic.¹

Inter-
national
Com-
modity
Agree-
ments.

§ 581. International commodity agreements constitute an important development in the practice of treaties bearing on commerce. Their purpose is mainly to regulate by common agreement the supply of certain agricultural and other products and raw materials on the part of producing States. Experience has shown that the fall in prices following upon excessive and unregulated competitive supply of such goods is productive of avoidable economic hardship and unsettlement. The following are the more important commodity agreements: (1) Agreement of May 6, 1937, concerning the Regulation of Production and Marketing of Sugar²; (2) The Final Act of August 25, 1933, of the Conference of Wheat Exporting and Importing Countries,³ and the International Wheat Agreement of April 22, 1942, between Argentina, Australia, Canada, Great Britain, and the United States⁴; (3) the Agreement of September 9, 1942, for the International Control of the Production and

¹ This is usually accomplished not by a special proviso, but by drafting the main most-favoured-nation clause so that it provides for treatment not less favourable than that enjoyed by goods produced or manufactured in any foreign country. The *General Agreement on Tariffs and Trade*, 1947 (Cmd. 7258), contains in Article 1 a provision, subject to certain exceptions, for general unconditional most-favoured-nation treatment. And see Jennings in *H.Y.*, 30 (1953), pp. 338, 339.

² Hudson, *Legislation*, vii. p. 651; Misc. No. 3 (1937), Cmd. 5461. See also Protocol of August 31, 1951, for prolonging the Agreement of 1937: *Treaty Series*, No. 1 (1952), Cmd. 8437. This Agreement was preceded by a series of inter-governmental Agreements, dating back to 1864, concerning drawbacks and bounties on sugar. See e.g. Convention of November 8,

1864, regulating the drawbacks on sugar (*B.F.S.P.*, 54, p. 29); the Brussels Convention of March 5, 1902, relative to bounties on sugar (*B.F.S.P.*, 93, p. 31); Protocol of March 17, 1912, prolonging the international union established by the Sugar Convention of 1902 (*B.F.S.P.*, 106, p. 392). See Kaufmann, *Weltzuckerindustrie und internationale und coloniales Recht* (1904), and in *Hague Recueil*, 3 (1924) (ii.), pp. 218-222. Borel in *R.I.*, 2nd ser., 5 (1912), pp. 150-158; Andrieu in *E.G.*, 19 (1912), pp. 665-686; Willk in *American Political Science Review*, 33 (1939), pp. 860-878; Amzalak in *Hague Recueil*, 78 (1951) (i.), pp. 127-210. For the Agreement of 1948 establishing the International Rice Commission see *Treaty Series*, No. 75 (1950), Cmd. 8118. And see below, p. 1000.

³ Cmd. 4449 (1934).

⁴ *A.J.*, 37 (1943) Suppl., p. 24.

Export of Tin¹; (4) the Agreement of May 7, 1934, for the Regulation of the Production and Export of Rubber²; (5) the Inter-American Coffee Agreement of November 28, 1940.³

There is some danger that commodity agreements of this kind may result in a system of international monopolies creating an artificial scarcity and perpetuating a high level of prices. Proposals have accordingly been made and, in some cases, given effect, for associating consumer countries with any such agreed regulation of production and for creating so-called buffer stocks of commodities to meet the impact of sudden changes in supply.⁴ Most of the commodity agreements have created special organs and offices for administering the schemes of regulation of production and exports.⁵ In general, however, the execution of the agreements is left to the national authorities of the contracting parties, with the result that it has proved necessary, in most cases, to provide machinery for investigating com-

¹ *Intergovernmental Commodity Control Agreements* (published by the International Labour Office, 1943), p. 95. This volume, preceded by a valuable introduction (pp. iii-lviii) and cited here as *Commodity Agreements*, contains the texts of practically all recent agreements for the control of the production and export of various commodities. See *ibid.*, pp. 73-87, on previous agreements relating to tin, and pp. 87-89 for the Agreement of January 25, 1938, on a Tin Research Scheme.

² Hudson, *Legislation*, vi. p. 856; *L.N.T.S.*, 171, p. 203.

³ *Commodity Agreements*, p. 59. See also Wickizer, *The World Coffee Economy with Special Reference to Control Schemes* (1943), and, on the Inter American Coffee Board, Ruth Masters, *Handbook of International Organizations in the Americas* (1944), pp. 93-98. The regulation of the production and export of tea is the subject of an Agreement of November 18, 1934, between the various private associations such as the India Tea Association and the corresponding Dutch companies. See *Commodity Agreements*, p. 52.

⁴ See e.g. Agreement of June 20,

1938, on the Tin Buffer Stock Scheme: *Commodity Agreements*, p. 90. The idea underlying such internationally held and controlled buffer stocks is that they should be increased when production exceeds demand and drawn upon in the converse case. By buying up stocks at a time when prices tend to be depressed because of excess of supply, buffer stocks may assist in preventing a disastrous fall in price. And see in general the exhaustive study by Staley, *Raw Materials in Peace and War* (1937).

⁵ See e.g. Article 11 (a) of the Tin Agreement concerning the powers of the International Tin Committee; Article 15 (e) of the Rubber Agreement concerning the International Rubber Regulating Committee; Article 7 (2) of the Wheat Agreement concerning the International Wheat Council. It has been suggested that these and similar organs as well as buffer stock authorities should be granted international legal personality and a measure of independence, including immunity from taxation, of the jurisdiction of the State where they are situated. As to wheat see Cole in *Bulletin of State Department*, 16 (1947), pp. 1063-1065.

plaints arising out of the administration of the agreement.¹ Moreover, it is clear that, in addition, some co-ordinating machinery of international supervision—possibly by an organ of the Economic and Social Council of the United Nations—may be indicated in order to safeguard the interests of the consuming countries² and, generally, of an expanding and orderly international economy.³

¹ The Sugar, Coffee, and Tin Agreements give the central control authorities the power to enquire into complaints as to the infringement of the agreement by the national authorities and to make recommendations. The Sugar Agreement provides also for a measure of arbitral settlement (Article 51 (c)).

² As well as the interests of labour

³ The Second World War gave rise to some agreements establishing agencies for the control of commodities as well as to ordinary purchase agreements by Governments. Most of these agreements are of transient importance, but it may be of interest to refer to some of them. See *e.g.* as to the Combined Raw Materials

Board set up in January 1942 between the United States and Great Britain, Duncan Hall in *B.Y.*, 21 (1944) pp. 168-171. Ruth Masters, *op. cit.*, 53-59, *Commodity Agreements*, pp. 158-171, Agreement of June 23, 1939, between Great Britain and the United States for the exchange of cotton and rubber, *ibid.*, p. 178, Agreement of March 26, 1943, between the United States, Canada and Great Britain establishing a reserve of industrial diamonds, *ibid.*, p. 190, and Agreement of September 3, 1942, between the United States and Brazil for the development of foodstuffs production in Brazil *ibid.*, p. 195. And see below p. 1000.

APPENDIX

SPECIALISED AGENCIES OF INTERNATIONAL CO-OPERATION AND ADMINISTRATION

(As to International Organisation and Administration generally see above
§§ 167a, 167aa. As to the International Labour Organisation see above,
§§ 340f-340gh.)

I HEALTH AND EDUCATION

(1) THE WORLD HEALTH ORGANISATION

Goodman, *International Health Organisations* (1952)—Parry in *B Y*, 24 (1947), pp. 446-462—Sharp in *A J*, 41 (1947), pp. 509-530—Chisholm in *International Conciliation Pamphlet*, 1948, No. 439—Winslow, *ibid.*—Allen in *International Organization*, 4 (1950), pp. 27-43—Ascher, *ibid.*, 6 (1952), pp. 27-50.

The most important documents of the World Health Organisation are the *Handbook of Basic Documents* and *Handbook of Resolutions and Decisions of the World Health Assembly and the Executive Board* (new editions of each of which are issued periodically) and the *Official Records of the World Health Organisation* (which include each year the *Annual Report of the Director General to the World Health Assembly and the United Nations* and the *Records of the World Health Assembly and the Executive Board*). See also the *International Digest of Health Legislation*, the *Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death* (2 vols., 1949), and the *Pharmacopoea Internationalis* (Vol. I, 1951); the *Technical Report Series* contains the findings of the technical committees. The *W.H.O. Bulletin and Monograph Series* consist primarily of medical studies.

For the constitution of the World Health Organisation see *U.N.T.S.*, 14, p. 185; *B.Y.*, 24 (1947), p. 451; Treaty Series, No. 43 (1948), Cmd. 7458.

Origin and Objects of the World Health Organisation

The Constitution of the World Health Organisation (to be referred to as W.H.O.) provides that the objective of W.H.O. shall be the attainment by all peoples of the highest possible levels of health and that, in order to achieve that purpose, W.H.O. shall act as the directing and co-ordinating authority on international health work and discharge certain more specific functions covering health in the broadest sense, including environmental hygiene and mental health. The creation of the W.H.O. thus conceived represents the culmina-

tion of a century of international efforts. The important stages in that development were marked by the first effective general convention on quarantine in 1903 ; the creation, in 1907, of the International Office of Public Health for the study of epidemic diseases, the administration of the International Sanitary Conventions and the rapid exchange of epidemiological information ; the setting up of the Health Organisation of the League of Nations with the wider mandate to take steps in matters of international concern for the prevention and control of disease ; and the enlargement of the scope of direct international assistance in the field of health by the United Nations Relief and Rehabilitation Administration.¹ The powers conferred upon W.H.O. by its Constitution and the practical scope of its activities are vastly broader than the more limited range of these earlier organisations. The programme of W.H.O. includes activities relating to malaria, tuberculosis, venereal and other communicable diseases, maternal and child health, mental health, social and occupational health, nutrition, nursing, environmental sanitation, public health administration, professional education and training, and health education of the public. This programme reflects the far-reaching developments in medical research and practice and in public health administration which have taken place since the early days of international co-operation in the field of public health.

Membership of W.H.O.

W.H.O. is intended to be a universal organisation and the provisions of its Constitution concerning membership have been framed with this end in view. The Constitution specifically declares that membership in W.H.O. 'shall be open to all States.'² Members of the United Nations may become Members by accepting the Constitution in accordance with their constitutional processes.³ Other States invited to the International Health Conference were entitled to accept it in the same manner before the First Session of the World Health Assembly.⁴ States which do not become Members in accordance with these provisions may apply to become Members and 'shall be admitted as Members when their application has been approved

¹ See Goodman, *International Health Organisations* (1952) and Barkhuus, *The Sanitary Conferences* (1943). See also Vitta, 'Le droit sanitaire international,' *Hague Recueil*, 23 (1930) (iii), pp. 578-590 ; Abt, *Vingt-cinq ans d'activité de l'Office International d'Hygiène publique* (1900-1923) ; Buchanan, *International Cooperation in Public Health : Its*

Achievements and Prospects (Milroy Lectures, 1934) ; and Woodbridge, U.S.R.A.—*The History of the United Nations Relief and Rehabilitation Administration* (1950), vol. I, pp. 331-332 and 434-442, and vol. II, pp. 20-26.

² Article 3.

³ Article 4.

⁴ Article 5.

by a simple majority of the Health Assembly.'¹ While such an application for membership has to be approved by the World Health Assembly, the Assembly appears to be under an obligation to grant admission provided a proper application is submitted to it; in the case of some other international organisations, including most of the other specialised agencies, the admitting authority acts in its discretion.² Seventy-nine States had accepted the W.H.O. Constitution by December 31, 1952. The United States accepted membership of W.H.O. 'with the understanding that, in the absence of any provision in the W.H.O. Constitution for withdrawal from the Organisation, the United States reserves its right to withdraw from the Organisation on a one-year notice' subject to meeting its financial obligations in full for the Organisation's current fiscal year.³ The validity of ratification subject to such an understanding was referred to the First World Health Assembly, which unanimously decided to accept it.⁴

The Structure of W.H.O.

The Constitution of W.H.O. lays special emphasis on the technical qualifications of the persons representing States participating in the work of the Organisation. The Health Assembly is to 'be composed of delegates representing Members.'⁵ However, the Constitution provides that 'these delegates should be chosen from among persons most qualified by their technical competence in the field of health,

¹ Article 6. This rule was to be subject to the conditions of any agreement with the United Nations. However, the United Nations-W.H.O. Agreement contains nothing on the question.

² As to the United Nations see the Advisory Opinions of the International Court in the *Admission case*: § 188c above.

³ *Official Records of W.H.O.*, No. 31, p. 383.

⁴ *Official Records of W.H.O.*, No. 13, pp. 77-80. It was suggested in the course of the discussion that the United States should not be in a more favoured position than other Members and that the Assembly should therefore lay down as a proposition of general application that any member-State may determine its membership on a year's notice, but no action was taken on this suggestion. Eight States (U.S.S.R., Ukrainian S.S.R., Byelorussian S.S.R., Bulgaria, Roumania, Albania, Czechoslovakia and

Hungary) subsequently notified W.H.O. that they no longer considered themselves Members, and two States (the Peking Government of China and Poland) notified their withdrawal: these 10 States are classified by W.H.O. as 'inactive Members.' The World Health Assembly has adopted resolutions indicating that W.H.O. 'will always welcome the resumption by these Members of full co-operation in the work of the Organisation,' and that 'it is not considered that any further action at this stage is desirable.' The legal position is therefore still open. The proposition that any Member may withdraw on one year's notice has not been formally accepted. The States which have purported to withdraw (without giving such notice) are still treated by the Organisation as inactive Members. It would presumably be open to them to resume full participation without re-admission to membership.

⁵ Article 10.

preferably representing the national health administration of the Member.¹ The Executive Board consists of 18 persons designated by as many Members. The Health Assembly, taking into account an equitable geographical distribution, elects the Members entitled to designate a person to serve on the Board. Each of these Members 'should appoint to the Board a person technically qualified in the field of health, who may be accompanied by alternates and advisers.'² The Board exercises on behalf of the whole Health Assembly the powers delegated to it by that body.³ Unlike the Members of the Executive Board of U.N.E.S.C.O.,⁴ the Members of the W.H.O. Executive Board are not elected in a personal capacity by the World Health Assembly; although not representing Governments, they are both appointed by⁵ and subject to replacement by⁶ Governments.

The emphasis placed on regional arrangements is a special feature of W.H.O. The Constitution provides that the Health Assembly shall from time to time define the geographical areas in which it is desirable to establish a regional organisation and that it may, with the consent of a majority of the Members situated within each area so defined, establish a regional organisation to meet the special needs of the area.⁷ Each regional organisation is to be an integral part of W.H.O.⁸ and is to consist of a Regional Committee and a Regional Office.⁹ Subject to the general authority of the Director-General of W.H.O., the Regional Office is the administrative organ of the Regional Committee and carries out within the region the decisions of the Health Assembly and of the Board.¹⁰ Regional Directors are appointed by the Board in agreement with the Regional Committee;¹¹ their staffs are to be appointed in a manner to be determined by agreement between the Director-General and the Regional Director.¹² There is no analogy in the Charter of the United Nations or the Constitutions of the other specialised agencies for this degree of devolution of authority. Regional organisations have been established for Africa, the Americas, South-East Asia, Europe, the Eastern Mediterranean and the Western Pacific, and all the assistance to Governments which constitutes a large part of the work of W.H.O. is given through these regional organisations.¹³

¹ Article 11.

² Article 24 of the W.H.O. Constitution.

³ Article 29.

⁴ See below, p. 988.

⁵ Article 24.

⁶ Rule 2 of the Rules of Procedure of the Executive Board. A proposal that the Board should be transformed into a body of Government representatives was considered and rejected.

⁷ Article 44.

⁸ Article 45.

⁹ Article 46.

¹⁰ Article 51.

¹¹ Article 52.

¹² Article 53.

¹³ For a survey of the existing arrangements and the manner in which they operate see *The Work of W.H.O., 1962, Official Records of W.H.O., No. 46, pp. 72-147.*

W.H.O. Regulations

W.H.O. has, within strictly defined limits, regulative powers of a unique character. In addition to having authority, analogous to that of the International Labour Organisation and the Food and Agriculture Organisation, to adopt conventions and agreements which come into force on acceptance by Members in accordance with their constitutional processes,¹ as well as the authority to make recommendations to Members with respect to any matter within the competence of the Organisation,² the World Health Assembly has been given the power to adopt regulations concerning sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; nomenclatures with respect to diseases, causes of death and public health practices: standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products circulating in international commerce; and advertising and labelling of biological, pharmaceutical and similar products in international commerce.³ Such regulations come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.⁴ No positive act is required by a State desiring to become a party to the regulations: such positive act is necessary only if it desires to reject them or notify reservations to them. The Constitution does not limit the right to notify reservations. It would therefore seem to follow that Members may notify reservations unilaterally at their discretion except in so far as the right to make such reservations can be validly and effectively limited by the inclusion of provisions on the subject in particular regulations.⁵ W.H.O. has exercised the new regulative powers entrusted to it by Article 21 of its Constitution in two important fields by adopting the Nomenclature Regulations, 1948⁶ (with Supplementary Regulations, 1949)⁷ and the International Sanitary Regulations,

¹ Articles 19 and 20 of the W.H.O. Constitution.

² Article 23 of the W.H.O. Constitution.

³ Article 21 of the W.H.O. Constitution.

⁴ Article 22 of the W.H.O. Constitution.

⁵ As Members retain the right to reject regulations there would not seem to be any objection of principle to a particular regulation providing that it must be accepted or rejected as a whole or limiting the scope of admissible reservations. This view

has been followed by the World Health Assembly in the case of the International Sanitary Regulations, in which the matter was of special importance as they have the effect of superseding and abrogating a whole series of earlier international engagements release from which is predicated upon the acceptance of new regulations. See p. 982 below.

⁶ *Official Records of W.H.O.*, No. 13, pp. 349-352.

⁷ *Official Records of W.H.O.*, No. 21, pp. 383-384.

1951.¹ The Nomenclature Regulations provide that Members of W.H.O. shall compute and publish annually for each calendar year statistics of causes of death in accordance with the relevant articles of the Regulations and in accordance with the classification nomenclature and numbering set out in the lists given in the *Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death*² annexed thereto.

The International Sanitary Regulations supersede in whole or in part 13 earlier conventions, agreements and protocols, including the basic International Sanitary Convention of 1926 and International Sanitary Convention for Aerial Navigation of 1933. They leave in force for the time being the malaria provisions of the Aerial Navigation Convention, as amended in 1944, which are to be superseded at a later date by supplementary regulations. They do not affect certain provisions of the Pan-American Sanitary Code, 1924, relating primarily to the notification of diseases through the Pan-American Sanitary Bureau. Subject to these exceptions, they re-state in a single document the international sanitary law of general application which has been developed in a long series of instruments from 1851 onwards.³ The Regulations lay down a special procedure for the

¹ *Official Records of W.H.O.*, No. 37, pp. 335-353.

² Supplement 1 to the *Bulletin of the World Health Organisation*, 2 vols. (1948-1949).

³ The following Conventions relating to health may be referred to in this connection :

Convention establishing the Health Office, December 9, 1907 : Martens, *N.R.G.*, 3rd ser., 2, p. 913 ; Treaty Series (1909), No. 6, revised by the Sanitary Convention, June 21, 1926 *L.N.T.S.*, 78, p. 229 ; *British and Foreign State Papers*, 123, p. 610 ; Hudson, *Legislation*, iii, p. 1903 ; Vitta in *Hague Recueil*, vol. 33 (1930) (iii), pp. 549-668. This Convention was in turn revised in 1944 : see Cmd. 5637. The Office was to be gradually liquidated as the result of the creation of the World Health Organisation. See also Sharp in *A.J.*, 41 (1947), pp. 509-530. And see the Protocol of July 22, 1946 : *U.N.T.S.*, 9, p. 3. As to the International Sanitary Convention of January 30, 1892, see Martens, *N.R.G.*, 2nd ser., 19, p. 261 ; as to the Cholera Convention of Dresden of April 15, 1893, *ibid.*, p. 239 ; as to the Cholera Convention of April 3, 1894,

ibid., 24, pp. 516, 553 ; as to the Plague Convention of March 19, 1897, *ibid.*, 28, p. 339, and 29, p. 495. See also Louth, *La politique sanitaire internationale* (1906), and Ullmann in *R.I.*, 11 (1879), pp. 527-531, and in *R.G.*, 4 (1897), p. 437. As to the Sanitary Convention of December 3, 1903, revising the previous cholera and plague conventions, see Martens, *N.R.G.*, 3rd ser., 1, p. 78 ; Treaty Series (1907), No. 27.

See also the following Conventions : Sanitary Convention for Aerial Navigation, April 12, 1933 : Treaty Series, No. 19 (1935), Cmd. 4938 ; Hudson, *Legislation*, vi, p. 292.

Convention for Mutual Protection against Dengue Fever, July 25, 1934 : Treaty Series, No. 37 (1935), Cmd. 5008 ; Hudson, *Legislation*, vi, p. 930.

Agreement respecting Facilities to be given to Merchant Seamen for the Treatment of Venereal Disease, December 1, 1924 : Treaty Series (1926), No. 20.

Convention for the Exemption of Hospital Ships from Harbour Dues, December 21, 1905 : see *British and Foreign State Papers*, 98, p. 624.

Convention concerning the Unification of the Pharmacopoeial Formulas for Potent Drugs, November

consideration of reservations. Reservations are not valid unless accepted by the World Health Assembly. The Regulations do not enter into force in respect of a State making a reservation until it has been accepted by the Health Assembly, or, if the Assembly objects to it on the ground that it substantially detracts from the character and purpose of the Regulations, until it has been withdrawn.¹ The Regulations become binding on future members of W.H.O. within three months from their admission, subject to the usual right of rejection or reservation.

The International Sanitary Regulations entrust W.H.O. with important functions in connection with the exchange of epidemiological information and the settlement of quarantine disputes. W.H.O. also discharges certain functions in connection with the administration of the narcotic drugs conventions transferred to it from the International Office of Public Health by a protocol² negotiated under the auspices of the United Nations amending the League of Nations conventions of 1925 and 1931 and expanded by a further United Nations protocol of 1948.³

29, 1906: see Martens, *N.R.G.*, 3rd ser., 1, p. 592; Treaty Series (1907), No. 10. On the conference of experts convened under the auspices of the League of Nations for the standardisation of sera and serological tests see *Off. J.*, 3 (1922), pp. 179, 934. For the Convention on the same subject of August 20, 1920: *L.N.T.S.*, 98, p. 125; Hudson, *Legislation*, v, p. 64. Provision was made in 1920 for a permanent organisation and secretariat: see *Off. J.*, 1929, pp. 1448, 1478; 1930, p. 738. See also Agreement between the United States and the United Kingdom of January 25, 1946, on the principles applying to the exchange of information relating to the synthesis of penicillin: Cmd. 6757.

(Convention concerning Statistics of Causes of Death, June 19, 1934. Treaty Series, No. 27 (1934), Cmd. 4715; Hudson, *Legislation*, vi, p. 839.

¹ The Health Assembly may, as a condition of its acceptance of a reservation, request the State making such reservation to undertake that it will continue to fulfil any obligation or obligations corresponding to the subject-matter of the reservation previously accepted by the State under existing conventions and agreements. If a State makes a reservation which in the opinion of the Health

Assembly does not detract substantially from an obligation or obligations previously accepted by that State under existing conventions and agreements, the Assembly may accept the reservation without requiring such an undertaking as a condition of its acceptance. If the Health Assembly objects to a reservation and the reservation is not then withdrawn, the Regulations do not enter into force with respect to the State which has made such a reservation, and any existing conventions and agreements to which it is a party remain in force for that State (Article 107). The International Sanitary Regulations came into force on October 1, 1952. Of the 89 countries concerned (the Members and Associate Members of W.H.O. and other parties to the earlier conventions which are entitled to notify their acceptance of the Regulations (Article 110)), only 25 submitted reservations. In all, 73 reservations were notified; 35 were accepted by the Fifth World Health Assembly with or without modification; 38 were not accepted.

² Protocol of December 11, 1946, amending the Agreements, Conventions and Protocols on Narcotic Drugs, *L.N.T.S.*, vol. 12, pp. 160-210.

Protocol of November 19, 1948,

W.H.O. Scientific and Professional Standards

In certain fields the standards adopted by W.H.O. are scientific and professional in character and are not made effective primarily by means of legal instruments. This is particularly the case in respect of the international standards which have been adopted for drugs and other therapeutic substances. W.H.O. has also refrained from giving the character of a legal instrument to the international pharmacopoeia¹ which has been issued in the first instance as an international standard and guide for national action on the understanding that it is not intended to be a legal pharmacopoeia in any country unless adopted by the pharmacopoeial authority of that

bringing under international control Drugs outside the scope of the Convention of July 13, 1931, *L.N.T.S.*, vol. 44, pp. 278-282; Treaty Series, No. 4 (1950), Cmd. 7874. See generally with regard to the regulation and control of use and consumption of and trade in opium and other narcotic drugs: International Opium Convention, January 23, 1912: *L.N.T.S.*, 8, p. 187; International Opium Convention, February 11, 1925: *L.N.T.S.*, 51, p. 337; Hudson, *Legislation*, iii, p. 1680; Treaty Series (1928), No. 13; International Opium Convention, February 19, 1925: *Off. J.*, 6 (1925), p. 689; Treaty Series, No. 27 (1925), Cmd. 3264; *L.N.T.S.*, 81, p. 317; Hudson, *Legislation*, iii, p. 1589; International Opium Convention, July 13, 1931: Treaty Series, No. 31 (1933), Cmd. 4415; *L.N.T.S.*, 139, p. 301; Hudson, *Legislation*, v, p. 1048; *British and Foreign State Papers*, 134, p. 361. See also the Dangerous Drugs Act, 1932 (23 Geo. 5, c. 5) (to give effect to the Convention of 1931). On the international regulation of the opium traffic see Hirschmann, *Die Opiumfrage und ihre internationale Behandlung* (1912); Dunn, *The Opium Traffic in its International Aspects* (1920); Buell, *The International Opium Conference* (1925) (World Peace Foundation Pamphlet); Willoughby, *Opium as an International Problem, the Geneva Conference, 1925* (1925); Hoijer, *Le trafic de l'opium et d'autres stupéfiants* (1925); Renborg, *International Drug Control* (1947); Hamilton Wright in *A.J.*, 6 (1912), pp. 868-889, and 7 (1913), pp. 108-139; Mandere in *Grotius*

Annuaire, 1914, pp. 125-138; Van Wettum, *ibid.*, 1927, pp. 63-78. And see Lintz, *La question des stupéfiants* (1928), and in *R.G.*, 35 (1928), pp. 571-590; Wissler, *Die Opiumfrage* (1931); Chanut, *Le régime de l'opium en droit international* (1933); Eismlohr, *International Narcotic Control* (1934); Bailey, *The Anti-Drug Campaign* (1935); Hepburn in *New York University Law Quarterly Review*, 9 (1931-1932), pp. 321-336; Hoijer in *R.I.* (Paris), 9 (1932), pp. 528-578; Wright in *A.J.*, 28 (1934), pp. 475-486; Moorshed in *Geneva Special Studies*, 11, No. 1 (1934); Staricoff in *J.C.I.L.*, 3rd ser., 18 (1936), pp. 94-100; Renborg in *A.J.*, 37 (1943), pp. 436-450. And see the Agreement of November 27, 1931, concerning the Suppression of Opium-smoking: *L.N.T.S.*, No. 4100; Hudson, *Legislation*, v, p. 1149. See also International Opium Convention, December 11, 1946, amending various previous agreements, conventions and protocols: Treaty Series, No. 35 (1947), Cmd. 7135. For a concise history see Report to the President of the United States, April 21, 1947: *Bulletin of State Department*, 16 (1947), p. 817. See also Morlock, *ibid.*, pp. 687-692. For the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, of June 26, 1936, Geneva, see Hudson, *Legislation*, vii, p. 859; *L.N.T.S.*, 198, p. 300. See also Starke in *A.J.*, 31 (1937), pp. 31-43.

¹ *Pharmacopoea Internationalis, editio prima, volumen I, Bulletin of the World Health Organisation, Supplement No. 2 (1951).*

country. In some States the pharmacopoeial authority is an official, whereas in others it is a professional or scientific body.¹

Scope of the Activities of the W.H.O.

The greatest advance made by W.H.O. on the work of earlier international health organisations has been in the extent to which its larger resources and wider competence have enabled it to develop a broader range of activities, including schemes of technical assistance to Governments, with a direct impact on public health administration and medical practice. In all these activities, the strengthening of national health administrations has been treated as a primary objective. W.H.O., like the League of Nations before it, has been acting on the view that the education and training of medical personnel is of primary importance for this purpose. W.H.O. has greatly extended and developed the policy of stimulating action in the field of health by means of technical studies by expert advisory panels and committees. The conclusions of these committees do not commit W.H.O. Their members are required to act as international experts serving the Organisation exclusively and they may not request or receive instructions from any Government or authority external to the Organisation. Rules of Procedure provide that purely scientific questions should not be submitted to a vote but that, if the members of a committee or sub-committee cannot agree, each shall be entitled to retain and express his personal opinion and that this statement of opinion shall take the form of an individual or group report which shall state the reasons for the divergence of opinion. W.H.O. discharges its functions of co-ordinating and stimulating research primarily through close co-operation between its expert committees and existing research institutions including such bodies as the Institut Pasteur in Paris and the Statens Serum Institut in Copenhagen. In exceptional cases it itself establishes or promotes the establishment of an international research centre by an appropriate scientific body on a contractual or grant basis. Illustrations of these are the Tuberculosis Research Office in Copenhagen financed and directed by W.H.O., which undertakes both field and laboratory work, and the World Influenza Centre maintained jointly by W.H.O. and the Medical Research Council of Great Britain. W.H.O. also

¹ In view of discrepancies between certain of the prescriptions of the *Pharmacopoea Internationalis* and those of the Brussels Agreements of 1906 and 1929 for the unification of the formulae of potent drugs (99 *British and Foreign State Papers*, p. 179; Martens, *N.R.G.*, 3rd ser., 1,

p. 592; Hudson, *Legislation*, v, pp. 64-83), a protocol for the termination of these agreements was signed in Geneva on May 20, 1952, in order to remove any legal barriers to general acceptance of the international pharmacopoeia.

renders services to governments in connection with the supply of essential drugs and equipment.

(ii) THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION (U.N.E.S.C.O.)

Dunn, *War and the Minds of Men* (1950)—Besterman, *U.N.E.S.C.O.* (1951)—Acher, *Programme-Making in U.N.E.S.C.O.*, 1946-1951 (1951)—Parry in *B.Y.*, 23 (1946), pp. 421-430—Maxwell Garnett in *Year Book of World Affairs*, 1 (1927), pp. 202-203—Wilson in *International Conciliation*, No. 415 (1945), No. 431 (1947), No. 438 (1948)—Tripp, *ibid.*, No. 497 (1954).

The most important documents of U.N.E.S.C.O. are the annual *Report to the United Nations*, the *Report of the Director-General to the U.N.E.S.C.O. Conference*, the *Records of the General Conference*, consisting of *Resolutions*, *Proceedings and Reports of Member States*, and the *Handbook of National Commissions* (1951). Among other U.N.E.S.C.O. publications of legal interest are the *Collection of Cultural Agreements* and the *Copyright Bulletin*. The U.N.E.S.C.O. *Official Bulletin* consists of summarised information and does not normally contain the full texts of official documents. The periodical publications of U.N.E.S.C.O. include an *International Social Science Bulletin*, *Political Science Abstracts*, and *Current Sociology*.

For the Constitution of U.N.E.S.C.O. see *U.N.T.S.*, 4, p. 275; Treaty Series, No. 50 (1946), Cmd. 6063; *B.Y.*, 23 (1946), p. 416; Sohn, *Cases and Other Materials on World Law* (1950), p. 1291

Purpose of U.N.E.S.C.O.

The purpose of U.N.E.S.C.O. is 'to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.'¹ Three main functions are assigned to U.N.E.S.C.O. by its Constitution with a view to realising this purpose. These are: collaboration 'in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication', giving a fresh impulse to popular education and to the spread of culture; and the maintenance, increase and diffusion of knowledge. With a view to advancing mutual knowledge and understanding, U.N.E.S.C.O. is to 'recommend such international agreements as may be necessary to promote the free flow of ideas by word and image.'² The contribution of the U.N.E.S.C.O. to knowledge is to be made by assuring the conservation and protection of

¹ Article I (1) of the Constitution of U.N.E.S.C.O.

² Article I (2) of the Constitution of U.N.E.S.C.O.

the world's inheritance of books, works of art, and monuments of history and science, and recommending to the nations concerned the necessary international conventions; by encouraging co-operation among nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture, and the exchange of publications, objects of artistic and scientific interest and other materials of information; and by initiating methods of international co-operation calculated to give peoples of all countries access to the printed and published materials produced by any of them.¹ In order to preserve the independence and diversity of the cultures and educational systems of the State Members, U.N.E.S.C.O. is precluded from intervening in matters which are essentially within their domestic jurisdiction.² U.N.E.S.C.O. has replaced the League of Nations Intellectual Co-operation Organisation,³ but its activities are of much broader scope.

Membership of U.N.E.S.C.O.

Membership of the United Nations carries with it the right to membership of U.N.E.S.C.O. Fifty-two Members of the United Nations have so far exercised the right of assuming membership. States not Members of the United Nations may, subject to consulta-

¹ Article I (2) (c) of the Constitution of U.N.E.S.C.O.

² Article I (3) of the Constitution of U.N.E.S.C.O. A prohibition of that nature is particularly understandable in the cultural field and to some extent reflects the position in federal states where such matters are reserved, in whole or in part, to state or provincial jurisdiction. However, while the wisdom of a constitutional injunction to caution in a field where national and religious sentiment is so strong cannot be questioned, the exact legal effect of the provision in the Constitution of the U.N.E.S.C.O. appears uncertain. The operative words are a literal transposition of the corresponding provision of the Charter of the United Nations; but the circumstances to which they apply are far from identical. It is not clear what is necessary to give action by U.N.E.S.C.O. the character of 'intervention.' *Prima facie* the kind of action normally undertaken by U.N.E.S.C.O. could only be regarded as intervention by interpreting the term far more widely than would seem proper in the case of the corre-

sponding provision of the Charter of the United Nations (see above, § 168f). It is almost equally difficult to assess the limits of domestic jurisdiction in the educational, cultural and scientific field for the purpose of a Constitution the whole object of which is to provide for international co-operation in that field. Perhaps the clause should be regarded essentially as a reminder that U.N.E.S.C.O. operates on a basis of consent and can secure results only by securing the full consent of those concerned.

³ On the whole subject see Luchaire, 'Principes de la co-opération intellectuelle internationale,' in *Hague Recueil*, 9 (1925) (iv), pp. 311-404; Bonnet, 'L'œuvre de l'Institut international de co-opération intellectuelle,' in *Hague Recueil*, 61 (1937) (iii), pp. 461-537; Zimmern, *Learning and Leadership—A Study of the Needs and Possibilities of International Intellectual Co-operation* (1928); and *Note on Intellectual Co-operation* by Gilbert Murray, in Murray, *From the League to the United Nations* (1948). See also Greaves, *The League Committees and World Order* (1931).

tion with the Economic and Social Council and the acceptance of any recommendation which it may make for the rejection of an application, be admitted to U.N.E.S.C.O., upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.¹ Sixteen States have become Members in this manner. There has been no case of a recommendation by the Economic and Social Council to reject an application. The U.N.E.S.C.O. Constitution contains no provision for withdrawal from Membership.² On the other hand, Members expelled from the United Nations automatically cease to be Members of U.N.E.S.C.O.³ Members suspended from the rights and privileges of United Nations membership are to be suspended from the rights and privileges of U.N.E.S.C.O. membership on the request of the United Nations.⁴

Structure and Methods of Work of U.N.E.S.C.O.

U.N.E.S.C.O., like the other specialised agencies, is an organisation of States. In practice, it is the least governmental in character. The U.N.E.S.C.O. General Conference consists of delegates who vote as national delegations⁵ but are appointed after consultation with National Co-operating Bodies representative of the Government and the principal national bodies interested in educational, scientific and cultural matters.⁶ The Executive Board consists of persons chosen in a personal capacity by the General Conference from among the delegates appointed by the member-States together with the President of the Conference, who sits *ex officio* in an advisory capacity.⁷ In electing the members of the Board, the Conference is to endeavour to include persons, competent in the arts, the humanities, the sciences, education and the diffusion of ideas, and qualified by experience and capacity to fulfil the administrative and executive duties of the Board. It is also to have regard to the diversity of cultures and to a balanced geographical distribution. Not more than one national of any member-State may serve on the Board at any one time, the President of the Conference excepted.⁸

¹ Article 2 (2) of the U.N.E.S.C.O. Constitution and Article 2 of the Agreement between the United Nations and U.N.E.S.C.O.

² In 1952 Poland informed U.N.E.S.C.O. that it no longer considered itself a member, and the U.N.E.S.C.O. Conference adopted a resolution reaffirming the principle of universality and inviting Poland to reconsider its decision; U.N.E.S.C.O., *Report to the United Nations*, 1952-1953, p. 165.

³ Article 2 (5) of the U.N.E.S.C.O. Constitution.

⁴ Article 2 (4).

⁵ Article IV (8) of the Constitution of U.N.E.S.C.O.

⁶ Article IV (1) of the Constitution of U.N.E.S.C.O.

⁷ Article V (1) of the Constitution of U.N.E.S.C.O.

⁸ Article V (2) of the Constitution of U.N.E.S.C.O.

The members of the Board are required to exercise the powers delegated to them by the Conference on behalf of the Conference as a whole and not as representatives of their respective Governments.¹ Each member-State is to make such arrangements as suits its particular conditions for the purpose of associating its principal bodies interested in educational, scientific and cultural matters with the work of U.N.E.S.C.O., preferably by the formation of a National Commission broadly representative of the Government and such bodies.² National Commissions or National Co-operating Bodies, where they exist, are to act in an advisory capacity to their respective delegations to the General Conference and to their Governments in matters relating to U.N.E.S.C.O. and to function as agencies of liaison in all matters of interest to it.³ Since an effective National Commission must reflect both the general traditions and the organisational structure of the intellectual life of the country concerned, there is naturally wide variety in the arrangements adopted by the 61 out of 65 member-States which had by December 31, 1952, established National Commissions, both in respect of the legal technicalities of the establishment of the Commissions and in their composition, influence, manner of operation and practical effectiveness.⁴ U.N.E.S.C.O. has also tended to operate through non-governmental organisations to a greater extent than the United Nations or the other specialised agencies. The provision in its Constitution empowering U.N.E.S.C.O. to make suitable arrangements for consultation and co-operation with such organisations explicitly provides that it 'may invite them to undertake specific tasks' and that 'such co-operation may also include appropriate participation by representatives of such organisations on advisory committees set up by the General Conference.'⁵ The General Conference is also specifically empowered to 'summon international conferences on education, the sciences and humanities and the dissemination of knowledge.' There is no limitation on the nature or composition of such conferences.⁶ These arrangements constitute an attempt to devise effective machinery for international co-operation which will respect the freedom of intellectual life and avoid undue governmental control of educational, cultural and scientific matters.⁷

¹ Article V (1) of the Constitution of U.N.E.S.C.O.

² Article VII (1) of the Constitution of U.N.E.S.C.O.

³ Article VII (2) of the Constitution of U.N.E.S.C.O.

⁴ On the whole subject see U.N.E.S.C.O., *Handbook of National Commissions*, 1951.

⁵ Article XI (4) of the Constitution of U.N.E.S.C.O.

⁶ Article IV (3).

⁷ U.N.E.S.C.O.'s basic problem from the outset has been essentially that of reconciling freedom of mind and imaginative approach to the problems of expanding intellectual frontiers with a measure of governmental control necessary in this

The Scope of Functions of U.N.E.S.C.O.

The wide terms of the purposes and functions of U.N.E.S.C.O. as formulated in its Constitution explain the great variety of its activities. It organises at the request of under-developed countries and with the financial co-operation of the Governments concerned surveys of their educational systems designed to afford guidance on future policy in that sphere. Its programme of fundamental education comprises a central clearing-house for information and fundamental education committees in many countries, the provision of technical assistance, and the maintenance of regional fundamental education centres. Its programme of free and compulsory primary education provides for assistance to member-States in the introduction of such education by regional conferences, the establishment of regional training centres for primary school teachers, and arrangements for the education of refugee children. The Field Science Co-operation Offices are designed to facilitate the co-ordination of research and the spread of knowledge by maintaining contact between the scientists and technologists in the under-developed areas and those in the main centres of scientific research. U.N.E.S.C.O. has continued and extended the work of the International Institute of Intellectual Co-operation in developing international co-ordinating bodies for the sciences and humanities. For this purpose, in addition to co-operation with existing bodies, it has stimulated the establishment of new organisations, including an International Sociological Association, an International Political Science Association, and an International Committee of Comparative Law, which have been brought together with other organisations to form an International Social Science Council.¹

sphere, for certain purposes. A series of steps have been taken by the U.N.E.S.C.O. Conference in an attempt to place on an organised basis international action in this novel sphere of social policy, including the adoption of a Statement of Methods (*Records of the General Conference of U.N.E.S.C.O.*, 5th Session, Florence, 1950, *Resolutions*, pp. 71-76), of Basic and Annual Programmes (*Records of the General Conference of U.N.E.S.C.O.*, 5th Session, Florence, 1950, *Resolutions*, pp. 15-23), of Directives concerning Relations with International Non-Governmental Organisations (*ibid.*, pp. 121-128), of Rules of Procedure concerning Recommendations to member-States and International Conventions (*ibid.*, pp. 137-139), and Rules of Procedure for the Summon-

ing of International Governmental and Non-Governmental Conferences (for the text see *Records of the General Conference of U.N.E.S.C.O.*, 7th Session, Paris, 1952, *Resolutions*, pp. 110-112).

¹ Reference may be made here to the following scientific unions set up prior to the establishment of U.N.E.S.C.O.:

Convention concerning the International Hydrographic Bureau, June 30, 1919; Statute of June 21, 1921, Monaco; Hudson, *Legislation*, i, p. 663.

Convention concerning the International Institute of Refrigeration, June 21, 1920; *L.N.T.S.*, 8, p. 66; revised on May 31, 1937; Hudson, *Legislation*, vii, p. 743; Cmd. 5747 (1938).

Geodetic Convention, December 31,

In addition to facilitating co-operation between existing research organisations, U.N.E.S.C.O. has in certain cases promoted the establishment of international research institutions as a means of providing the stimulus to the setting up of autonomous organisations directly supported by the participating States. U.N.E.S.C.O. has played a prominent part in the adoption of the Universal Copyright Convention of 1953. That Convention was agreed and opened for signature at an inter-governmental conference convened by the Swiss Federal Council on behalf of U.N.E.S.C.O. and the International Union for the Protection of Literary and Artistic Works. The preparatory work of the Convention was organised by U.N.E.S.C.O., ratifications are to be deposited with it, and it is to provide the secretariat of the Inter-governmental Committee established by the Convention in connection with problems concerning its application, operation and revision.¹ The Convention does not attempt to unify or supersede the earlier systems of protection; the difficulties of attempting to bring about a unification of the Berne²

1925: Treaty Series (1923), No. 6; *L.N.T.S.*, 79, p. 167; Hudson, *Legislation*, iii, p. 1823; renewed June 22, 1936: *L.N.T.S.*, No. 4126; Hudson, *Legislation*, vii, p. 340. The International Geodetic Association, created in 1886, the International Seismologic Association, created in 1905, and the Central Office, created in 1911, for the international hydrographic and biological investigation of the North Sea (for details see third edition of this volume, § 598), are no longer in existence. The Seismologic Association was formally dissolved in 1922, and its functions taken over by the Seismologic Section of the Union Géodésique et Géographique Internationale, a private association founded in 1919 in place of the Geodetic Association. On the Central Bureau of the Map of the World see International Map Committee, *Resolutions and Proceedings of the International Map Committee Assembled in London, 1919*, published by the General Staff of the British War Office.

Convention for the Creation of an International Office of Chemistry, October 29, 1927: Hudson, *Legislation*, iv, p. 3205. And see *ibid.*, p. 3207, for the Regulations of the International Office of Chemistry.

As to the Metric System see Convention for the Unification and Improvement of the Metric System, May

20, 1875: Martens, *N.R.G.*, 2nd ser., i, p. 663; Guillaume in *La vie internationale*, iii, pp. 5-44. This Convention was modified by the Convention of October 6, 1921: *L.N.T.S.*, 17, p. 46, Treaty Series (1923), No. 24. See also W. Kaufmann in *Hague Recueil*, 3 (1924) (ii), pp. 222-224.

See also Convention concerning International Exhibitions, November 22, 1928: Treaty Series (1931), No. 9, Cmd. 3776; *L.N.T.S.*, 111, p. 343; Hudson, *Legislation*, iv, p. 2554. It was modified by a Convention of May 10, 1948, Treaty Series, No. 57 (1951), Cmd. 8511. The Convention contains provisions relating to 'official or officially recognised international exhibitions,' i.e. exhibitions to which foreign countries are invited through the diplomatic channel, which are not held periodically, and whose main object is to show the progress of the country concerned in one or several branches of production. The Convention contains provisions concerning the frequency of exhibitions, the obligations of the inviting and participating countries, the granting of awards, and the international exhibitions bureau.

¹ Article 11 and Resolution concerning Article 11.

² Ladas, *The International Protection of Literary and Artistic Property* (1938), vol. 1, pp. 71-631.

and inter-American systems in that field¹ having proved insuperable.² Questions of copyright regulated by the Berne Convention³ and inter-American treaties will be governed by either the Berne Universal Convention or any applicable inter-American instrument, whichever is the more recent.⁴ The purpose of the Universal Con-

¹ *Ibid.*, vol. I, pp. 635-673.

² *Ibid.*, vol. II, pp. 673-679.

³ Article 17 of the Universal Copyright Convention and Appendix Declaration.

⁴ Article 18 of the Universal Copyright Convention. As to copyright see Convention for the Protection of Works of Art and Literature, September 9, 1886. This Convention was revised in 1908 (see Martens, *N.R.G.*, 3rd ser., 4, p. 590 and Treaty Series (1912), No. 19). See Wauwermans, *Les Conventions de Berne (révisées à Berlin)*, etc. (1910); and 49 & 50 *Vict.*, c. 33. For the revised Convention of June 2, 1928, see Hudson, *Legislation*, iv, p. 2463 (with a bibliography); Treaty Series, No. 12 (1932), Cmd. 4057; Ladas in *A.J.*, 23 (1929), pp. 552-569; Messina in *Hague Recueil*, 52 (1935) (ii), pp. 447-580. For the Pan-American Habana Convention concerning Literary and Artistic Copyright of February 20, 1920, revising the Buenos Aires Convention of 1910, see Hudson, *Legislation*, iv, p. 2369. In general see Orelli, *Der internationale Schutz des Urheberrechts* (1887); Thomas, *La convention littéraire et artistique internationale*, etc. (1894); Briggs, *The Law of International Copyright* (1906); Röthlisberger, *Die Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst* (1906), and in *La vie internationale*, ii (1912), pp. 201-247; Ladas, *The International Protection of Literary and Artistic Property*, 2 vols. (1939); Hackworth, ii, § 118; Ruffini in *Hague Recueil*, 12 (1926) (ii), pp. 391-569; Ostertag in *Michigan Law Review*, 25 (1926), pp. 107-123; Solberg in *Yale Law Journal*, 36 (1926), pp. 68-111. On the protection by international action of works of art against destruction in war, see Ch. de Visscher in *R.I.*, 3rd ser., 16 (1935), pp. 32-74, 246-287. On the Agreement of April 14, 1891, concerning arrangements in regard to indications of origin and the registration of trade marks see Martens, *N.R.G.*, 2nd

ser., p. 208. As to the Convention of March 20, 1883 (revised June 2, 1911, Washington): Pelletier et Vidal-Noguét, *La convention d'union pour la protection de la propriété industrielle du 20 Mars 1883 et les conférences de révision postérieures* (1902); Pillet, *Le régime international de la propriété industrielle* (1911); Ostertag in *Michigan Law Review*, 25 (1926), pp. 107-123; Rogers in *Yale Law Journal*, 36 (1926), pp. 235-244; Jaton, *La répression des fausses indications de provenance et les conventions internationales* (1926) (with an extensive bibliography). The Conferences at The Hague which took place between October 8 and November 6, 1925, and in London on June 2, 1934, introduced certain modifications in the previous Conventions: *L.N.T.S.*, 74, p. 289; Hudson, *Legislation*, iii, p. 1761; *A.J.*, 34 (1940), Suppl., p. 89. See also Jaton, *op. cit.*; Plaisant et Fernand-Jacq, *Le nouveau régime international de la propriété industrielle* (1927); and Alingh Prins in *Grotius Annuaire*, 1927, pp. 18-62. And see *L'Union Internationale pour la Protection de la Propriété Industrielle*, 1883-1933 (Berne, 1933). On the creation of a central office of patents of inventions see Chahaud in *R.I.*, 3rd ser., 2 (1921), pp. 151-160. See also Agreement concerning the Preservation or Re-establishment of the Rights of Industrial Property affected by the First World War, signed June 30, 1920: *L.N.T.S.*, 1, p. 60. There exists a separate office at Habana created by almost all the American States in 1917, and established in 1919. See also the Agreements of November 6, 1925, on Suppression of False Indications of Origin of Goods: *L.N.T.S.*, 74, p. 319; Hudson, *Legislation*, iii, p. 1782; on International Registration of Trade Marks: *L.N.T.S.*, 74, p. 327; Hudson, *Legislation*, iii, p. 1785; and on International Registration of Industrial Designs or Models: *L.N.T.S.*, 74, p. 341; Hudson, *Legislation*, iii,

vention is to supplement the existing systems of protection by defining a minimum standard of copyright protection applicable to relationships not otherwise protected.

U.N.E.S.C.O. has also been responsible for the adoption of two agreements on the international flow of information, an Agreement of July 15, 1949, to facilitate the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, and an Agreement of November 22, 1950, on the Importation of Educational, Scientific and Cultural Materials.¹

II. AGRICULTURE, TRADE AND FINANCE

(i) THE FOOD AND AGRICULTURE ORGANISATION OF THE UNITED NATIONS (F.A.O.)

Schultz (ed.), *Food for the World* (1943)—Brandt, *The Reconstruction of World Agriculture* (1945)—de Castro, *The Geography of Hunger* (1952)—Parry in *B.Y.*, 23 (1946), pp. 412-421, and 26 (1949), pp. 506-507—Piquet in *International Conciliation*, No. 412 (1945)—Hambridge, *ibid.*, No. 432 (1947)—Belshaw in *International Organization*, 1 (1947), pp. 291-306.

The most important official documents for understanding the structure and working of F.A.O. are: *United Nations Conference on Food and Agriculture, Final Act and Session Reports. First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture, Washington, 1 August 1944*, published in the United Kingdom as *Documents Relating to the Food and Agriculture Organisation of the United Nations, 15 August to 14 December 1944*, Cmd. 6590 (1945); *Constitution, Rules and Regulations of the Food and Agriculture Organisation of the United Nations*; the *Work of F.A.O. for successive years* (the Report of the Director-General

p. 1799. See also Patents and Designs (Convention) Act, 1928 (1 Geo. 5, c. 3), amending existing legislation to give effect to the Hague Convention for the Protection of Industrial Property. See *La propriété scientifique* (Reports published by the International Institute of Intellectual Co-operation, 1929); Ladaa, *The International Protection of Industrial Property* (1930); Plaisant, *Répertoire des brevets d'invention en droit international* (2nd ed., 1929); the same in *Hague Recueil*, 19 (1932) (i), pp. 357-541; Hackworth, ii, §§ 116, 117; Stringham, *Patents and 'Gebrauchsmuster'* in *International Law* (1935); Pichot in *Répertoire*, vii, pp. 94-125, and viii, pp. 615-690; Plaisant and

Fernand-Jacq, *ibid.*, ii, pp. 447-677; Weiss in *R.I.*, 3rd ser., 16 (1935), pp. 334-349. See also the General Inter-American Convention for Trade Mark and Commercial Protection of February 20, 1929, and a Protocol, of the same date, on Registration of Trade Marks: Hudson, *Legislation*, iv, p. 2642; Ladaa, *The International Protection of Trade Marks by the American Republics* (1929); *A.J.*, 23 (1929), pp. 158-182; McClure, *ibid.*, 36 (1942), pp. 383-399.

¹ For a survey of national regulations on the subject see U.N.E.S.C.O., *Trade Barriers to Knowledge—A Manual of Regulations affecting Educational, Scientific and Cultural Materials* (1951).

to the F.A.O. Conference and the United Nations); and the reports of successive sessions of the F.A.O. Conference and the F.A.O. Council. See also *Food and Agriculture Legislation*. F.A.O. publishes regularly the *State of Food and Agriculture*, a general survey of the agricultural outlook, and numerous technical studies.

For the Constitution of the F.A.O. see *B.Y.*, 23 (1946), p. 416 and 26 (1949), p. 506; Treaty Series, No. 4 (1946), Cmd. 6595; Sohn, *Cases and Other Materials on World Law* (1960), p. 1279; *A.J.*, 40 (1946), Suppl., p. 76.

Origin and Objects of F.A.O.

The Food and Agriculture Organisation is an advisory organisation designed to promote the common welfare by furthering separate and collective action 'on the part of the member-nations for the purpose of raising levels of nutrition and standards of living of the people under their respective jurisdictions, securing improvements in the efficiency of the production and distribution of all food and agricultural products, bettering the condition of rural populations, and thus collaborating towards an expanding world economy.'¹ Through it, Members are to report to one another on the measures taken and the progress achieved in these fields of action. F.A.O. is to collect, analyse and disseminate information relating to nutrition, food and agriculture.² The scope of the activities of the organisation comprises fisheries and marine products, forestry and forest products, and agricultural products which are not food (including fibres, vegetable oils and fats, hides, skins and furs, beverages, and tobacco).³ Its functions include activities relating to scientific, technological, social and economic research in the matter of nutrition, food and agriculture; the improvement of education and administration relating to nutrition, food and agriculture, and the spread of public knowledge of nutritional and agricultural science and practice; the conservation of natural resources and the adoption of improved methods of agricultural production; the improvement of the processing, marketing and distribution of food and agricultural products; the adoption of policies for the provision of adequate agricultural credit, national and international; and the acceptance of international policies with regard to agricultural commodity arrangements.⁴ Its methods of operation include furnishing such technical assistance as Governments may request, and organising, in co-operation with the Governments concerned, such missions as may be needed to assist them to fulfil the obligations arising from

¹ Preamble to the Constitution of F.A.O.

² Article I (1) of the Constitution of F.A.O.

³ Article XVI of the Constitution of F.A.O.; *First Report to the Govern-*

ments of the United Nations by the Interim Commission on Food and Agriculture, paragraphs 51 to 64.

⁴ Article I (2) of the Constitution of F.A.O.

their acceptance of the recommendations of the United Nations Conference on Food and Agriculture held at Hot Springs, Virginia, in May-June 1943.¹ The F.A.O. Conference may make recommendations concerning questions relating to food and agriculture to be submitted to member-nations for consideration with a view to implementation by national action² and submit conventions relating to food and agriculture to member-nations for consideration with a view to their acceptance by the appropriate constitutional procedure.³ The results of F.A.O. Conferences are normally recorded in a report which embodies the resolutions adopted and any other decisions taken; the main purpose of the report is to state the general sense of the Conference on the questions of policy which have been discussed. While the primary emphasis of the work of F.A.O. is upon research, the dissemination of knowledge, advisory functions and technical assistance, the *First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture*, which constitutes an authoritative commentary on the F.A.O. Constitution, envisages the possibility of F.A.O. performing certain administrative functions, particularly in the field of international credit and commodity arrangements.

F.A.O. has absorbed and superseded the International Institute of Agriculture, created in 1905,⁴ which laid the foundations of an effective international system of crop reporting and initiated a series of international conventions on agricultural subjects.⁵ F.A.O. has

¹ Article I (3) of the Constitution of F.A.O.

² Article IV (2) of the Constitution of F.A.O.

³ Article IV (3) of the Constitution of F.A.O.

⁴ As to the Convention for the Creation of an International Agricultural Institute of June 7, 1905, see Martens, *N.R.G.*, 3rd ser., 2, p. 238; Treaty Series (1910), No. 17. See Hobson, *The International Institute of Agriculture* (1931) (a comprehensive work); Louis-Dop in *La vie internationale*, i (1912), pp. 428-454; Weith-Knudson in *Festschrift für Lupo Brentano* (1916); Dop, *La nouvelle condition juridique de l'Institut international d'Agriculture* (1932). See also the International Convention for the Creation of an Agricultural Mortgage Credit Company of May 21, 1931; League Doc. C. 434 (1). M. 181 (1). 1931. II. A.; Hudson, *Legislation*, v, p. 969. And see for the history of the Convention Doc. 375. M. 155. 1931.

II. A. See also Cohen in *Revue économique internationale*, 23 (1933) (iii), pp. 105-125, and Vimaux, *ibid.*, pp. 127-145. On international co-operation in the sphere of agriculture see Houdier, *L'organisation internationale de l'agriculture* (1935); Vitta in *Hague Recueil*, 56 (1936) (ii), pp. 305-412.

⁵ For a general survey of these conventions see Vitta, 'La coopération internationale en matière d'agriculture,' *Hague Recueil*, 56 (1936) (ii), pp. 350-370. Conventions on measures against *phylloxera vastatrix*, an insect which attacks vines (see 69 *British and Foreign State Papers*, p. 619; Martens, *N.R.G.*, 2nd ser., 6, p. 261; with amendments in 73 *British and Foreign State Papers*, p. 323; Martens, *N.R.G.*, 2nd ser., 8, p. 435; and 81 *British and Foreign State Papers*, p. 1311; Martens, *N.R.G.*, 2nd ser., 15, p. 570) and on the protection of birds useful to agriculture (102 *British and Foreign State*

been entrusted with a wider mandate. This was due in large measure to the widespread interest aroused by the *Interim and Final Reports of the League of Nations Mixed Committee on the Relation of Nutrition to Health, Agriculture and Economic Policy* in 1936¹ and 1937² and to the stimulus to more effective international action given by the extent to which Governments were called upon to assume direct responsibility for food supplies during and after the Second World

Papers, p. 967; Martens, *N.R.G.*, 2nd ser., 30, p. 686) have been concluded in 1878 (amended in 1881 and 1889) and in 1902 respectively. The Institute sponsored further conventions dealing with the organisation of the fight against locusts (Convention of October 31, 1920: Hudson, *Legislation*, i, pp. 502-504), the protection of plants (Convention of April 16, 1929: Hudson, *op. cit.*, iv, pp. 2680-2692), the unification of the methods of sampling and analysis of cheeses (Convention of April 26, 1934: Hudson, *op. cit.*, vi, pp. 840-851), the unification of the methods of analysis of wines in international commerce (Convention of June 5, 1935: Hudson, *op. cit.*, vii, pp. 88-100), the unification of the methods of keeping and operating cattle herds (Convention of October 14, 1936: Hudson, *op. cit.*, vii, pp. 426-439). The conventions on the protection of the names of cheeses (Convention of June 10, 1930: Hudson, *op. cit.*, v, pp. 593-601) and the marking of eggs in international commerce did not come into force (Convention of December 11, 1931: Hudson, *op. cit.*, v, pp. 1164-1169). As to locusts see also the Convention of February 22, 1949: Treaty Series, No. 53 (1949), Cmd. 7783. Another group of conventions on veterinary questions, adopted under the auspices of the League of Nations, deals with the campaign against contagious diseases of animals (Convention of February 20, 1935: Hudson, *op. cit.*, vii, pp. 1-13), the transit of animals, meat and other products of animal origin (Convention of same date, *ibid.*, pp. 13-27) and the export and import of animal products (Convention of same date, *ibid.*, pp. 27-29)—a question already dealt with to some extent from another point of view by the agreements concerning the exportation of hides and skins and of bones, adopted in the course of the

action attempted by the League for the abolition of import and export prohibitions and restrictions (Agreement of July 11, 1923: Hudson, *op. cit.*, iv, pp. 2495-2522)). See also Convention for the Protection of Fauna and Flora, November 8, 1933. This Convention provides for the establishment of national parks and other reserves within which hunting is prohibited, for the institution of regulations concerning the hunting of fauna outside such areas, for the regulation of the traffic in trophies, and prohibition of certain methods of killing and hunting of fauna: Treaty Series, No. 27 (1936), Cmd. 5280; *L.N.T.S.*, No. 3995; Hudson, *op. cit.*, vi, p. 594. See also Hayden, *International Protection of Wild Life* (1942). And see Exchange of Notes of November 26, 1932, between Great Britain and Italy concerning traffic in game trophies across the frontier between Kenya and Italian Somaliland: Treaty Series, No. 1 (1933), Cmd. 4232. See also the Convention for the Protection of Plants, of April 16, 1929, ratified by a number of States, including Italy: Hudson, *op. cit.*, iv, p. 2680.

¹ *The Problem of Nutrition*, vol. I, *Interim Report of the Mixed Committee*, Series of League of Nations Publications, 1936, II, B. 3; vol. II, *Report on the Physiological Bases of Nutrition*, Series of League of Nations Publications, 1936, II, B. 4; vol. III, *Nutrition in Various Countries*, Series of League of Nations Publications, 1936, II, B. 5; vol. IV, *Statistics of Food Production, Consumption and Prices*, Series of League of Nations Publications, 1936, II, B. 6.

² *Nutrition: Final Report of the Mixed Committee*, League of Nations Document A.13.1937. II.A; see also Boyd Orr, *Food, Health and Income* (1936), and Aekroyd, *Human Nutrition and Diet* (1937).

War.¹ These new tendencies found expression in the Final Act of the United Nations Conference on Food and Agriculture² convened at Hot Springs, Virginia, in May-June 1943 which, without representing a formal commitment by Governments, furnished the basis for the formulation of the Constitution of F.A.O. which became effective on October 16, 1945, by acceptance by twenty States.

Structure of F.A.O.

The F.A.O. Constitution, as amended in 1947, 1950 and 1951, provides for an F.A.O. Conference and a Council of F.A.O. The F.A.O. Conference, in which each member-nation is represented by one delegate, determines the policy and approves the budget of the organisation and exercises the other powers conferred upon it by the Constitution. These include the power to make recommendations to member-nations and to international organisations as well as the power to approve and submit to member-nations conventions, agreements and regulations or supplementary agreements designed to implement any convention or agreement. Such regulations come into force for each member-nation after acceptance by it in accordance with its constitutional procedure. The Conference may amend the Constitution, no further act of acceptance by Members being required unless the amendment involves new obligations. In its original form the F.A.O. Constitution provided for an Executive Committee, consisting of members of the Conference appointed as individuals to exercise powers delegated to them by the Conference on behalf of the whole Conference and not as representatives of their respective Governments. In 1947 there was substituted for the Executive Committee a Council of Government Representatives with an independent chairman.

The F.A.O. operates to a considerable extent through regional bodies, such as the International Rice Commission, Regional Fisheries Councils (namely, the Indo-Pacific Fisheries Council, the Latin-American Fisheries Council, and the General Fisheries Council for the Mediterranean—each constituted by formal international agreement), Regional Forestry and Forest Products Commissions, and Regional Nutrition Meetings and Conferences.³

¹ See McKee Rosen, *The Combined Boards of the Second World War*, and Woodbridge, *U.N.R.R.A.—The History of the United Nations Relief and Rehabilitation Administration*.

² For the Final Act see *United Nations Conference on Food and Agriculture, Hot Springs, Virginia, May 18 to June 3, 1943, Final Act and Section Reports* (U.S. Government Printing Office, Washington, 1943).

³ F.A.O. has not attempted to assume the executive responsibilities of a number of miscellaneous bodies working in its general field, such as the International Commission for Agricultural Industries, the International Office of Epizootics, the International Seed-Testing Association, the International Sericulture Commission, the Permanent International Bureau of Analytical Chem-

(ii) **THE PROPOSED INTERNATIONAL TRADE ORGANISATION (I.T.O.),
THE GENERAL AGREEMENT ON TARIFFS AND TRADE (G.A.T.T.)
AND COMMODITY COUNCILS.**

Alexandrowicz, *International Economic Organisations* (1952), pp. 22-75, 161-192—Willoox, *A Charter for World Trade* (1949)—Fawcett in *B.Y.*, 24 (1947), pp. 376-382, and in *Year Book of World Affairs*, 1951, pp. 269-289—Fein in *International Organisation*, 2 (1948), pp. 39-52—Bronz in *Harvard Law Review*, 62 (1949), pp. 1089 *et seq.*—Plaisant in *R.G.*, 54 (1950), pp. 161-224.

The (primarily economic) literature on the subject is voluminous.

G.A.T.T. has issued a collection of *Basic Instruments and Selected Documents* in two volumes (1952) with two Supplements (1953 and 1954). And see Cmd. 7212 (1947) and 7258 (1947) and *U.N.T.S.* 55, p. 194, for the General Agreement on Tariffs and Trade.

The Havana Charter and the Proposed International Trade Organisation

There is no fully developed international organisation in existence which discharges in respect of trade and industrial development functions comparable to those entrusted to F.A.O. in respect of agriculture. The Havana Charter,¹ which has so far failed to secure the ratifications necessary to bring it into force, provides for the establishment of an International Trade Organisation for the fulfilment of the following objects: the promotion of high levels of employment, production and demand; fostering industrial and general economic development, particularly of countries still in the early stages of industrial development, and encouraging the international flow of capital for productive investment; liberalising commercial policies in respect of tariffs, preferences, quotas, customs formalities and similar matters; checking restrictive business practices and monopolistic control and supervising in the public interest inter-

istry of Human and Animal Foods, the International Institute of Refrigeration and the International Wine Office. The questions covered for certain areas by Regional Fisheries Councils within the framework of F.A.O. are dealt with in respect of other areas and types of catch by autonomous Commissions, such as the International Commission for the North-West Atlantic Fisheries, the International North Pacific Fisheries Commission and the International Whaling Commission (see above, §§ 284-285b).

A comprehensive instrument, the International Plant Protection Convention of December 5, 1951, has been adopted under F.A.O. auspices in substitution for earlier conventions

(see above, p. 995). This Convention provides for the legislative, technical and administrative measures to be taken to control pests and diseases of plants and plant products and to prevent their introduction and spread across national boundaries; it makes provision for the maintenance of national plant protection organisations; it defines requirements applicable to the import of plants and plant products; and it provides for co-operation with F.A.O. in a world reporting service of plant diseases and pests. By July 1953, 37 Governments had signed the Convention and it was in force for 15 signatories and 2 adhering Governments.

¹ See above, p. 323.

governmental commodity control agreements. I.T.O. is intended to operate through a conference of representatives of Members of the Organisation, an Executive Board of Members of the Organisation selected by the Conference, commissions established by the Conference and reporting to the Executive Board, commodity study groups and conferences consisting of representatives of Members of the Organisation interested in the production or consumption of, or trade in, commodities, and Commodity Councils established by individual commodity control agreements. Commodity Councils are to consist of one representative of each country participating in the control agreement establishing the Council. The voting power of these representatives is to be so apportioned that in decisions on substantive matters participating countries which are mainly interested in imports of the commodity concerned have together a number of votes equal to that of those mainly interested in obtaining export markets for the commodity. The Havana Charter embodies an elaborate, though occasionally nominal, code of obligations covering wide sectors of economic policy.¹

The General Agreement on Tariffs and Trade

Pending the coming into force of the Havana Charter, a General Agreement on Tariffs and Trade, concluded at Geneva on October 30, 1947,² provides for the provisional observance by the parties of the general principles of the Charter. It embodies reciprocal arrangements for the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce. The Agreement contains provisions concerning general most-favoured-nation treatment, freedom of transit, anti-dumping and countervailing duties, valuation for customs purposes, formalities connected with importation and exportation, marks of origin, the publication and administration of trade regulations, the elimination and non-discriminatory administration of quantitative restrictions, subsidies, non-discriminatory treatment on the part of state-trading enterprises, and similar matters. The Agreement also provides that representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of the Agreement which involve joint action and, generally, with a view to facilitating its operation and furthering its objectives.

Commodity Councils

International commodity policy is covered by special arrangements for particular commodities supplemented by an Interim

¹ See above, p. 324. And see, in *World Affairs*, 1951, pp. 286-289, particular, Fawcett in *Year Book of* ² *U.N.T.S.*, 56, p. 194.

Co-ordinating Committee for International Commodity Arrangements to facilitate governmental consultation and action. Three major commodity agreements are of special importance—the International Wheat Agreement, 1949, renewed in 1952, the International Sugar Agreement, 1953, and the International Tin Agreement, 1953, each of which establishes a Commodity Council.¹ Commodity agreements for rubber and coffee have also been in force at various times.² In view of the danger that commodity agreements of this kind may result in a system of international monopolies creating an artificial scarcity and perpetuating a high level of prices, increasing importance has been attached to associating consumer countries with any such agreed regulation of production and creating so-called 'buffer stocks' of commodities to meet the impact of sudden changes in supply or demand. The idea underlying such internationally held and controlled buffer stocks is that they should be increased when production exceeds demand and drawn upon in the converse case.³

(iii) THE INTERNATIONAL MONETARY FUND

Halm, *International Monetary Co-operation* (1945)—Hoilperin, *International Monetary Reconstruction* (1945)—Gutt, 'Les accords de Bretton Woods et les institutions qui en sont issues,' in *Hague Recueil*, 72 (1948) (i), pp.

¹ See above, § 581. And see Alexandrowicz, *International Economic Organisations* (1952), pp. 179-182.

² See *Inter-Governmental Commodity Control Agreements* published by the International Labour Office (1943), which contains the texts of practically all agreements for the control of the production and export of various commodities concluded during the period 1930-1943, together with an Introduction discussing the problems involved. The *Interim Co-ordinating Committee for International Commodity Arrangements* issues annually a *Review of International Commodity Problems* which is published by the United Nations.

³ See above, § 581. See also the following conventions in the field of international economic co-operation :

International Convention for the Publication of Customs Tariffs of July 5, 1890 : Martens, *N.R.G.*, 2nd ser., 18, p. 558 ; Convention for the Establishment of International Commercial Statistics* of December 31,

1913 : Martens, *N.R.G.*, 3rd ser., 11, p. 304 ; Treaty Series (1924), No. 15 ; Convention concerning Economic Statistics of December 14, 1928. See Treaty Series, No. 43 (1930), Cmd. 3710 ; *L.N.T.S.*, 110, p. 171 ; Hudson, *Legislation*, iv, p. 2575. The Parties undertook to compile and publish statistics concerning, *inter alia*, external trade, occupations, agriculture, livestock, forestry and fisheries, mining and metallurgy, industry and index-numbers of prices, in accordance with a protocol attached to the Convention. For the Protocol of December 12, 1948, amending the Convention of 1928 see *U.N.T.S.*, 20, p. 229 and Treaty Series, No. 76 (1950), Cmd. 8731. See also the Convention for the Standardisation of Methods of Presenting the Results of the Analysis of Human and Animal Foods of June 9, 1931 : *L.N.T.S.*, 149, p. 61 ; Hudson, *Legislation*, v, p. 1039. For the former Convention of October 16, 1912, see *British and Foreign State Papers*, 114, p. 580.

67-165—Bergen, *Money in a Maelstrom* (1951), pp. 140-201—Nussebaum, *Money in the Law, National and International* (1950), pp. 525-546—Harrod, *The Life of John Maynard Keynes* (1951), pp. 525-585—Alexandrowicz, *International Economic Organisations* (1952), pp. 123-138—Rasminsky in *Foreign Affairs*, July 1944, pp. 598 *et seq.*—Mann, *The Legal Aspect of Money* (2nd ed., 1953), pp. 378-387 and in *B.Y.*, 22 (1945), pp. 251-258—Parry in *B.Y.*, 23 (1946), pp. 430-457—Knorr in *International Organisation*, 2 (1948), pp. 19-39—Kindelberger, *ibid.*, 5 (1951), pp. 32-47—Mikesell in *International Conciliation*, No. 455 (1953).

For the constitution of the International Monetary Fund see *B.Y.*, 23 (1946), pp. 433-451; Treaty Series, No. 21 (1946), Cmd. 6885; *U.N.T.S.*, 2, p. 39; Sohn, *Cases and Materials on World Law* (1950), p. 1216.

For the proceedings of the Bretton Woods Conference see United States Department of State, *Proceedings and Documents of the United Nations Monetary and Financial Conference*.

The Fund publishes each year an *Annual Report*, a *Summary of Proceedings of the Annual Meeting of the Board of Governors*, and an *Annual Report on Exchange Restrictions*. It also publishes regularly a *Balance of Payments Yearbook*, *International Financial Statistics* (monthly), an *International Financial News Survey* (weekly), and *Staff Papers* (a periodical which publishes research papers produced by the staff of the Fund, some of which have legal interest). There is a collected edition of the *Resolutions of the Board of Governors* issued from time to time. A full bibliography prepared by the staff of the Fund is available in *Staff Papers*, vol. I, No. 3, pp. 471-491 and vol. III, No. 1, pp. 171-180. See also Hexner, *ibid.*, February 1950, on the relations between the International Trade Organisation and the International Monetary Fund.

Purpose of the Fund

The International Monetary Fund is partly a focal point for international monetary co-operation and the maintenance of orderly exchange arrangements and partly a device for granting financial assistance to meet temporary maladjustments in their balance of payments to Members accepting a definite code of conduct in exchange transactions. This includes far-reaching obligations of mutual consultation before action having international repercussions is taken. The purposes of the Fund are defined by its Articles of Agreement as being: (a) to promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems; (b) to promote exchange stability, to maintain orderly exchange arrangements among Members, and to avoid competitive exchange depreciation; (c) to assist in the establishment of a multilateral system of payments in respect of current transactions between Members and in the elimination of foreign exchange restrictions which hamper the growth of world trade; (d) to give confidence to Members by making the resources of the Fund avail-

able to them under adequate safeguards, thus providing them with the opportunity to correct maladjustments in their balance of payments without resorting to measures impairing national or international prosperity; and (e) in accordance with the above, to shorten the duration and lessen the degree of absence of equilibrium in the international balances of payments of Members. One of the purposes which is to guide the Fund in all its decisions is that of facilitating the expansion and balanced growth of international trade and thus contributing to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all Members as primary objectives of economic policy. The Articles of Agreement of the Fund lay down the important principle that the Fund shall not object to proposed changes in the par value of a currency 'because of the domestic social or political policies of the Member proposing the change.'

Origin and Membership of the Fund

The Fund Agreement represents a compromise between United Kingdom proposals for an International Clearing Union (the Keynes Plan¹) and a United States proposal for an International Stabilisation Fund² which was based primarily on the United States proposals but influenced in detail by certain features of the Keynes Plan and by intermediate Canadian proposals.³ The basic difference between the two Plans was that, whereas the Keynes Plan was based on the principle of bank credit and would have authorised the proposed Clearing Union to create such credit in its discretion for the purpose of financing exchange transactions between Members, the United States Plan provided for a fund consisting of particular currencies which could finance such transactions only by the sale for the currency of each Member of the amounts of other currencies at its disposal.

The Articles of Agreement of the Fund were approved by the Final Act of the Bretton Woods Conference on July 22, 1944. The original Members of the Fund are those of the countries represented at the Bretton Woods Conference whose Governments accepted membership before December 31, 1945. Twenty-nine States

¹ Cmd. 6437 (1943); the text of the Keynes Plan is also available in *Department of State, Proceedings and Documents of the United Nations Monetary and Financial Conference*, vol. II, pp. 1548-1573.

Financial Conference, vol. II, pp. 1536-1547.

² For the text see *Department of State, Proceedings and Documents of the United Nations Monetary and*

Tentative Draft Proposals of Canadian Experts for an International Exchange Union, Ottawa, June 9, 1943; the text is also available in *Department of State, Proceedings and Documents of the United Nations Monetary and Financial Conference*, vol. II, pp. 1575-1596.

accepted membership prior to that date. Membership is open to the Governments of other countries at such times and in accordance with such terms as may be prescribed by the Fund. In September 1953 there were fifty-six Members of the Fund. Any Member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office; withdrawal becomes effective on the date such notice is received. If a Member fails to fulfil any of its obligations under the Agreement, the Fund may declare the Member ipeligible to use its resources. If after the expiration of a reasonable period the Member persists in its failure, or a difference between a Member and the Fund concerning an unauthorised change in the par value of its currency continues, the Member may be required, by a decision of the Board of Governors, to withdraw from membership of the Fund.

Structure of the Fund

The Fund operates through a Board of Governors, Executive Directors and a Managing Director. All the powers of the Fund are vested in the Board of Governors, consisting of one Governor and one alternate appointed by each Member in such a manner as it may determine and serving for five years subject to the pleasure of the Member. The Board of Governors may delegate to the Executive Directors authority to exercise any powers of the Board with certain exceptions specified in the Articles of Agreement. The Board has, in fact, delegated to the Executive Directors authority to exercise all of the powers of the Fund with the exception of the reserved powers. The Executive Directors are responsible for the conduct of the general operations of the Fund. There are not less than 12 Directors, five being appointed by the five Members having the largest quotas, five being elected by the Members not entitled to appoint Directors other than the American Republics, and two being elected by the American Republics not entitled to appoint Directors; the minimum number of Directors may be increased so as to provide representation for new Members of the Fund and in certain other circumstances. Elections of Executive Directors take place every two years. The Executive Directors select a Managing Director who is chief of the operating staff of the Fund and conducts, under the direction of the Executive Directors, the ordinary business of the Fund. Voting in both the Board of Governors and the Executive Board is based on quotas.¹

¹ Each Member of the Fund has 250 votes plus one additional vote for each part of its quota equivalent to 100,000 U.S. dollars; the initial quotas range

from half a million U.S. dollars to 2,750 U.S. dollars, thus giving a voting range from 255 to 27,750 votes.

Status and Immunities of the Fund

The Articles of Agreement contain detail provisions as to the status, immunities and privileges of the Fund. The Fund possesses full juridical personality and, in particular, the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings. The Fund, its property and its assets, wherever located and by whomsoever held, enjoy immunity from every form of legal process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract. Property and assets of the Fund, wherever located and by whomsoever held, are immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action. The archives of the Fund are inviolate. To the extent necessary to carry out the operations provided for in the Agreement, all property and assets of the Fund are free from restrictions, controls and moratoria. The official communications of the Fund are to be accorded by Members the same treatment as the official communications of other Members. The Fund, its assets, property and income, and its operations and transactions authorised by the Agreement, are to be immune from all taxation and all customs duties, and the Fund is to be immune from liability for the collection or payment of any tax or duty. No taxation of any kind is to be levied on any obligation or security issued by the Fund, including any dividends or interest thereon, by whomsoever held, which discriminates against such obligation or security solely because of its origin or if the sole jurisdictional basis for such taxation is the place of currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund. Such obligations or securities are therefore not exempted from tax when in the hands of holders not entitled to exemption but are protected against discriminatory taxation or taxation based on the place or nature of the operation of the Fund as such.

International Monetary Relationships

The Fund Agreement embodies a system of principles and devices designed to govern international monetary relationships. It provides for the maintenance of orderly exchange arrangements on the basis of par values of currencies. It lays down rules governing the use of the resources of the Fund by purchases of currency for the correction of temporary maladjustments in balances of payments. It contains provisions concerning the regulation of capital transfers and the apportionment of scarce currencies. It embodies general obligations designed to promote the elimination of restrictions on current payments and the convertibility of foreign-held balances.

Each Member undertakes to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other Members and to avoid competitive exchange alterations. The mechanism adopted for this purpose is the assignment to the currency of each Member of a par value expressed in terms of gold as a common denominator or in terms of the United States dollar of the currencies of weight and fineness in effect on July 1, 1944. The initial par values for original Members were agreed between the Members concerned and the Fund primarily on the basis of prevailing rates of exchange. The par values for the currencies of subsequently admitted Members are determined by agreement between the Member and the Fund in accordance with the terms of the resolution admitting the Member. As stated, each Member has obligations under the Agreement to maintain orderly exchange arrangements on the basis of the par values. Firstly, gold purchases are to be based on par values. The Fund is to prescribe a margin above and below par value for transactions in gold by Members, and no Member is to buy gold at a price above par value plus the prescribed margin or to sell gold at a price below par value minus the prescribed margin. Secondly, foreign exchange dealings are to be based on parity; the maximum and minimum rates for exchange transactions between the currencies of Members taking place within their territories are not to differ from parity by more than one per cent. in the case of spot transactions or, in the case of other exchange transactions, by a margin which exceeds the margin for spot exchange transactions by more than the Fund considers reasonable. Each Member undertakes, through appropriate measures consistent with the Agreement, to permit within its territories exchange transactions between its currencies and the currencies of other Members only within these limits. The mechanism of par values is designed to secure stability but not rigidity. The Agreement therefore makes provision for changes in par values. A Member is not to propose a change in the par value of its currency except to correct a fundamental disequilibrium. A change in the par value of a Member's currency may be made only on the proposal of the Member and after consultation with the Fund. The general effect of the arrangements governing changes in par values may be described as being that neither the Fund nor the Member can, by taking or declining to take action, leave the other without a remedy, but that each, in determining its course of action, must take into account the probable attitude and reaction of the other. If the Fund does not concur in a proposed change in the par value of a currency, the Member can in the last resort make the change unilaterally, but if the Member does so it becomes ineligible to use the resources of the Fund unless the Fund

otherwise determines, and it is liable to be required, after the expiration of a reasonable period, to withdraw from the Fund. The system is one of checks and balances so designed that while the Fund is not given, and in the present stage of development of international organisation and international economic and financial relationships cannot properly be given, final authority over national policies concerning currency depreciation, these policies no longer result from unilateral decisions which no international authority is formally entitled to appraise or, if necessary, to counteract.¹

Interpretation of the Fund Agreement

The Articles of Agreement provide that any question of interpretation of the provisions thereof arising between any Member and the Fund or between any Members of the Fund shall be submitted to the Executive Directors for their decision, any Member, not entitled to appoint an Executive Director, which is particularly affected being entitled to send a representative to attend the meeting at which the matter is under consideration. In any case in which the Executive Directors have given a decision, any Member may require that the question be referred to the Board of Governors whose decision shall be final. Pending the result of the reference to the Board, the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors. Whenever a disagreement arises between the Fund and a Member which has withdrawn, or between the Fund and any Member during liquidation of the Fund, such disagreement is to be submitted to arbitration by a tribunal of three arbit-

¹ There are certain limiting factors which determine the nature and extent of the contribution which the Fund can make to the maintenance of monetary stability. The first is the size of its resources. As of April 30, 1952, these amounted to 8,153.5 million United States dollars, of which approximately 1,500 million had been paid in gold, 750,000 in payments of 1/100 of 1 per cent. made in dollars, a further 2,000 million in dollars representing the United States subscription, and 3,750 million in other currencies, 870 million being still receivable. The total amount available in gold and dollars therefore represented a proportion of less than 50 per cent. of the total reduced by each new admission to the Fund, the remainder being distributed over some 50 different currencies. The second is the fluid character of the Fund, which implies that a Member having re-

course to the resources of the Fund soon exhausts its rights to buy foreign currencies unless it is in a position to repurchase its own currency. The Fund was framed on the assumption that different currencies would be in short supply at different times. The Fund was not designed to rectify a long-term disequilibrium in the balance of payments between different parts of the world. The third limiting factor, which is closely related to the second, is that the Fund rests upon certain assumptions concerning the liberalisation of commercial policy which are still far from having been fulfilled. The circumstances in which the Fund has in fact been called upon to operate are so different from those originally envisaged that it has been necessary to continue to apply arrangements provided for in the Fund Agreement in respect of the post-war transitional period.

rators, one appointed by the Fund, another by the Member or withdrawing Member, and an umpire who, unless the parties otherwise agree, is to be appointed by the President of the International Court of Justice. There has been no occasion for the submission of a disagreement to arbitration, but the Executive Directors have given a number of interpretations. These are regularly reported to the Board of Governors, but there has been no case of an appeal against an interpretation to the Board.

Although the Fund, in contrast to the Bank, enjoys immunity from every form of judicial process except to the extent that it expressly waives its immunity, and although proceedings relating to the Fund Agreement in a court of law by or against the Fund itself are therefore improbable, the Fund Agreement may affect the rights and obligations of private persons in litigation in a number of cases with the result that municipal courts may be called upon to invoke the provisions of the Fund Agreement or to consider its possible effects.¹ They may sometimes hesitate in such cases to express any view concerning the interpretation of the Agreement on account of the interpretation provisions of the Agreement itself.² Among the questions which have been the subject of decisions in municipal courts may be mentioned par values and rates of exchange,³ the unenforceability of certain exchange contracts,⁴ and the international recognition of capital controls as defeating certain private claims.⁵

(IV) THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

The Bank publishes each year an *Annual Report* and *Summary Proceedings of the Annual Meeting of the Board of Governors*.

For the literature on the Bank see above, p. 1000. See also Sohn, *Cases and Materials on World Law* (1950), p. 1251—Alexandrowicz, *International*

¹ On the whole subject see Joseph Gold, 'The Fund Agreements in the Courts,' in *International Monetary Fund, Staff Papers*, vol. I, No. 3, pp. 315-333, and vol. II, No. 3, pp. 482-498.

² Cf. *Kahler v. Midland Bank Ltd.* [1948] 1 All E.R. 819.

³ *Setton et al. v. Land Bank of Egypt, Journal des Tribunaux Mixtes*, No. 4052, March 23/24, 1949, p. 45; *Chilean Electric Co. v. State Railway Enterprises*, *Revista de Derecho*, Concepción, Chile, vol. XVI, No. 70, Oct./Dec., 1949, pp. 509-584; *Simonaer v.*

Community of Jette St. Priné, *Journal des Tribunaux Bruxelles*, No. 3808, 1 May, 1949, p. 260; see also Gold, *op. cit.*, vol. I, No. 3, pp. 316-323.

⁴ Cf. *Zivnostenska Banka National Corporation v. Frankman* [1949] 2 All E.R. 671 at p. 676; for a number of cases from various countries see Gold, *op. cit.*, vol. I, No. 3, pp. 323-333 and vol. II, No. 3, pp. 490-492.

⁵ *Catz and Lipps v. S.A. Union Versicherung*, *Jurisprudence du Port d'Anvers*, vols. 7-8 (1949), p. 321, and Gold, *op. cit.*, vol. II, No. 3, pp. 492-494.

Economic Organisations (1953), pp. 139-160—Basch in *International Conciliation*, No. 455, February 1950.

For the constitution of the Bank see Treaty Series, No. 21 (1946), Cmd. 6885; *B.Y.*, 24 (1947), p. 462; *U.N.T.S.*, 2, p. 134.

Purposes and Membership of the Bank

The purposes of the International Bank for Reconstruction and Development are defined by its Articles of Agreement¹ as being, *inter alia*: (a) to assist in the reconstruction and development of territories of Members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs, and the encouragement of the development of productive facilities and resources in less-developed countries; (b) to promote private foreign investment by means of guarantees or participation in loans and other investments made by private investors, and, when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, the necessary finances for productive purposes out of its own capital, funds raised by it and its other resources; (c) to promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of Members.²

The original Members of the Bank are those Members of the Fund who accepted membership in the Bank before December 31, 1945. Twenty-eight States accepted membership prior to that date. Membership is open to other Members of the Fund at such times and in accordance with such terms as may be prescribed by the Bank. In September 1953 there were fifty-six Members of the Bank. A Member may withdraw at any time by submitting a notice in writing to the Bank at its principal office; withdrawal becomes effective on the date such notice is received.

¹ Adopted at Bretton Woods on July 22, 1944, and signed at Washington on December 27, 1945.

² The authorised capital stock of the Bank is 10,000 million United States dollars, of which \$8,453,500,000 had been subscribed by June 30, 1952. Only 20 per cent. of the subscribed capital is payable or subject to call as needed by the Bank for its operations, and only this percentage and certain sums placed to reserve are available for direct loans out of its own funds; of this 20 per cent. only 2 per cent. is payable by all Members

in gold or United States dollars, the remaining 18 per cent. being payable, when calls are made, in the currency of the Member and utilisable subject to its consent to transactions in that currency. The remaining 80 per cent. is subject to call only when required to meet obligations of the Bank in connection with loans out of funds raised in the market of a Member or otherwise borrowed by the Bank and loans made by private investors through the usual investment channels guaranteed in whole or in part by the Bank.

Structure and Lending and Borrowing Powers of the Bank

The Bank operates through a Board of Governors, Executive Directors and a President. Its structure, organisation and voting arrangements resemble so closely those of the Fund that it is unnecessary to recapitulate them in detail here. There are, however, certain differences which require mention: An important practical role is played by the loan committees which are required by the Agreement to report on proposed loans. These are appointed by the Bank. Each committee includes an expert selected by the governor representing the Member in whose territories the project is located and one or more Members of the technical staff of the Bank. There is an important distinction between the immunities of the Bank and those of the Fund in respect of judicial process. Action may be brought against it only in a court of competent jurisdiction in the territories of a Member in which it has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions may be brought by Members or persons acting for or deriving title from Members. The property and assets of the Bank are immune from all forms of seizure or execution before the delivery of final judgment against the Bank. These provisions are a natural reflection of the fact that, whereas the Fund is an instrumentality of Governments for adjusting certain of their currency relations, the Bank is by its nature a party to financial and legal relationships with private investors on a large scale. In other respects, the status, immunities and privileges of the Bank correspond to those of the Fund. The resources and facilities of the Bank are to be used exclusively for the benefit of Members, with equitable consideration to projects for development and reconstruction alike. Each Member is to deal with the Bank only through its treasury, central bank, stabilisation fund or other similar fiscal agency, and the Bank is to deal with Members only by or through those agencies.¹

Interpretation of the Bank Agreement

The Articles of Agreement provide that any question of interpretation of the provisions thereof arising between any Members of the Bank shall be submitted to the Executive Directors for their decision.² In any case in which the Executive Directors have given

¹ Its relationships with its Members are thus taken out of purely political channels with no direct responsibility for financial policy. This provision does not prevent the Bank, in exercising its powers to buy, sell and

guarantee securities, from dealing with any person or legal entity in the territories of any Member.

² Article IX (a) of the Articles of Agreement.

a decision, any Member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.¹

(v) THE BANK FOR INTERNATIONAL SETTLEMENTS

Treaty Series, No. 6 (1931), Cmd. 3766—*L.N.T.S.*, 104, p. 441—Hudson, *Legislation*, v, p. 307 (with a detailed bibliography)—the same in *A.J.*, 24 (1930), pp. 561-566—Otle, *La Banque internationale* (1929)—Einzig, *The Bank for International Settlements* (1930)—Karanikas, *La Banque des Règlements Internationaux* (1931)—Beitzke, *Die Rechtsstellung der Bank für internationalen Zahlungsausgleich* (1932)—Dulles, *The Bank for International Settlements at Work* (1932)—Schlüter, *Die Bank für internationalen Zahlungsausgleich* (1932)—Fischer Williams in *A.J.*, 24 (1930), pp. 665-673—Cereti in *Rivista di diritto pubblico*, 23 (1931), pp. 169-193—Trotabas in *R.I.*, 3rd ser., 12 (1931), pp. 61-84—Canina in *Hague Recueil*, 37 (1931) (iii), pp. 294-306—Griziotti, *ibid.*, vol. 42 (1932) (iv), pp. 353-466. And see Treaty Series, No. 25 (1937)—Hudson, *Legislation*, vii, p. 404—*L.N.T.S.*, 197, p. 31, for the Protocol of July 30, 1936, regarding the Immunities of the Bank for International Settlements. These attach not only to its own property and assets but also to those entrusted to it in accordance with banking practice. On the Protocol see Hudson in *A.J.*, 32 (1938), pp. 128-134.

The Bank for International Settlements, although established by inter-governmental agreement, is essentially an agency of co-operation between central banks. Originally created primarily to act as trustee for the management of reparation annuities payable by Germany after the First World War, the Bank quickly developed a wider usefulness on the basis of provisions in its Statutes authorising it to promote the co-operation of central banks, to provide additional facilities for international financial operations, and to act as trustee or agent in regard to international financial settlements entrusted to it under agreements with the parties concerned. The Bretton Woods Conference of 1944 recommended its liquidation, but it has been found convenient to maintain it and it now discharges important new functions in connection with the operation of the European Payments Union. Its relationship with Governments has, in practice, been substantially modified as the result of increased governmental control of central banking and the assumption by treasuries and other government agencies of functions previously regarded as being primarily the responsibility of central banks.²

¹ Article IX (b) of the Articles of Agreement.

² As the Bank for International Settlements has wide powers to undertake central banking operations of an international character for which

III. TRANSPORT AND COMMUNICATIONS

(i) THE INTERNATIONAL CIVIL AVIATION ORGANISATION
(I.C.A.O.)

Lemoine, *Traité de Droit Aérien* (1947), especially §§ 76-99, 136-158, 170, 534-456—Shawcross and Beaumont, *Air Law* (2nd ed., 1951), §§ 49-78—McNair, *Law of the Air* (2nd ed., 1954)—Pépin in *Hague Recueil*, 71 (1947) (ii), pp. 481-545—Jennings, *ibid.*, 75 (1949) (ii), pp. 513-586—Lissitzyn, *International Air Transport and National Policy* (1942)—Mance, *International Air Transport* (1943)—Tomba, *International Organisation in European Air Transport* (1936)—Parry in *B.Y.*, 23 (1946), pp. 457-466. And see the bibliography printed above, p. 516.

I.C.A.O. issues *Proceedings* of the Assembly and the Council and of various Committees, including the Legal Committee, a *Report of the Council* to each session of the Assembly, *International Standards and Recommended Practices* (consisting of annexes to the International Civil Aviation Convention), *Reports of Regional Air Navigation Meetings* and their Committees, *Reports of other Conferences*, and technical reference publications.

The Constitution of the International Civil Aviation Organisation forms part of the Chicago Convention of October 7, 1944, on International Civil Aviation. For the text see: Cmd. 6614 (1945); *U.N.T.S.*, 15, p. 295; *B.Y.*, 23 (1946), p. 460; Sohn, *Cases and Materials on World Law* (1950), p. 1253.

Aims and Functions of I.C.A.O.

The aims of the International Civil Aviation Organisation created by the International Civil Aviation Convention of December 7, 1944,¹ which has superseded the International Commission for Air Navigation established by the Convention on the Regulation of Aerial Navigation of October 13, 1939,² are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport. These aims are to: (a) ensure the safe and orderly growth of international civil aviation throughout the world; (b) encourage the arts of aircraft design and operation for peaceful purposes; (c) encourage the

there is no equivalent in the powers of any of the new organisations, it seems probable that it will continue to play an important part in the general structure of international organisation. The Bank is administered by a Board consisting of the Governors for the time being of the central banks of certain specified countries.

¹ See above, § 197*et*. See also

Shawcross and Beaumont, *Air Law* (2nd ed., 1951), §§ 49-78; Maurice Lemoine, *Traité de Droit Aérien* (1947), especially §§ 76-99, 136-158, 170, 534-546.

² See A. Roper, *La Convention internationale portant Règlementation de la Navigation aérienne du 13 octobre 1919*.

development of airways, airports and air navigation facilities for international civil aviation ; (d) meet the needs for safe, regular, efficient and economical air transport ; (e) prevent economic waste caused by unreasonable competition ; (f) ensure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international air lines ; (g) avoid discrimination between contracting States ; (h) promote safety of flight in international air navigation ; and (i) promote generally the development of all aspects of international civil aeronautics. The specific functions entrusted to I.C.A.O. relate primarily to safety standards and the provision of adequate technical facilities for air navigation. I.C.A.O. is responsible for keeping up to date the technical annexes to the International Civil Aviation Convention which constitute a navigation code for the air. If it is of opinion that the airports or other air navigation facilities, including radio and meteorological services, of a contracting State are not reasonably adequate for the needs of international air services, I.C.A.O. may consult with the State directly concerned and other States affected with a view to the improvement of such facilities. It may, at the request of a contracting State, provide for all or part of the cost of improvements, maintain and administer any or all of the navigation facilities required for the operation of international air services, or provide for technical assistance in the supervision * and operation of airports and other facilities.¹ I.C.A.O. has not been given authority to operate air services or to fix frequencies of flights and rates. Nor has general agreement been reached on the extent to which foreign countries may put down and take on passengers, mail and cargo, but various functions concerning air transport are assigned to I.C.A.O. by the Air Services Transit Agreement and Air Transport Agreement signed concurrently with the International Civil Aviation Convention.² I.C.A.O. is to publish information relating to the advancement of air navigation and the operation of international air services. It may conduct research into all aspects of air transport and air navigation which are of international importance. Each contracting State undertakes that its international airlines shall file with I.C.A.O. traffic reports, cost statistics and financial statements showing, *inter alia*, all receipts and their sources.

¹ Financial and technical aid in the provision of air navigation facilities and services has been provided for by Agreements of November 25, 1946, and May 12, 1949, on North Atlantic Ocean Weather Stations, and by Agreements concluded by I.C.A.O.

with Iceland on September 10, 1948, and with Denmark on September 9, 1949, providing for the maintenance of certain air navigation services in Iceland and, in Greenland and the Faeroes respectively.

² See above, § 197*ab*.

Structure of I.C.A.O.

I.C.A.O. operates through the following agencies: an Assembly of all contracting States meeting annually; a Council, which is a permanent body responsible to the Assembly and which consists of a President, who is the Chief Executive Officer of the Organisation, and representatives of contracting States elected by the Assembly; and various subsidiary bodies, including an Air Navigation Commission and an Air Transport Committee, technical divisions of the Air Navigation Commission and Regional Air Navigation Meetings, and a Legal Committee which has replaced the International Technical Committee of Legal Experts on Air Law which functioned from 1925 to 1939.

The International Civil Aviation Convention provides that in electing members of the Council the Assembly shall give adequate representation to the States of chief importance in air transport, to States which make the largest contribution to the provision of facilities for international civil air navigation, and to States whose designation will ensure that all the major geographical areas of the world are represented on the Council. No special procedural arrangements are provided to ensure the application of these elastic criteria.

The Navigation Code of the Air

The annexes to the International Civil Aviation Convention embody international standards and recommended practices and procedures for air navigation. Such annexes may be adopted or amended by the Council by a two-thirds majority vote, but are not effective if disapproved within three months, or any longer period prescribed by the Council, by a majority of the contracting States. They are so drafted as to distinguish between standards, which in general consist of those specifications the uniform application of which is recognised as necessary for the safety or regularity of international air navigation, and recommended practices the uniform application of which is recognised as desirable. The contracting States are required to conform to the standards in accordance with the Convention. They are bound to notify the Council in case they find it impossible to comply with the standards. In the case of the recommended practices the obligation of contracting States is to endeavour to conform to them. The annexes deal with personnel licensing, rules of the air, meteorological codes, aeronautical charts, air-ground communications, operation of aircraft in scheduled international services, aircraft nationality and registration marks, airworthiness of aircraft, aeronautical telecommunications, air traffic services, search and rescue, accident investigation, aero-

dromes, aeronautical information services, and measures to facilitate the handling of passengers and goods at airports.

(ii) THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANISATION (I.M.C.O.)

Salter, *Allied Shipping Control* (1921)—Rosen, *The Combined Boards of the Second World War* (1951)—Marx, *International Shipping Cartels* (1953)—Parry in *B. Y.*, 23 (1946), pp. 491-495, and 25 (1948), pp. 437-457.

The *Final Act and Related Documents of the United Nations Maritime Conference* have been published by the United Nations.

For the Constitution see *U.N.T.S.*, 11, p. 107 (concerning the International Maritime Consultative Council); *B. Y.*, 25 (1948), p. 437.

Functions of the I.M.C.O.

A Convention for the creation of an Inter-Governmental Maritime Consultative Organisation was opened for signature or acceptance in March 1948. It had received by September 1, 1953, fifteen of the twenty-one ratifications necessary to bring it into force, including the ratifications of seven States with a total tonnage of not less than 1,000,000 gross tons each. The purpose of the proposed Organisation is to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters affecting shipping engaged in international trade; to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation; to promote the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; to provide for the consideration of matters concerning unfair restrictive practices by shipping concerns and of any matters concerning shipping that may be referred to I.M.C.O. by any organ of the United Nations or a specialised agency; and to provide for the exchange of information among Governments on matters under consideration by I.M.C.O.¹ It is specifically provided that the functions of the Organisation are consultative and advisory.² In matters which appear to I.M.C.O. capable of settlement through the normal processes of international shipping business, it is to make recommendations to that effect. When, in the opinion of I.M.C.O., any matter concerning unfair restrictive practices by shipping concerns is incapable of settlement through the normal processes of international shipping business,

¹ Article 1 of the I.M.C.O. Convention.

² Article 2.

or has in fact so proved, and provided it shall first have been the subject of direct negotiations between the Members concerned, the Organisation shall, at the request of one of these Members, consider the matter.¹

The Convention also specifies that assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade.² The purpose of these limitations is apparent. It is to ensure that the activities of I.M.C.O. do not involve increased governmental regulation of the economies of shipping or interfere with national shipping policies which may be related to national development, balance of payments and security considerations. Even within these limitations there is scope for a wide range of useful action by I.M.C.O. However, it is important to bear in mind that the mandate of I.M.C.O., while not excluding some measure of consultation and exchange of information among Governments in regard to the economic problems of shipping,³ does not include the whole field of international shipping problems or even all of the problems relating to shipping in respect of which a substantial measure of international co-operation has been achieved at various times in other ways. There are, however, certain provisions which permit some measure of progressive extension of the action of I.M.C.O. if circumstances so warrant. This applies notably to a provision for the consideration by I.M.C.O. 'of any matters that may be referred to it by an organ or specialised agency of the United Nations,' in virtue of which the General Assembly or the Economic and Social Council, or perhaps a specialised agency, could presumably entrust I.M.C.O., within the limits of its consultative and advisory character, with responsibilities in respect of a wider range of matters concerning shipping. It is not yet possible to judge how far the creation of I.M.C.O. will affect earlier arrangements for international co-operation in respect of shipping matters, such as the steps taken for the unification of maritime law;⁴ the measures for the promotion of safety of life at sea, including the International Regulations for Preventing Collisions at Sea, the International Code of Signals, the Safety of Life at Sea Conventions and the International Load Line Convention;⁵ and the action taken by the League of Nations Organisation for Communications and Transit in respect of such matters as the right to fly a maritime flag,⁶ freedom of transit,

¹ Article 4.

² Article I (b).

³ See below, p. 1017.

⁴ See above, § 265a.

⁵ See above, § 265.

⁶ See above, § 258.

the international régime of maritime ports,¹ the unification of buoyage and lighting of coasts and the unification of tonnage measurement.²

Membership and Structure of I.M.C.O.

Membership of I.M.C.O. is open to all States, subject to certain procedural requirements.³ Members of the United Nations and other States invited to the United Nations Maritime Conference may become Members by becoming parties to the Convention by signature or acceptance.⁴ Any other State may apply to become a Member and shall be admitted provided that, upon the recommendation of the I.M.C.O. Council, its application has been approved by two-thirds of the Members other than Associate Members.⁵ Any Member of the Organisation may withdraw by giving 12 months' notice at any time after the expiration of 12 months from the entry into force of the Convention.⁶ No State or territory may become or remain a Member contrary to a decision of the General Assembly of the United Nations.⁷

I.M.C.O. is to operate through an Assembly consisting of representatives of all the Members,⁸ a Council, a Maritime Safety Committee, and such subsidiary organs as may be necessary. The general powers entrusted to it for the achievement of its purposes are : to consider and make recommendations on matters remitted to it⁹ ; to provide for the drafting of conventions or other suitable instruments, to recommend these to Governments and to inter-governmental organisations, and to convene such conferences as may be necessary¹⁰ ; and to provide machinery for consultation among Members and the exchange of information among Governments.¹¹ There is provision for the transfer to I.M.C.O. of functions within its scope from other organisations or from Governments discharging such functions under the terms of an international instrument.¹² The powers of the Assembly, regular sessions of which are to be held once every two years,¹³ are limited in an unusual manner. It is required to refer matters to the Council for the formulation of any recommendations or instruments thereon ; any recommendations or instruments submitted by the Council to the Assembly which are not accepted by the Assembly are to be referred

¹ See above, § 190c.

² See above, § 265.

³ Article 5 of the I.M.C.O. Convention.

⁴ Articles 6, 7 and 57 of the I.M.C.O. Convention.

⁵ Non-self-governing territories may be Associate Members under certain conditions.

⁶ Article 50.

⁷ Article 11.

⁸ Article 13.

⁹ Article 3 (a).

¹⁰ Article 3 (b).

¹¹ Article 3 (c).

¹² Article 49.

¹³ Article 14.

back to the Council for further consideration, with such observations as the Assembly may make.¹ Regulations concerning maritime safety are recommended to Members for adoption by the Assembly but must have been referred to it by the Maritime Safety Committee through the Council.² The Assembly may refer to the Council for consideration or decision any matters within the scope of the Organisation, except that it may not delegate the function of making recommendations to Members for the adoption of regulations concerning maritime safety.

The Council is so composed as to secure strong representation of the Governments of the nations with the largest interest in providing international shipping services and those with the largest interest in international seaborne trade. It is to consist of six Governments in each of these categories, two Governments elected by the Assembly from the Governments of other nations having a substantial interest in providing international shipping services and two Governments elected by the Assembly from the Governments of other nations having a substantial interest in international seaborne trade.³ The original composition of the Council is determined by an annex to the Convention and subsequent changes in the classification of Governments require the concurring votes of a majority of the existing Members of the Council providing shipping services or interested in seaborne trade, as the case may be.⁴ The Council is to receive the recommendations and reports of the Maritime Safety Committee and to transmit them to the Assembly and, when the Assembly is not in session, to the Members for information, together with the comments and recommendations of the Council. Matters within the scope of the Maritime Safety Committee are to be considered by the Council only after obtaining the views of the Maritime Safety Committee thereon.⁵ In addition to discharging administrative and financial responsibilities, the Council performs all the functions of the Organisation between sessions of the Assembly except the function of making recommendations to Members for the adoption of regulations concerning maritime safety.⁶

The Maritime Safety Committee is to consist of 14 members elected by the Assembly from the Governments of nations having an important interest in maritime safety, of which not less than eight are to be the largest ship-owning nations and the remainder are to be elected so as to ensure adequate representation of the Governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in

¹ Article 16 (h).

² Article 16 (i).

³ Article 17.

⁴ Article 18.

⁵ Article 23.

⁶ Article 27.

the carriage of large numbers of berthed or unberthed passengers, and of major geographical areas.¹ The Maritime Safety Committee has the duty of considering any matter within the scope of the Organisation and concerned with aids to navigation, construction and equipment of vessels, manning from the point of view of safety, rules for the prevention of collisions, handling of dangerous cargoes, marine safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue, and any other matters affecting maritime safety.² The Committee is to provide machinery for performing any duties assigned to it by the Convention or by the Assembly, or any duty within its scope assigned to it by any other inter-governmental instrument.³ The Committee is to maintain such close relationship with other inter-governmental bodies concerned with transport and communications as may further the object of I.M.C.O. in promoting maritime safety and facilitate the co-ordination of activities in the fields of shipping, aviation, telecommunications and meteorology with respect to safety and rescue.⁴ The Committee is to hold regular meetings once a year⁵ and, through the Council, to submit to the Assembly proposals made by Members for safety regulations or for amendments to existing safety regulations, together with its comments or recommendations thereon, and to report to the Assembly on its work.⁶

(III) THE UNIVERSAL POSTAL UNION

A useful account of the development of the Universal Postal Union will be found in *L'Union Postale Universelle—Sa Fondation et son Développement, 1874-1949*, published by the Bureau international de l'Union postale in 1949. An annotated edition of the conventions, regulations and agreements of the Union was published by the International Bureau in 1949 in three volumes under the title *Les Actes de l'Union Postale Universelle Remises à Paris, 1947, et Annotées par les soins du Bureau international*, a new edition, based on the 1952 revision of the Acts, is in preparation. The report submitted annually to the United Nations and published as an Economic and Social Council document contains a review of current activities and useful information and is also available in the monthly journal of the International Bureau, *Union Postale*, which in 1953 was in its 78th year. The documents of successive Universal Postal Congresses are published by the International Bureau, the most recent being *Documents du Congrès de Bruxelles, 1952*, 8 vols. For the text of the original 1874 Convention see Martens, *N.R.G.*, 2nd ser., 1, pp. 651-659; for the

¹ Article 28.

² Article 29 (a)

³ Article 29 (b).

⁴ Article 29 (c).

⁵ Article 30.

⁶ Article 31.

text of the 1939 revision, which represents the stage of development reached immediately before the Second World War, see Hudson, *International Legislation*, vol. VIII, pp. 303-347. For the text of the Convention of 1947 see Treaty Series No. 57 (1949), Cmd. 7704; *B.Y.*, 25 (1948), pp. 465-472. An English text of the 1952 revision prepared by the British Post Office has been published by the Universal Postal Union. The following are also of interest: Sly, *The Genesis of the Universal Postal Union* (1927), International Conciliation Pamphlet, No. 233; Blayac, *Origine, évolution et organisation de l'union postale universelle* (1932); Diena, *L'Union Postale Universale* (1950); Boisson, *La Société des Nations et les bureaux internationaux des Unions universelles, postale et télégraphique* (1932); Haekworth, iv, §§ 359-361; Törkel in *B.Y.*, 10 (1929), pp. 171-180, and in *R.I.*, 3rd ser., 12 (1931), pp. 120-130; Akzin in *A.J.*, 27 (1933), pp. 651-674.

Purpose and Achievements of the Universal Postal Union

The purpose of the Universal Postal Union, which constitutes a single postal territory for the reciprocal exchange of correspondence, is to secure the organisation and improvement of international postal services and to promote in this sphere the development of international collaboration.¹ The letter post, including airmail, is governed by the provisions of the Universal Postal Convention itself and the detailed regulations annexed thereto; other services form the subject of agreements binding only upon those Members of the Union which have acceded to them. The Universal Postal Union is not itself an operating agency. It does not maintain post offices or handle mail on an international scale. Its function is to keep up to date and to administer the code of rules which makes it possible to provide an efficient international postal service through co-operation in the handling of international mail or postal services. These continue to be national but operate under common international rules.

The progress achieved in this sphere may be measured by the contrast in the position in 1874, when the Universal Postal Union was established, and that in 1954. In 1874 postal rates were high, complex and in some respects uncertain. Great Britain had nine different postal rates for other European countries; there were nine different postal routes in use from Russia to Japan, with eight different sets of rates. With few exceptions, post-cards, which were a recent innovation, could only be sent internationally at letter rates. The weight and size permitted for printed matter and parcels varied with the destination and route to be used. In some cases correspondence could be pre-paid for only part of the journey. The rules applicable to insufficiently pre-paid correspondence were far from

¹ Article 1 of the Universal Postal Convention as revised in 1952.

uniform. Practice in regard to registered and express letters varied widely. The arrangements in regard to the transit rates payable between administrations were as complex as those in regard to postal rates.¹ In 1954, 94 postal administrations were Members of the Universal Postal Union and as such bound by the Convention and detailed regulations. These lay down uniform rules governing every aspect of the letter post, including charges, weights, sizes, prepayment of postage, unpaid and under-paid correspondence, international reply coupons, express delivery, redirection, undeliverable items, customs control, registered items, allocation of charges, transit charges, and the make-up, transfer and routing of mails. There were special rules concerning airmail correspondence, including rules concerning air conveyance charges and steps to be taken in the event of an accident in course of conveyance. In addition to these general provisions, there were a series of special services governed by agreements binding only on the Members of the Union which have acceded to them. There were agreements concerning insured letters and boxes, postal parcels, postal money orders and postal travellers' cheques, transfers to and from postal cheque accounts, cash-on-delivery items, the collection of bills, and subscriptions to newspapers and periodicals. The Convention and Agreements, with the detailed regulations thereto, constitute a comprehensive and detailed code of postal regulations the essential parts of which are of world-wide operation. The so-called Annotated Code,² which consists of these instruments with annotations concerning questions in regard to their application dealt with in the Records of the Universal Postal Union Congress and in circulars issued by the Universal Postal Union, is a convenient handbook of world law on postal matters.

Structure and Methods of Work of the Universal Postal Union

Traditionally, the Universal Postal Union has operated through periodical Congresses and Conferences and *ad hoc* commissions, routine business being entrusted to the International Bureau. However, when the Convention was revised in 1947 provision was made for an Executive and Liaison Commission, which is to meet in principle once a year. The policy-making organ of the Universal Postal Union is the Congress. Delegates of the countries of the Union meet in Congress not later than five years after the date of the entry into force of the Acts of the preceding Congress in order

¹ On the whole subject see *L'Union postale universelle—Sa Fondation et son Développement, 1874-1949*, Mémoire, pp. 17-28.

² *Les Actes de l'Union Universelle Révisés à Paris, 1947, et Annotés par les soins du Bureau International*, 3 Fascicules, 1949.

to revise or complete those Acts as required.¹ In virtue of the rules of procedure all questions are settled by the Congress by a majority, though a quorum of two-thirds is necessary for certain decisions.² The Executive and Liaison Committee consists of 20 members who exercise their functions during the interval between two successive Congresses. The Committee has no functions in its own right; its task is to ensure continuity in the intervals between Congresses. At least half of the membership is renewed at each Congress, and no country may be chosen by three Congresses in succession. The representative of each of the member-countries on the Committee is appointed by the postal administration of his country and must be a qualified official of the postal administration. Committees for the study of specific questions continue to be appointed and to report to the Universal Postal Congress.

Although the Executive and Liaison Committee is now responsible for controlling the activities of the International Bureau, the Bureau continues to be 'under the general supervision' of the Swiss Postal Administration, and Switzerland continues to exercise important functions under the Convention, notably in regard to questions relating to membership of the Union, appointments, administrative regulations and finance. These arrangements are partly a historical survival and partly a convenient device to make it unnecessary for a small and highly technical international bureau to equip itself to transact the wide range of diplomatic, financial and administrative business which has been traditionally conducted on its behalf by the Swiss authorities. To some extent these arrangements are an insurance designed to facilitate the continued operation of the Universal Postal Union during any future international emergency under the protection of Swiss neutrality. The Convention also continues to assign certain functions to the host countries of successive Congresses.

The International Bureau has no independent duties or responsibilities; it is regarded as being essentially the agent of the postal

¹ Article 11 (1) of the 1952 Convention.

² See *Les Actes de l'Union Postale Universelle Révisés à Paris, 1947, et Annotés par les soins du Bureau International*, Fascicule 1, pp. 30-33. As to the American Continent see Convention of September 16, 1921, *L.N.T.S.*, 30, p. 141, reorganising the Pan-American Postal Union created in 1912, and also the Postal Convention of November 9, 1926. There is a Central Office of this Union at Montevideo, Uruguay. There exists

also a postal union of the Americas and Spain, established by the Convention of Madrid of November 10, 1931 (*Hudson, Legislation*, v, p. 1104), and revised by the Convention signed at Panama on December 22, 1936: *Hudson, ibid.*, vii, p. 500. And see generally on the Postal Union of the Americas and Spain, Ruth Masters, *Handbook of International Organizations in the Americas* (1944), pp. 379-389, and Piedrahita in *L'Union Postale*, 63 (1938), pp. 319-325 and 388-397.

administrations. It is responsible for collecting, collating, publishing and distributing information relating to the international postal services, including information concerning the introduction, resumption, supervision or discontinuance of various services. In a few cases it arranges for the production of uniform documents for international use and for their supply on demand to administrations. It acts as a clearing house for the settlement of accounts relating to the international postal service between the administrations which claim its assistance. There is no central account for actual payments. The amounts due are settled directly between the administrations concerned on the basis of the postal regulations and when payments are necessary they are made directly by the administrations or through the general clearing facilities of the Bank for International Settlements. The function of the International Bureau in the matter is essentially to reduce to a minimum the number of cases in which payments are necessary by offsetting credits and debits, on a multilateral basis, in respect of transit charges and international reply coupons. The Bureau also performs the preparatory work for the successive Congresses of the Union which periodically revise the Convention, Regulations and Agreements. It makes arrangements for arbitration by postal administrations in cases referred to such arbitration under the provisions of the Convention. A large proportion of the disagreements concerning the interpretation of the Convention which occur are now settled less formally by seeking the opinion of the Bureau. It has also become increasingly common for the Bureau to undertake inquiries asked for by administrations in order to learn the opinions of other administrations on particular questions, it being understood that the result of an inquiry does not constitute a vote and is not formally binding. While technical assistance in the improvement of the less-developed postal administrations may increasingly afford new scope for the activities of the Universal Postal Union, the Union is unique among international organisations in that it has accomplished the primary purpose it was established to fulfil so completely that its functions create the impression of being of a routine character.¹

¹ As to railway transport see:
(1) Convention concerning Railway Transports and Freights, October 14, 1890; Martens, *N.R.G.*, 2nd ser., 19, p. 289; Kaufmann, *Die mitteleuropäischen Eisenbahnen und das internationale öffentliche Recht* (1873); Rosenthal, *Internationales Eisenbahnfrachtrecht* (1894); Mayne, *Les accords internationaux des chemins*

de fer (1901); Eger, *Das internationale Übereinkommen über den Eisenbahnfrachtverkehr* (3rd ed., 1909); Blume, *Internationales Übereinkommen über den Eisenbahnverkehr* (1910); v. der Lye in Strupp, *Wort.*, i, pp. 266-273; Dupuis in *Hague Recueil*, 2 (1924) (i), pp. 263-273; the same Convention, revised October 23, 1924, Paris: Treaty Series, No. 3 (1933), Cmd.

(iv) THE INTERNATIONAL TELECOMMUNICATION UNION
(I.T.U.)

Brown, *Cable and Wireless Communications of the World* (1930)—Herring and Gross, *Telecommunications. Economics and Regulation* (1936)—Davis, *The Law of Radio Communication* (1937)—Tomlinson, *The International Control of Radio Communications* (1938)—Mance, *International Telecommunications* (1943)—Coddington, *The International Telecommunication Union* (1952).

The International Telecommunication Union publishes from time to time editions of the *International Telecommunication Convention and Regulations*; *Proceedings of the International Telecommunication Union*; *Plenipotentiary Conferences, Final Acts and Agreements* adopted by special International Telecommunication Union Conferences; *Annual Reports* by the Secretary-General to the Members of the Union; a *Telecommunication Journal* and numerous service publications for use in the operation of telecommunication services.

Functions of the International Telecommunication Union

The purposes of the International Telecommunication Union are to maintain and extend international co-operation for the improve-

4243; Loening, *Internationales Ueberkommen über den Eisenbahnfrachtverkehr vom 23 Oktober 1924* (1927); Travers, *Le droit commercial international*, v (1932); Develle, *Le régime international des voies ferrées* (1935); Fourcauld in *Répertoire*, iii, pp. 289-409. For international traffic law in general see Hollander in *A.J.*, 17 (1923), pp. 470-488, and Kunz in *Z.o.R.*, 13 (1933), pp. 408-438. (2) Convention concerning the Standardisation of Railways and the Sealing of Railway Trucks, May 15, 1886: Martens, *N.R.G.*, 2nd ser., 22, p. 42, and *ibid.*, 3rd ser., 2, p. 878. (3) Convention and Statute on the International Régime of Railways, December 9, 1923: Treaty Series, No. 23 (1925); *L.N.T.S.*, 47, p. 55. See also the Agreement concerning Transport of Corpses signed on February 10, 1937, under the auspices of the International Office of Public Hygiene: Hudson, *Legislation*, vii, p. 630. (4) Convention on the Transport of Goods by Rail, November 23, 1933: Hudson, *ibid.*, vi, p. 627. And see Convention relating to the Simplification of Customs Formalities, November 3, 1923, Geneva: *L.N.T.S.*, 30 n. 371; Treaty Series, No. 16 (1926).

As to road traffic see: (1) Convention concerning the International Circulation of Motor Vehicles, October

11, 1909: Martens, *N.R.G.*, 3rd ser., 3, p. 834; Treaty Series, No. 18 (1910). See also the Motor Car (International Circulation) Act, 1910 (9 Edw. 7, c. 37). (2) Convention on Road Traffic, April 24, 1926: see above, § 141, n. (3) Convention on Taxation of Foreign Motor Vehicles, March 30, 1931, Geneva: *ibid.* See also *ibid.* for other conventions of this type.

As to Conventions concluded after the Second World War see: (1) Convention on Road Traffic, September 19, 1949; (2) Protocol on Road Signs and Signals, of the same date; (3) European Agreement of September 16, 1950, supplementing the two preceding instruments; (4) Declaration of the same date on the Construction of Main International Traffic Arteries. See also the two International Conventions of January 10, 1952, signed at Geneva, to facilitate the Crossing of Frontiers for Passengers and Baggage by Rail and to facilitate the Crossing of Frontiers for Goods carried by Rail. And see the Agreement of June 16, 1949, providing for the provisional application of the Draft International Customs Conventions on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road: Treaty Series, No. 104 (1951), Cmd. 8431.

ment and proper use of telecommunication and to promote the development of technical facilities in that sphere and their most efficient operation. The functions specifically attributed to the Union with a view to achieving these purposes are to effect allocation and to register the assignments of radio frequencies; to foster collaboration among Members with a view to the establishment of rates at low levels; to promote the adoption of measures for ensuring the safety of life through the co-operation of telecommunication services; and to undertake studies, formulate recommendations, and collect and publish information.

These comprehensive functions were formulated, in their present form, by the 1947 Atlantic City Telecommunications Convention,¹ subsequently revised at Buenos Aires in 1952.² The Atlantic City Convention represented a substantial revision of the International Telecommunications Convention signed at Madrid in 1932, which in turn was a fusion of the International Telegraph Convention of 1865 revised at St. Petersburg in 1875 and the Washington Radio Telegraph Convention of 1927. The latter represented a revision of the Brussels Convention of 1906 and the London Convention of 1912. The Convention, as now in force, defines the composition, functions and structure of the International Telecommunication Union and contains general provisions relating to telecommunications (including the principle of the right of the public to use the international telecommunications service, the secrecy of telecommunications and the priority of telecommunications concerning safety of life) and special provisions for wireless. These, too, include general principles as to the rational use of frequencies and spectrum space, the obligation to establish and operate stations in such a manner as not to result in harmful interference with the service or communications of other Members, priority for distress calls and messages and the repression of false or deceptive distress or safety signals and of the irregular use of call signs. The Convention is accompanied by general regulations as to matters of procedure and by four sets of administrative regulations containing detailed rules concerning the operation of the various telecommunications services, namely, the Telegraph Regulations, Telephone Regulations, Radio Regulations, and Additional Radio Regulations. Under the Convention of 1932 Members were not required to accept more than one set of administrative regulations. This provision was designed primarily to enable the United States, which does not admit governmental regulation of the telegraph and telephone services or of

¹ Treaty Series, No. 76 (1950), Convention, Buenos Aires, 1952, Cmd. 8124. International Telecommunication

² International Telecommunication Union, 1953.

charges and service instructions for the radio service, to be a Member of I.T.U. without accepting more than the general Radio Regulations. Since 1947 all the administrative regulations have been binding in principle on all parties to the Convention. However, reservations are admitted; the United States has now accepted the Telegraph Regulations, subject to numerous reservations on points of detail, but neither the United States nor Canada has accepted the Telephone Regulations, which under their terms apply only to the European network and to countries which regard themselves as linked with it. The Convention and administrative regulations are supplemented by special agreements relating to particular services which in some cases are regional in character. These include a European Broadcasting Convention (the Copenhagen Plan),¹ a further European Broadcasting Agreement governing very high frequency sound and television broadcasting (the Stockholm Plan),² a North American Regional Broadcasting Agreement,³ a European Regional Convention for the Maritime Mobile Radio Services,⁴ and a Final Act governing the North-East Atlantic Loran (Long-Range Radio Navigation) Service.⁵

Structure of the International Telecommunication Union

For the purpose of administering these arrangements the International Telecommunication Union operates through Plenipotentiary and Administrative Conferences of representatives of Members, an Administrative Council of Members of the Union elected by the Plenipotentiary Conference, International Consultative Committees for Telegraphy, Telephone and Radio consisting of administrations of Members, and an International Frequency Registration Board, together with a General Secretariat. The Administrative Council and the International Frequency Registration Board were introduced in 1947 to enable the Union to discharge the wider functions entrusted to it. The Plenipotentiary Conference meets at five-yearly intervals and revises the International Telecommunica-

¹ I.T.U. European Broadcasting Conference, *European Broadcasting Convention*, Copenhagen, 1948. See Treaty Series, No. 30 (1950), Cmd. 7946.

² I.T.U. European Broadcasting Conference, Stockholm, 1952, *Final Act—Agreement, Plans, Final Protocol and Recommendation*.

³ I.T.U. North American Regional Broadcasting Conference, Washington, 1950, *North American Regional Broadcasting Agreement—Final Pro-*

ocol, Resolutions and Recommendations, Washington, D.C., 1950.

⁴ I.T.U. European Regional Conference for the Maritime Mobile Radio Service, *European Regional Convention for the Maritime Mobile Radio Service*, Copenhagen Plan, Berne, 1948.

⁵ I.T.U. Special Administrative Conference for the North-East Atlantic, *Final Acts of the Special Administrative Conference for the North-East Atlantic (Loran)*, Geneva, 1949.

tions Convention as is necessary. The Administrative Telegraph and Telephone Conferences and the Administrative Radio Conference revise the administrative regulations with which they are respectively concerned. The Administrative Council, which normally meets once a year, supervises the administration of the Union between sessions of the Plenipotentiary Conference. Questions have arisen in regard to the exact competence of the Administrative Council in relation to other organs of the Union. That competence is defined by the Convention as being to 'act on behalf of the Plenipotentiary Conference within the limits of the powers delegated to it by the latter.' On the basis of this provision it has become customary for the Administrative Council to give directives to the permanent organs of the Union, including the International Consultative Committees. The Consultative Committees for Telegraphy and Telephony study technical operating and tariff questions relating to telegraphy and telephony and issue recommendations on them. The Radio Consultative Committee studies and issues recommendations concerning technical and operating questions relating to wireless the solution of which depends primarily on considerations of a technical character. The International Frequency Registration Board is designed to record all frequency assignments in a master record so as to establish the date, purpose and technical characteristics of such assignment with a view to ensuring its formal international recognition.

The members of the Board are persons nominated by members elected by Administrative Radio Conferences who are required to serve 'not as representatives of their respective countries, or of a region, but as custodians of an international public trust.' It is specified that no member of the Board shall request or receive instructions relating to the exercise of his duties from any Government or a member thereof or from any public or private organisation or person, that each Member of the Union must respect the international character of the Board and of the duties of its members, and that no member of the Board or its staff may participate in any manner or have any financial interest whatsoever, other than a retirement pension in respect of previous service, in any branch of telecommunication.

Prior to the creation of the Board there was no discretionary power to decline to register a frequency notified to I.T.U. With the increasing congestion of the spectrum it became necessary to create machinery for reducing the probability of harmful interference. As it has proved impracticable to secure the abandonment of the right of each country to use any frequency it may deem best, a compromise solution has been accepted to take the form of arrange-

ments which distinguish between notification and registration. A frequency is registered and becomes entitled to international protection if the Board finds it to be in full conformity with all the provisions of the regulations. If the Board is unable to find that this is the case, the frequency is simply notified and the Member is entitled to make use of it at its own risk of having to discontinue operations if harmful interference in fact results. If no such interference in fact occurs over a sufficient period, a notified frequency may subsequently be registered. An Agreement concluded at Geneva on December 3, 1951, at an Extraordinary Administrative Radio Conference represents a significant step towards the preparation of a new international frequency list. The Agreement was signed by 63 countries, not including the Soviet Union and eight other Eastern European countries.

A characteristic feature of I.T.U. is the provision for the participation of recognised private operating agencies and manufacturers of equipment in Administrative Conferences and in the International Consultative Committees. The rapidity and scope of major technical developments in the field of telecommunications confront the International Telecommunication Union with problems of constant readjustment to new needs which affect the character of its work.

(v) THE WORLD METEOROLOGICAL ORGANISATION (W.M.O.)

The World Meteorological Organisation publishes *Resolutions and Proceedings* of its Congress, *Resolutions* of its Executive Board, a *W.M.O. Bulletin* and technical meteorological publications. See also Parry in *B.Y.*, 26 (1949), pp. 494-498.

For the Constitution see Treaty Series, No. 36 (1950), Cmd. 7989; *B.Y.*, 26 (1949), p. 498.

Functions of the World Meteorological Organisation

The W.M.O. is designed (a) to facilitate world-wide co-operation in the establishment of networks of stations for the making of meteorological observations and to promote the establishment and maintenance of meteorological centres charged with the provision of meteorological services; (b) to promote the establishment and maintenance of systems for the rapid exchange of weather information, (c) to further standardisation of meteorological observations and to ensure the uniform publication of observations and statistics; (d) to further the application of meteorology to aviation, shipping, agriculture and other human activities; and (e) to encourage research and training in meteorology and to assist in co-ordinating the international aspects of such research and training. W.M.O.

replaced and is in some measure a continuation and reorganisation on an official basis of the International Meteorological Organisation, a semi-official organisation of government meteorologists established in 1878. In large measure as the result of the efforts of I.M.O. during its 73 years of activity, the world network of meteorological stations comprised in 1951 almost 10,000 stations working at fixed hours and following uniform methods based on the technical standards and other publications issued by I.M.O.¹ so as to constitute a systematic international exchange of meteorological information.² Because of the increasing importance of meteorology, mainly as the result of developments in aviation, it was decided after the Second World War to create W.M.O. as an official body to assume responsibility for the activities previously undertaken by I.M.O. W.M.O. operates through the World Meteorological Congress which meets at intervals not exceeding four years and takes decisions by a two-thirds majority of the votes cast, an Executive Committee, Regional Meteorological Associations, a Technical Commission, a Secretariat, and Permanent Representatives of Members.

Structure and Procedures of the World Meteorological Organisation

The structure and procedures of W.M.O. have been extensively influenced by the practices developed by I.M.O. as an unofficial body. The Congress of the W.M.O. determines general policies ; it adopts technical regulations covering meteorological practices and procedures ; it makes recommendations to Members ; it takes action in regard to the reports and activities of the Executive Committee ; it establishes Regional Associations and Technical Commissions ; and it determines the limits within which the Executive Committee may approve the annual expenditures of the Organisation and apportion such expenditures among Members. The Convention provides that all Members shall do their utmost to implement the decisions of the Congress.³ If any Member finds it impracticable to give effect to some requirement in a technical resolution adopted by Congress, the Member is to inform the Secretary-General of the Organisation whether its inability to give effect to it is provisional or final, and is to state its reasons therefor.⁴ There is neither provision for formal acceptance of the decisions of Congress nor a provision, comparable to that of the Constitution

¹ The publications of I.M.O., now available from W.M.O., comprise 81 volumes.

² See *Organisation Météorologique Internationale*, Publication No. 81, *Extraordinary Conference of Directors, Paris, 1951, Final Report*. For a

useful account of the constitution and history of I.M.O. see *League of Nations Handbook of International Organisations*, 1938, pp. 140-142.

³ Article 8 (a).

⁴ Article 8 (b).

of the World Health Organisation, to the effect that technical regulations will apply to Members in the absence of rejection or reservation within a given time limit. However, it appears to be assumed on the basis of experience that decisions will in fact be implemented by action taken by the meteorological services. Without having any formal legal power to do so, W.M.O., like I.M.O. before it, does in fact fix dates on which changes in meteorological practice become widely effective. The Regional Associations are responsible for promoting execution of the resolutions of Congress and of the Executive Committee in their respective regions, and may adopt resolutions concerning technical procedures to be followed within the region. The Technical Commissions study and promote meteorological developments in both the scientific and the practical fields, standardise methods, procedures and techniques in the application of meteorology, and make recommendations to Congress. Permanent Representatives are Directors of meteorological services who act as normal channels of communication between the Organisation and their respective countries. Specifications for meteorological services for international air navigation had been agreed between W.M.O. and the International Civil Aviation Organisation and promulgated by both Organisations.

INDEX

Aaland Islands :

- demilitarisation of, 539 n., 927 n.
- neutralisation of, 591 n., 965 n.
- status of, 927 n.

Abandoned river-beds, 566

Abdication of monarchs, 761, 775

Absorption, succession of States on, 158-163

Abuse of rights, 345-347

Abyssinia :

- annexation by Italy, 257 n., 571
- British and Italian spheres of influence in, 562 n.
- Family of Nations, position in, 49
- recognition of Italian rule over, 136
- slavery in, 734 n.
- withdrawal of recognition of, by Great Britain, 152

Accession to treaties, 934-935

Accretion, 563-566

- abandoned river-beds, 566
- alluvion, 564
- artificial formations, 564
- conception of, 563
- deltas, 565
- kinds of, 563-564

Acquisition of territory, 543-546

- by corporation or individual, 544-545
- former doctrines of, 545
- modes of, 546
- new States, 544

Act of Parliament :

- assent to treaties, 40
- conflict with International Law, 509 n.

Act of State :

- plea of, 336, 688 n.
- recognition of foreign, 267-268

Actio personalis moritur cum persona, 348 n.

Actions involving States, 271-272

Acts, 808-809. *See also* Treaties

Ada-Kalé, Island of, 455 n. 561 n.

Adhesion to treaties, 935

Adjudication, 546 n.

Administration of territory, 558

Administrative officers. *See also* Government officials internationally injurious acts of, 362-364

Aegi, case of, 843

Aerial navigation, 516-530. *See also*

- Air ; Aircraft ; Aviation
- air space, theories as to, 463, 517-518
- British legislation, 518
- cabotage, 524
- conventional regulation of, 518-529
- customary International Law, 523
- International Commission for, 278 n., 360, 521
- International Convention (1919), 518-522, 523-525

Agents :

- consular, 833
- lacking diplomatic or consular character, 859-863
 - commercial, 860-861
 - commissaries, 862-863
 - despatch-bearers, 810, 813, 863
 - political, 859-860
 - secret, 860
 - spies, 862
- revolutionary party or insurgents, of 774, 859-860

Aggression, League of Nations guarantee against, 393-395

Aggressive war, 356

Agitation, 783, 784

Agreements, 898-899, 901-902, 921. *See also* Treaties

Agricultural Institute, International, Convention on, 995, 996

Agricultural Mortgage Credit Company's Commission on (1911), 995 n.

Agriculture. *See* Food and Agriculture Organisation

Air. *See also* Aerial navigation ; Aircraft ; Aviation

- Air Navigation Act (1920), 518
- Air Navigation Act (1936), 518 n.
- Air Navigation Code, 1013
- Air Navigation Convention (1919), 487, 519, 523, 524

Air (continued)—

- International Civil Aviation Convention (1944), 526
- sovereignty over, 519
- territorial rights over, 462-463

Air Transport:

- Convention for Unification of Rules regarding (1929), 522
- International Agreement of Chicago (1944), 525-529

Aircraft:

- damage by, 518 n.
- international navigation by private aircraft, 520
- jurisdiction over private aircraft, 520
- military, 521, 551
- nationality of, 519
- non-military, 521
- right of passage, 519 n.
- State aircraft, 521

Airways, international, 524**Air-la-Chapelle, Congress of (1818), 776**

- Peace of (1748), 930

Alaska:

- boundary dispute, 535 n.
- claims to sovereignty over adjoining sea, 586-587
- military highway, 538 n.
- sale by Russia to United States, 549, 587

Albania:

- establishment of, 312
- international status of, 255 n.

Alexander of Yugoslavia, assassination of, 710**Alexander VI, Papal Bull of (1493), 583****Alexandretta, cession by France to Turkey, 214 n., 216****Aliens. See also Denial of Justice; Nationality; Naturalisation**

- admission of, 675
- Aliens Acts (British), 675 n., 676 n., 690, 691 n.
- allegiance of, 680, 682
- Asia and Africa, in, 682-686
- asylum, right of, 676-678
- departure of, 690
- duties of, 287-288
- equality of treatment with nationals, 688 n.
- expulsion of, 691-695
- extradition of, 695-703
- jurisdiction over, 330, 680
- military service of, 45 n., 680, 681 n.
- naturalisation of, need for consent, 288
- non-discrimination against, 688 n.
- offences against, 366

Aliens (continued)—

- Passport Regulations, Conference on (1928), 676 n.
- position after reception, 678-691
- property of, respect for, 351, 687-689
- protection of minorities. *See* Minorities
- protection of subjects abroad, 686.
- See also* Citizens abroad
- reception of, 676
- reconduction of, 694-695
- responsibility to, 365
- subject to territorial supremacy, 679-682
- taxation of, 288, 680 n.
- treatment of, 364, 365, 689

Allegiance:

- aliens, of, 680, 682
- as source of British nationality, 207
- Commonwealth association and, 206 n.

Alliances, 959-964

- after World War I, 960
- after World War II, 961
- casus foederis*, 963-964
- conception of, 959-961
- during World War II, 960
- kinds of, 961
- parties to, 961

Allied Forces Act (1940), 326, 848 n.**Allied forces in Great Britain in World War II, 327****Allied Powers (War Service) Act (1942), 681 n.****Alluvion, 564****Alsace-Lorraine, status of inhabitants, 551 n., 553****'Alternat,' 281****Ambassadors, 19, 777. See also Diplomatic envoys**

- Conference of, after World War I, 277 n.

Amelia Island, case of, 300**America. See Inter-American Conference; International Conference of American States; Pan-American Conferences; United States of America****American Institute of International Law:**

- Declaration of the Rights and Duties of Nations (1916), 260 n.
- Project for Codification of 'American International Law,' 260 n.
- American International Law, 52-54, 260 n.

American Republics, meetings of Foreign Ministers, 765**Analysis of Human and Animal Foods, Convention on (1931), 1000 n.**

Anderson, John, case of, 332 n.
 Andorra, legal position of, 194 n.
 Anglo-American Agreement on Petroleum (1945), 891 n.
 Anglo-American and Continental Schools of International Law, 54
 Anglo-American doctrine of, International Law, 43
 Anglo-Ethiopian Agreement (1944), 906 n., 908 n.
 Anglo-Polish Treaty of Alliance (1939), 906 n.
 Animals, Convention concerning diseases, transport and protection of, 996 n.
 Anne, Queen, Statute of (1708), 789 n., 800 n., 810 n., 811 n.
 Annexation, 566-575
 of administered territory, 567 n.
 Antarctic regions, 556 n., 557 n.
 Anti-Smuggling Act (1935), 496 n.
 Anti-War Pact of Non-Aggression and Conciliation (1933), 144
 Antigua, lease of air bases in, 458
Apocrisarii, 769
 Arcos Ltd., case of, 861 n.
 Arctic regions, 556 n.
 Armaments, reduction of, 393
 Armed forces. *See also* Military and naval forces
 Allied forces in Great Britain in World War II, 327
 armed forces on foreign territory, extritoriality of, 200, 846-851
 injurious acts by, 362
 Armed Neutrality (1780 and 1800), 909
 Arms. *See* Coats of Arms
 Arrest of :
 foreign merchantmen on open sea, 330-331, 606
 merchantmen, how effected, 606
 national in foreign territory, 295 n.
 Asylum :
 for political refugees, 670 n.
 right of, 67 n., 676-678, 794
 Atlantic. *See* North Atlantic
 Atlantic Charter (1941), 738, 872
 Atmosphere, territorial, 462-463
 Atomic energy, control of, 342 n., 373 n., 430 n.
Attentat clause, 709
 Austin, 7
 Australia :
 mandate over Nauru, 229
 mandates held by, 199
 maritime flag, 593
 trusteeship system, adoption of, 229
 Austria :
 absorption of Poland (1795), 156

Austria (*continued*)—
 annexation of Bosnia and Herzegovina, 587 n., 944
 customs régime with Germany, 155, 287, 895
 identity with Austria-Hungary, 155 n.
 independence of, 287 n.
 international status of, 255
 Austria-Hungary, legal position of, 172-173
 'Automatic belligerency' of self-governing Dominions, 196 n., 206 n., 207, 208
 'Autonomous neutralisation,' 243 n.
 Aviation. *See* International Civil Aviation Organisation
 Ayala, 90
 Azoff, Sea of, international status of, 588
 Azuni, 586

B

Bahrain Islands, Anglo-Persian dispute concerning, 577 n., 618 n.
 Balance of power, intervention in interest of, 311-312
 Balasore, lease of French Loge by Great Britain to France, 456 n.
 Balkan Entente, 962 n.
 Balkans, intervention in, 312, 313
 Baltic Republics, recognition of, 145 n.
 Bancroft Conventions, 666 n.
 Bank for International Settlements, 1010
 Bank for Reconstruction and Development. *See* International Bank for Reconstruction and Development
 Barbary, 96
 Barcelona :
 Conference of (1921), Declaration concerning maritime flag, 592
 Convention of (1921), 398 n., 471-474
 Bavaria, international position of, 176 n.
 Bays. *See also* Gulfs
 distinguished from territorial waters, 460-461
 non-territorial, 508-509
 territorial, 505-508
 Bearers of despatches, 810, 813, 863
 Bechuanaland, 195 n., 196 n.
 Beckert, Wilhelm, case of, 811 n.
 Bed of the open sea :
 claims to, 618 n.
 subsoil, 589 n., 629-635
 surface of, 628-629
 Behring Sea Arbitration, 499, 501, 587, 618 n., 619 n., 621

- Belgium:**
 • customs union with Luxemburg, 179 n.
 economic union with Luxemburg, 249
 International Law part of the law of, 43
 invasion by Germany (1914), 301-302
 merger of Congo Free State, 156
 neutralisation of, 246-248, 879 n., 941 n.
 abrogation of, 247
 return to, 247
 violation of, 246
 personal union with Congo Free State, 171
 • revolt from Netherlands, 579 n.
 trusteeship system, adoption of, 228 n.
- Belle-Isle, Maréchal de, case of, 807**
- Bell, 90**
- Belligerents, recognition of, 21**
- Bentham, 57, 94**
- Berlin Congo Conference (1885), 475 n., 559, 733, 874 n., 970 n.**
- Berlin, Congress of (1878), 149, 306, 311**
- Berlin, Treaty of (1878), 166 n., 296, 669, 875 n., 943**
 neutralisation of Montenegro, 503
 protection of minorities, 641, 712
- Bermuda, lease of air bases in, 458**
- Bernadotte, Count, murder of, 306 n.**
- Bernstorff, Count, case of, 808**
- Bessarabia, recognition of Roumanian sovereignty over, 142 n.**
- Bible, International Law in, 73-74**
- Bibliographies of International Law, 112-113**
- Bill of the Rights of Man, International, 736 n., 740, 743, 744**
- Birth on board ship, 597**
- Black Sea:**
 international position of, 478 479, 513-516
 neutralisation of, 591, 943
 abolition of, 591
- Blackstone, International Law, and, 39**
- Blockade:**
 notification of, 874
 of ports occupied by insurgents, 141
 right of, 603
- Bluntschli:**
 draft code of International Law, 58 n.
 on freedom of navigation, 465
- Bodin, 120**
- Bogotá Charter (1948), 145, 185**
- Boroughs, Sir John, 585**
- Boania, Austro-Hungarian administration of, 455**
- Bosnia and Herzegovina, annexation by Austria, 567 n., 944**
- Bosphorus and Dardanelles, 512, 513-516, 588**
 international position of, 478
- Boundaries, 530 535**
 commissions on, 535
 disputes, 534
 lakes and land-locked seas, 533
 maritime belt, 534
 mountains, 534
 natural and artificial, 531-532
 rivers, 532
 straits, 534
 waters, 532 534
- Boundary waters**
 cession of, 463
 transfer of, 463
- Boycott of foreign goods, 293 n.**
- Boy-Ed, Captain, case of, 816**
- Brazil, revolt from Portugal, 579 n.**
- Brenau, case of the, 511 n.**
- Bretton Woods Conference (1944), 1010**
- Briand-Kellogg Pact. See Renunciation of War, General Treaty for**
- Bristol Channel, 460 n.**
- British Commonwealth of Nations**
See also British Empire
 citizenship within, 652-654
 legal nature of, 197-211
 treaty-making power of members of, 885-887
- British Empire. See also Dominions, self-governing, British Commonwealth of Nations**
 'automatic belligerency,' question of, 196 n., 207, 208
- British nationality, 645, 646 n., 663**
 legal nature of, 209 212
 legal status of, 170
- British Guiana, lease of air bases in, 458**
- British Nationality and Status of Aliens Acts, 208 n., 650 n., 651 n., 652 n., 652, 656 n., 659, 663**
- British seas, 584, 586**
- Broadcasting, 529. See also International Telecommunication Union; Wireless**
 Convention on use of, in the cause of peace, 530 n.
- Brooke, Sir James, title to Sarawak, 545 n.**
- Brutus, 90**
- Brussels:**
 Anti-Slavery Conference (1890), 734, 912

Brussels (continued) -

- Conference concerning Laws and Customs of War (1874), 899
- Convention concerning assistance and salvage at sea (1910), 602, 607
- Convention concerning collisions at sea (1910), 601-602
- Convention concerning Government-owned ships (1926), 858
- Convention concerning salvage at sea, 601, 607
- Brussels Treaty of Economic, Social and Cultural Collaboration and Collective Self-defence (1948), 182-183, 963
- Bryan-Chamorro Treaty (1914), 307 n., 894 n., 895 n.
- Bryce, Viscount, and proposals for avoidance of war, 381
- Buenos Ayres, Boundary Treaty of (1881), 927
- Bulgaria :
 - as vassal State of Turkey, 191 n.
 - emigration of minorities, 648 n.
 - recognition of, 149
 - restriction of personal supremacy, 296
 - Treaty of Peace with (1947), 469, 539 n., 741 n.
- Bumboats in the North Sea, control of, 607 n., 620
- Bundesstaaten*, 175-178
- Buoyage, Agreement for uniform system of (1936), 599
- Burlamaqui, 96
- Bynkershoek, 96-97, 586, 589 n.
- rule concerning breadth of maritime belt, 484 n., 490

C

- Cable Act (1922), 655 n.
- Cables. *See* Telegraph cables
- Cabotage, 472, 492-493, 504, 510, 971 n.
- aerial, 520, 524
- California, Japanese schoolchildren in, question of, 340
- Calvo clause, 345, 362 n., 687
- Cambodia, legal position of, 174
- Cameroons, mandates over, 214 n., 219
- Cameroons (British), trusteeship system and, 229
- Canada :
 - appeals to Judicial Committee of Privy Council, abolition of, 203 n.
 - Great Seal of, 887
 - maritime flag, 593

- Canada (continued)—*
 - recognition of sovereignty over Sverdrup Island, 142 n.
 - representation at Peace Conference (1919), 199
 - right to accredit diplomatic envoy, 200
 - treaty with United States (Halibut Fisheries) (1923), 200, 920 n.
- Canadian Great Lakes, international position of, 477
- Canals, 479-485
 - Kiel Canal, 482-483
 - Panama Canal, 483-485, 890 n.
 - property of riparian States, 480
 - Suez Canal, 480-482
- Cancellation of treaties, 945-949
 - change of status of contracting parties, 948
 - inconsistency with subsequent International Law, for, 946
 - violation by contracting parties, 947-948
- Canning, Sir Stratford, case of, 783, 868
- Canon-shot rule, 490
- Canon Law, 10
- Canonists, 79-80
- Canon, condominium over, 453
- Cape Spatel Lighthouse Commission, 599 n.
- Capitulations :
 - abolition of, 49, 50
 - consuls, position of, 845
 - Convention on (1937), 685, 686 n.
 - in certain Asian and African countries, 682-686
 - China, 684, 891 n., 942 n.
 - Egypt, 685-686
 - Iraq, 683
 - Japan, 683
 - Morocco, 686 n.
 - Palestine, 683
 - Persia, 684
 - Siam, 684
 - Syria, 683
 - Turkey, 49, 683
- Caroline Islands, sale by Spain to Germany, 549
- Carolina, case of the, 300-301, 847, 850
- Carriage of Goods by Air Act (1932), 522 n.
- Casa Blanca incident, 851 n.
- Cusus foederis*, 963-964
- Cattle Herdbooks, Convention on keeping of (1936), 996 n.
- Cellamare, Prince, case of, 791
- Centaro, Roberto, case of, 810 n.
- Central America, Republic of, 174
- Ceremonial, maritime, 285, 492-493

Certificate of Foreign Office, 765-768.

• See also Conclusiveness of statements of Executive

Cession of territory, 540-554, 578

acquisition of nationality by, 656-657

conception of, 547

forms of, 548-550

neutralised territory, 548 n.

object of, 548

option of nationality, 552-554

plebiscite, 551-552

State succession and, 165-168, 548-550

subjects of, 547

transfer of ceded territory, 550

veto of third Powers, 550-551

Ceylon:

legal position of, 209-212

pearl fisheries regulation, 281 n., 629 n.

Chablais and Faucigny, 548 n.

Swiss servitude over, 542

Channel Tunnel, 631 n.

Chapultepec, Act of (1945), 280 n., 318, 320 n., 963

Chargés d'affaires, 776, 778. See also Diplomatic envoys

Charges for enforcement of treaties, 931

Charter of United Nations, 9, 23, 213, 277

absence of *clausula rebus sic stantibus*, 448 n.

alliances inconsistent with, 962-963

codification of International Law, 68-69

Declaration Regarding Non Self-Governing Territories, 240

diplomatic immunity of officials, 821-823

domestic jurisdiction, 414-420

effect of, on coercion of vanquished State, 891

effect of, on non-members, 928

enforcement of treaties under, 932

equality of States and, 279-280, 412-414

establishment of, 401

human rights and fundamental freedoms, 206, 320, 641-642, 738

humanitarian intervention under, 312-313

International Law and, 404 n., 448 n.

intervention and, 320

duty of, 310

languages of, 772

legal nature of, 236

membership of United Nations, 406-412

Charter of United Nations (*contd.*)—
mutuality of benefits and obligations, 406-407

non-member States, 407

object of United Nations, 403-405

peaceful settlement and, 405, 406

Preamble, 413, 902 n.

provision for regional arrangements, 317

ratification of, 917

registration of treaties under, 921-923

respect for treaty obligations, 943 n.

revision and amendments, 280, 447-448, 879 n.

revision of International Law, 70

rights of man and, 738-743

self defence under, 299

sovereign equality under, 412-414

title by conquest, 570, 573, 574

treaties inconsistent with, 895-896

trusteeship system, 228-242

war and, 14, 892

Cheeses, Convention on Sampling of (1934), 996 n.

Chemistry, International Office of, 991 n.

Chicago, Civil Aviation Agreements (1944), 525-529

Children, nationality of, 670

China:

Capitulations in, 684, 891 n., 942 n.

Chungchun Railway, joint use with Russia, 454 n.

concessions in, 456 n., 457 n.

Japanese invasion of Manchuria, 302

leases of territory by, 457, 549

'open door,' 971 n.

People's Republic of China, 134

recognition by United Kingdom, 151 n.

Chinese Eastern Railway incident (1920), 294 n.

Chinkiang, British concession at, 456 n.

Cholera Convention (1893), 982 n.

Christendom, early, the Dominion of Law of Nations, 48

Christianity and International Law, 78

'Citizen,' meaning of, 644-645

Citizens abroad:

jurisdiction over, 330

protection of, 290, 325, 686-689, 786, 838

restrictions on power of State over, 294-296

right of intervention to protect, 309

Citizens on foreign vessels, jurisdiction over, 597 n.

- Citizenship.** *See* Nationality; Naturalisation
- Civil Strife, Pan-American Convention on Duties and Rights of States in the event of (1928),** 64, 292 n., 610 n., 816 n.
- Civilians,** 79
- Claims, nationality of,** 347-349
- Clausula rebus sic stantibus.*** *See* *Rebus sic stantibus*
- Clayton-Bulwer Treaty of Washington (1850),** 484
- Coal, European Organisation,** 824 n.
- Coasting trade, meaning of,** 971. *See also* Cabotage
- Coats of Arms:**
consular right to put up, 843
respect for, 282
- Code of Signals,** 598
- Codification of International Law,** 57-70. *See also* League of Nations Codification Committee development and, 68-69
- Hague Codification Conference (1930),** 62-63, 64-66
- Hague Peace Conference (1899),** 58-59; (1907), 59-60
history of, 57-62
League of Nations and, 60-62, 64
limits of, 64-68
meaning of, 57 n.
revision of International Law, 69-70
United Nations and, 68
- Coercion in conclusion of a treaty,** 891-892
- Collective guarantee of treaties,** 966-967
- Collective naturalisation,** 551 n., 553
- Collective security,** 405, 963
- Collisions at sea,** 601-603
- Colombia, secession from Panama (1903),** 129 n., 579 n.
- Comity, International,** 33-35
meaning of, 34 n.
- Commerce, freedom of,** 578 n. *See also* Open door; Most-favoured-nation clause
- Commercial agents,** 860-861
- Commercial attachés,** 861 n.
- Commercial Code of Signals,** 598
- Commercial representations abroad,** status of, 837 n., 861 n.
- Commercial Statistics, Convention for the Establishment of (1913),** 1000 n.
- Commercial treaties,** 942 n. 969-976
International Commodity Agreements, 974-976
most-favoured-nation clause, 971-974
- Commissaries,** 862-863
- Commission of American Jurists, International,** 53 n.
- Commissions, International,** 377
- Commodity Agreements, International,** 974-976
- Commodity Control Agreements,** 1000 n.
- Commodity Councils,** 998-1000
- Common consent as the basis of law,** 15-19
- Communications,** 1011-1029
- Communism:**
German-Japanese Agreement on (1936), 294 n.
responsibility of Soviet Russia for communist activities, 294 n.
- Composite international persons,** 169-188
- Composite States,** 169-186
confederated States, 173-174
federal States, 175-178
personal union, 171
real and apparent, 170-171
real union, 171
- Compromise clause, in treaties,** 950-951
- Concessionary contracts,** 162
- Conclusiveness of statements made by the Executive,** 128 n., 149, 150, 272 n., 336, 765, 809 n., 856 n.
- Concordats.** *See* Lateran Treaty
- Condominium,** 453
Great Britain and Egypt over the Sudan, 190 n.
Great Britain and France over the New Hebrides, 453
Great Britain and United States over Canton and Endenburg, 453-454
- Confederate States of America:**
delay of, 164 n.
withdrawal of recognition of, 152 n.
- Confederated States,** 173-174, 175
- Confederation of the Rhine,** 173-174
- Conference of Ambassadors after World War I,** 277 n.
- Conferences, international,** 869-871
conception of, 869
observers at, 870 n.
parties to, 869
preparatory meetings of experts, 871 n.
procedure at, 870
- Confiscation,** 270 n.
of alien property, 352
- Congo, Berlin Conference (1885),** 476 n., 559, 733, 874 n., 970 n.
- Congo Free State:**
Lado Enclave, 457
merger into Belgium, 156, 549
personal union with Belgium, 171

Congo, River, international position of, 468 n.

international. *See* Conferences, international

Connecticut, River, diversion of tributary waters of, 475 n.

Conquest. *See* Subjugation

Consent :

as basis of general law, 15-17

as basis of International Law, 17-19

as source of International Law, 25, 29

Consolato del Mare, 80

Constance, Lake, international position of, 477

Constantinople, Convention of (1888), 480-481

Constitution, right of State to adopt any desired, 287

Consuls, 829-845

appointment of, 834-837

archives, inviolability of, 842

British consular service, 833

character of, general, 830-831
exceptional, 844-845

classes of, 833

consular organisation, 831-834

development of institution of, 829-830

diplomatic service, amalgamation with, 788, 831 n.

relation to, 834

districts, 832

when conquered, 843, 844 n.

exequatur, 201, 835-837, 840, 843-844

Functions of, 837-839

in certain non-Christian States, 844-845

in protectorates, position of, 192 n.

in unrecognised States, 147, 148

jurisdictional immunities of, 841-843

kinds of, 832

obligation to admit, 834

position of, 840

privileges of, 840-843

protection of subjects by, 838-839

termination of office, 843-844

women, appointment of, as, 834

Contiguous zone, doctrine of, 497 n., 560

Continental Shelf, 501 n., 556, 631-635
proclamation concerning, by United States (1945), 631

by other States, 632 n.

Contraband, right of search for, 603

Contraband Traffic in Alcoholic Liquors, Convention for the Suppression of (1925), 620 n.

Contract debts :

Hague Convention concerning recovery of (1907), 309 n.
non-payment of, 344-345

Contracts :

effect of State succession on, 160

governmental immunity from local law, 272 n.

Conventio omnis intelligitur rebus sic stantibus, 939

Conventions, 898-899, 907, 919. *See also* Treaties

Copenhagen, bombardment of, by British fleet, 300

Treaty of (1857), 513 n.

Copyright, Universal Convention on, 992

Corfu affair, Commission of Jurists, 365 n., 862 n.

Corinth Canal, 480

Corporations, nationality of, 642 n.

Corps, diplomatic, 778-779

Corpses, Agreement concerning Transport of (1937), 1023 n.

Corsica, pledge by Genoa to France, 456, 549

Council of Europe, Statute of (1949), 183-186, 824 n.

Counterclaim in suits involving foreign State, 266 n.

Counterfeiting Currency, Conference on Suppression of, 333 n., 700 n.

Couriers, privileges of, 810, 813

Courland, voluntary merger in Russia, 549

Courts, International Law and, 33, 40-41

Covenant of the League of Nations. *See* League of Nations

Cracow, Free State of, 194 n.

Crimes Conference (1945), 223 n., 402 n., 873

Crimes. *See also* Extradition
committed on board man-of-war, 854

international, 338-342

on ships, 597 n.

Criminal jurisdiction over foreigners in foreign States, 331-333

Criminal Law, foreign, enforcement of, 328 n.

Criminal responsibility :

of individuals, 357

of States, 355-357

Criticism :

of foreign laws and institutions, 294

of foreign States, 284

Caucé, Emerio, 82

Cuba :

debt settled by Spain on, 166 n.

- Cuba (*continued*)—
 intervention by United States in (1906), 307
 quasi-protectorate of United States, 194 n., 289 n.
 revolt from Spain, 579 n.
Cujus est solum ejus est usque ad coelum et qd inferos, 518
 Cummins, Mr., case of, 816 n.
 Currency:
 Convention on Suppression of Counterfeiting (1929), 333 n.
 effect of changes of sovereignty, 160 n.
Custodes treugarum, 931 n.
 Custom, as source of International Law, 25-27
 Customary law, 7-8
 Customs, baggage of envoys, examination of, 803
 Customs Consolidation Act (1876), 496 n.
 Customs Formalities, Convention on Simplification of (1923), 1023 n.
 Customs Tariffs, Convention for the Publication of (1890), 1000 n.
 Customs union, between Austria and Germany, 155, 287 n., 895
 Customs Union Convention (1944), 182
 Customs unions, 155, 179 n.
 Cutting, Mr., case of, 332
 Cyprus:
 annexation by Great Britain, 567 n.
 British administration of, 455 n.
 maritime flag, 593 n.
 national status of inhabitants, 572 n.
 Cyrenaica, annexation by Italy, 571
 Czecho-Slovakia, provisions regarding maritime flag, 592 n.

D

- Damages:
 effect of State succession on, 162
 measure of, 353 n.
 non-payment of, 344-345
 penal or vindictive, 355
 Danish fleet, case of the, 299-300
 Danube, River:
 European Danube Commission, 466 n., 468-470, 955 n.
 International Commission of the Danube, 883 n.
 international position of, 440-470
 Danzig, Free City of:
 creation as a State, 194 n.
 League of Nations protectorate over, 385
 Treaty with Poland (1920), 194 n.

- Dardanelles, 588. *See also* Bosphorus
 international position of, 478
 Dawes Agreement (1924), 931
 De Bass, case of, 791
 De facto Government, diplomatic immunities of envoys, 137
 De facto recognition, 134-137
 distinguished from *de jure*, 149
 'De facto subjects,' 646-647
 De jure recognition, distinguished from *de facto*, 149
 Debts. *See* Public debt, succession of States
 Decisions of tribunals as source of International Law, 31-32
 Declaration of:
 International Rights of Man (1929), 737
 London (1871), 943; (1911), 913 n.
 Paris (1856), 5, 872, 879 n., 899 n.
 Rights and Duties of Nations (1916), 280 n.
 Rights of Mankind (1879), 57-58
 St. Petersburg (1868), 872
 Universal, Human Rights, 744-746
 Declarations, 872-873, 898-899, 907, 919, 968 n., *See also* Free Zones of Upper Savoy and Gex; Treaties
 Defamation of foreign governments, 283 n.
 Delagoa Bay, arbitration concerning, 580-581
 Delinquency, international, 338-357
 Denationalisation, 657-660, 674 n.
 Dengue Fever, Convention for Mutual Protection against (1934), 982 n.
 Denial of justice, 359-361
 'Deniers of the Law of Nations,' 95
 Denization, 663 n.
 Denmark:
 claim of sovereignty over Baltic, 584
 dispute with Norway concerning Eastern Greenland, 561, 764
 fisheries claim over Icelandic waters, 618 n.
 recognition of sovereignty over Eastern Greenland, 142 n.
 sale of West Indian Islands to United States, 549
 union with Iceland, 171 n., 172 n.
 Deportation. *See* Expulsion of aliens
 Deprivation of nationality, 657-658, 674 n.
 Dereliction, loss of territory by, 579-581
 Despatch bearers. *See* Bearers of
 Desuetude in treaties, 924 n.
 Dictatorial interference, 305

Dignity of States, 282-285
 consequences of, 282-285
 'Diplomatic' and 'legal' schools of
 International Law, 87-88
 Diplomatic envoys, 769-828. *See also*
 Agents
 ambassadors, 777
 appointment of, 779-781
 arrest by, 796
 arrest of, 807-808
 asylum, right of, 796, 797
 baggage of envoys, customs exam-
 ination and, 803 n.
 chargés d'affaires, 776, 778
 classes of, 775-779
 communications, inviolability of,
 790 n., 813 n.
 consular service, amalgamation
 with, 788
 death of, 820
 despatch bearers, 810, 813, 863
 development of the institution of,
 769-770
 diplomatic corps, 778-779
 dismissal of, 817
 duty to receive, 781
 envoys extraordinary, 777-778
 extraterritoriality of, 282, 290, 792-805
 family of, 812
 full powers, 780
 functions of, 785-787
 houses of, extraterritoriality of, 461
 immunities, 788, 790. *See also* Ex-
 traterritoriality
 of representatives of a *de facto*
 Government, 137 n.
 international rights of, 637
 internationally injurious acts of, 359
 inviolability of, 788-792
 kinds of, 775
 language of diplomacy, 771-772
 letters of credence, 780, 814, 815,
 817, 818
 list submitted to Foreign Office, 809
 ministers plenipotentiary, 776, 777-
 778
 ministers resident, 776, 778
 non-diplomatic persons, privileges
 of, 820-828
 occupied enemy territory, on, 808
 offences against, 366
 position of, 787-788
 privileges of, 788. *See also* Ex-
 traterritoriality
 promotion of, 816
 protection due to, 789-790
 protection of subjects of homo-
 State, 786
 recall of, 815-816
 reception of, 781-785
 refusal to receive, 782-783

Diplomatic envoys (*continued*)—
 residents, 364, 367
 retinue of, 808-813
 revolutionary States, agents of, 774
 right of chapel, 804
 right of legation, 772-775
 right of passage of, 806-807, 813
 rights of extraterritoriality of, 282,
 290. *See also* Extraterritoriality
 rupture of diplomatic relations, 775,
 817
 self-governing Dominions, sending
 and receiving, 200-205
 termination of mission, 813-820
 third States and, 806-808
 titles of, 777
 women as, 779-780
 Diplomatic Privileges Act (1708). *See*
 Anne, Queen, Statute of
 Diplomatic Privileges (Extension)
 Acts (1941), 828; (1944), 823 n.,
 824 826, 827, 828 n.; (1946),
 823 n., 824
 Discovery, 558
 Dismemberment of States, succession
 on, 164-165
 Dissolution of treaties, 936-944
 Distress, vessel in :
 exemption from local laws of foreign
 port, 607
 on the open sea, 504
 Diversion of waters, 200-201, 474 475
 Dogger Bank incident, 364 n.
 Domicile, naturalisation by acquisi-
 tion of, 656
 Dominican Republic, quasi protector-
 ate of United States, 194 n.
 Dominions, self-governing. *See also*
 British Empire; Imperial Con-
 ference
 'automatic belligerency' of, 196 n.,
 206 n., 207, 208
 British nationality, 208-209, 663
 channels of communication with
 Government in United Kingdom,
 201 n.
 consuls, right to appoint, 835-836
 declaration of war by, 205-206,
 207 n.
 definition, 201
 disputes between, 208
 maritime flag, 593
 Optional Clause, acceptance of, 208
 position before World War I, 198
 progress towards independent state-
 hood, 199-209
 right to remain neutral, 206 n.,
 207 n.
 Statute of Westminster (1931), 202-
 205
 treaties, position regarding, 201, 202

Dominions (continued)—

- treaty-making power, 886-887, 902, 919 n.
- Double nationality, 649 n., 664-668
- Drago doctrine, 309 n.
- Droit d'aubaine*, 690
- Droit de chapelle*, 604 *
- Droit d'enquête*, 604 n.
- Droit d'étape*, 640
- Droit de préséance*, 280
- Droit de renvoi*, 694
- Droit de rescousse*, 617 n.
- Dualist view of International Law, 37-38
- Dubois, M., case of, 802
- Dubois, Pierre, scheme for establishment of eternal peace, 82
- Dumba, Dr., case of, 808, 816
- Dumbarton Oaks, proposals of (1944), 402
- Dunkirk, fortification of, 952 n.
- Durass in conclusion of treaty, 691-692
- Dykes, accretion to State territory by, 564
- Dynasty, intervention on change of, 309

E

- Economic and Social Council of United Nations, 437-440, 444, 445, 743 n.
- Economic Conference, Geneva (1927), 322 n.
- Economic nationalism, effects of, 322-323
- Ecuador, admission to League of Nations, 904 n.
- Eggs, Convention on marking of (1931), 996 n.
- Egypt :
 - Capitulations in, 685-686
 - declaration of independence, 189 n.
 - Great Britain :
 - protectorate by, 481
 - Treaty with (1936), 102, 453 n., 482, 541 n., 779 n., 941 n.
 - vassal State of Turkey, 189, 190 n.
- Eire. *See* Irish Free State
- Ejusdem generis* rule, 954 n.
- Elbe, River, international position of, 470-471
- Embankments, accretion to State territory by, 564
- Emigration :
 - nationality of emigrants, 647
 - option of, on cession of territory, 553
 - right of, 648-649
- Endenburg, condominium over, 454
- English law and international law, 43

- Envoys. *See also* Diplomatic envoys
 - extraordinary, 776
 - permanent, 773
- Equality of States, 22-23, 123, 263-282
 - Act of Chapultepec (1945), 280 n., 318, 320 n., 963
 - Charter of United Nations and, 279-280, 412-414
 - immunity from jurisdiction, 264-267
 - international legislation and, 263-264
 - international organisations and, 277-279
 - legal and political equality distinguished, 275-277
 - recognition of foreign official acts, 267-270
- Error, effect of, on validity of treaties, 892-893
- 'Established,' meaning of, 571 n.
- Estonia :
 - non-recognition by United States of Russian annexation of, 145 n.
 - recognition of, 135
- Estoppel, 350 n.
- Estrada doctrine, 132 n.
- Ethiopia. *See* Abyssinia
- Eupen and Malmédy, plebiscite in, 552 n.
- European Coal and Steel Community, 186-187, 188, 933
- European Coal Organisation, 824 n.
- European Danube Commission. *See* Danube
- European Defence Community, 187-188, 963
- European Economic Co-operation, Convention of (1948), 183
- Ex injuria jure non oritur*, 574 n.
- Exchange of letters, 919
- Exchange of notes, 907
- Exchange of populations, 552-554
- Execution against foreign State, 266 n.
- Executive :
 - action or inaction of, as source of responsibility, 369
 - conclusiveness of statements of. *See* Conclusiveness of statements of Executive
- Equator, 201, 835-837, 840, 843-844
- Exhaustion of local remedies, 361-362, 640 n.
- Exhibitions, international, Convention on (1928), 991 n.
- Expatriation :
 - loss of nationality as result of, 669-670
 - right of, 648-649
- Expiration :
 - of citizenship, 668
 - of treaties, 936-944

Expressio unius est exclusio alterius, 954

Expropriation, 260 n.

of alien property, 352

Expulsion of aliens, 691-695

Extraterritoriality of diplomatic envoys :
as to others see Armed forces in
foreign territory ; Capitulations ;
Heads of States ; Men-of-War
domicile, immunity of, 793-796
exemption from :

civil jurisdiction, 798-800

criminal jurisdiction, 790,
793 n., 798-800

police, 802

subpoena as witness, 801-802

taxation, 802-803

fictional character of, 792

limitation of, 791

retinue of diplomatic envoys, 808-
813

right of chapel, 804

self-jurisdiction, 805

Extinction of States, 155-156, 819

Extradition, 695-703

attentat clause, 709

British legislation, 696, 701 n.

conditions of, 702-703

crimes, extraditable, 700-702

definition, 696

double criminality, 702

history, 696-698

municipal extradition law, 697-
698

nationals, of, 700

object of, 698-700

political criminals, 703, 704-710

treaties, 696-697

United States practice, 700 n.

whether a legal duty, 696

Extraterritoriality. See Capitulations

F

Falke, case of the, 610 n.

Falkland Islands :

alleged abandonment by Great
Britain, 580 n.

Dependencies, 557 n.

False Indications of Origin of Goods,
Convention on Suppression of,
992 n.

Family of Nation. See also Inter-
national community

common consent of, as basis for
International Law, 15-19

new members of, 544

non-Christian States, 40-50, 280

Farøe Islands and Iceland, Conven-
tion of London (1901), 622

Fauna, Convention for the Protection
of (1933), 996 n.

Federal States, 175-178, 459

cancellation of former treaties of
member-States, 948

consuls, right to appoint, 835

formation of, 154-156

international obligations and, 179-
182

list of, 178

responsibility for contracts of mem-
ber-States, 331

right of legation, 774

territory of, 459

treaty-making power, 882

Federations and Associations of
States, 182-188

Fetiales, 75, 77

Financial intervention and control,
312 n.

Finland :

recognition of (1919), 135, 149 n.

right of navigation on Neva, 541 n.

Treaty of Peace with (1947), 741 n.

Fiore, 58 n.

Fisheries :

around Farøe Islands and Iceland,
622

conservation zones, 500

general considerations, 618-619

in gulfs and bays, 500-510

maritime belt, 492-493, 499-
501

North Pacific Ocean, 620-622

North Sea, 619-620

North-West Atlantic, 622

open sea, 617-625

straits, 511-512

international regulation of, 624-
625

London Conference (1943), 623 n.

protective jurisdiction over, 499-
501

servitudes, 539

three-mile limit and, 509 n.

whaling, regulation of, 623-624

Fiume, cession to Allied and Associ-
ated Powers, 454 n.

international status of, 550 n.

Flag :

abuse of, 605

consul's right to hoist, 843

necessity for rules concerning, 590

respect for, 282

war, 592-593

Flag, maritime, claim to, 592

claims to sail under, 595-596

jurisdiction based on, 594

verification of, 604, 605

Flora, Convention for the Protection
of (1933), 996 n.

Food and Agriculture Organisation of the United Nations (F.A.O.), 376, 445; 823 n., 902 n., 909 n., 993, 1010
 origin and objects of, 994-997
 Preamble to Constitution, 902 n.
 structure of, 997
 Forced labour, abolition of, 735
 Foreign Jurisdiction Act (1890), 683
 Foreign legislation, limits of recognition of, 267-270
 Foreign Offices, 763-768
 certificate of, 765-768. *See also* Conclusiveness of statements made by the Executive
 Foreign public law, enforcement of, 327-330
 Foreign Secretary :
 negotiations with, 868 n.
 position of, 763-765
 Foreign States. *See also* Immunity from jurisdiction
 offences against the dignity of, 282, 283, 284
 Foreigners in foreign States, criminal jurisdiction over, 331-333
 'Forerunners of Grotius,' 89-91
 Fort, case of, 707 n.
 Founders of International Law, 89-99
 'Four Freedoms' (President Roosevelt), 738 n.
 Four Powers Agreement (1946), 902 n. 906 n.
 France :
 cession of Alexandretta to Turkey, 214 n., 216
 German occupation of (1871), 847
 International Law part of law of, 44
 interventions in Greece, 308, 312-313
 mandate for Cameroons and Togoland, 214 n.
 protectorates of, 195
 sinking of fleet at Oran, 303
 Syria and Lebanon :
 mandate over, 216
 Treaties with, 217
 treaty-making power of President, 888
 Treaty of Defence with Great Britain (1919), 199
 Treaty with Monaco (1918), 103 n.
 trusteeship system, adoption of, 227
Franchise de l'hôtel, 793-794
Franchise du quartier, 794-796
 Frankfurt, Treaty of (1871), 553
 Fraser River system, 621-622
 Free zones in ports, 592 n.*

Free Zones of Upper Savoy and Gex, case of, 142, 345, 543, 925 n., 926 n., 943
 declaration during proceedings, binding force of, 888 n.
 rebus sic stantibus principle, 543, 940, 941 n.
 Freedom of commerce, 578 n.
 Freedom of navigation :
 on open sea, 584-594
 on rivers, 325, 465-470
 within the maritime belt, 325, 493-495
 Freedom of the open sea, 582-594
 ceremonials, 591
 history of, 582-587
 maritime ceremonials, 584
 meaning of, 589-590
 rationale for, 593
 war and, 591
 'Freedoms' of aerial navigation, 526-528
 French, as language of diplomacy, 771-772
 Frontier. *See* Boundaries
 Frontiers, Conventions relating to crossing of, 1023 n.
 Full powers, 780, 884, 887, 902
 in British Dominions, 886
 Fundamental rights of man, 736-743
 Fundamental rights of States, 259-261

G

Gabella emigrationis, 690
 Gallatin, Mr., case of coachman of, 811 n.
 General International Law, 28
 General principles of law, as source of international Law, 29-31
 Geneva :
 Convention and Statute respecting International Régime of Maritime Ports (1923), 504
 Convention concerning terrorism (1937), 710
 Convention on hydraulic power (1923), 476
 Conventions for the amelioration of condition of wounded in armies in the field (1864, 1906, 1929, 1949), 879 n.
 Economic Conference (1927), 322 n.
 Lake of, international position of, 477
 Passport Regulations, Conference on (1926), 676 n.
 Protocol (1922), 287 n.
 Slavery Convention (1926), 734, 735

- Genoa, Republic of:
 sovereignty over Ligurian Sea, 583
 title of, 281 n.
- Genocide Convention (1948), 749-751, 915
- Gentilis, 90, 585
- Geodetic Association, 991 n.
- German-Japanese Agreement on Communism (1936), 294 n.
- Germany:
 assets abroad, Allied decrees concerning, 330 n.
 condominium over, 454 n.
 Control Council for, 568 n., 873 n.
 'Court of Racial Health,' 688 n.
 customs régime with Austria, 155, 287, 895
 Declaration regarding defeat of (1945), 454-455
 effect of unification (1934) on extradition treaties, 159 n.
 evacuation of minorities from other countries, 552 n.
- International Law:
 conception of, 55
 part of the law of, 43
 invasion of Belgium and Luxembourg (1914), 301-302
 member-States, legal position of, 173, 175, 176 n.
 right of legation of, 774
 Nationality Law (1935), 644
 occupation of (1919), 847
 occupation of (1949), 569 n.
 racial laws, 55, 688 n.
 repudiation of certain Articles of Treaty of Versailles, 943, 947 n.-948 n.
 status after World War II, 568-570
 Weimar Constitution (1919), 176 n.
- Gex. *See* Free Zones of Upper Savoy and Gex
- Gift of territory, 548-549
- Glossatores*, 939 n.
- Goeben and Breslau*, case of the, 514 n.
- Good offices, in conclusion of treaties, 934
- Government departments, immunity from jurisdiction, 265 n.
- Government officials:
 abroad, diplomatic immunity of, 265 n., 827
 naturalisation by appointment as, 656
- Governments. *See also* Heads of States
 change of, effect on treaties, 925
 members of, internationally injurious acts of, 255
 treaty-making power of, 584-585
- Governments-in-exile' in Great Britain during World War II, 326, 329 n.
- diplomatic immunities of officials, 828
- Great Britain. *See* United Kingdom
- Great Powers, political and legal hegemony of, 275-277
- Greece:
 contribution to International Law, 74-75
 guarantee of, 935 n.
 intervention by Great Britain, France and Russia (1827), 313; (1916, 1917), 308
 Turkey:
 revolt from, 579 n.
 war with (1827), 313; (1886, 1897), 311
 United States' assistance to, 308 n.
- Greece and Bulgaria, emigration of minorities, 648 n.
- Greek Refugee Settlement Scheme (1924), 553 n.
- Greenland:
 American Agreement for defence of (1941), 892 n.
 Danish-Norwegian dispute over, 142, 561, 580, 764, 893, 898
 recognition of Danish sovereignty over, 142 n.
- Grégoire, Abbé, draft of Declaration of the Rights of Nations, 58
- Grey, Viscount, on collective guarantees, 966-967
- Grotians, 30, 98-99, 106, 107
- Grotius, 6, 17, 71-83, 83-88, 99, 363, 737
- de jure belli ac pacis*, 6, 17, 84, 89
- forerunners of, 89-91
- on acquisition of territory, 545-546
- air space, 517 n.
- extradition, 696
- freedom of the sea, 584-586, 628
- innocent passage through rivers, 465
- interpretation of treaties, 951
- open sea, 589 n., 593
- plebiscite, 552 n.
- permanent legations, 770
- prescription, 575
- Guarantee of treaty, 932
- Guarantee, treaties of, 964-968
- collective guarantees, 966-967
- conception of, 964-965
- effect of, 966
- Locarno Pact (1925), 967 n.
- objects of, 964-965
- pseudo-guarantees, 966

Gulfs and Bays, 504-510
 distinguished from territorial
 waters, 460-461
 fishery in, 500-510
 jurisdiction in, 509-510
 navigation in, 509-510
 non-territorial, 508-509
 territorial, 505-508
 Gurney, Mr., case of, 810 n.
 Gyllenburg, case of, 791

H

Hague Codification Conference (1930),
 62-63, 65-68, 487 n., 488, 496 n.,
 507, 666-668, 917
 provisions concerning statelessness,
 669-670
 Hague Conventions, 879 n. *See also*
 International Court of Justice;
 Permanent Court of Arbitration;
 Permanent Court of International
 Justice
 Conflict of Nationality Laws (1930),
 643, 649, 654 n., 666-668
 Police and Fishery in the North Sea
 (1882), 509 n. *See also* North
 Sea Fisheries Convention
 Hague Peace Conferences (1899), 13,
 58-59, 879 n.; (1907), 13, 59-60,
 309 n., 488 n.
 Convention for Pacific Settlement
 of International Disputes, 59
 Convention on the Commencement
 of Hostilities, 874
 Convention on Conversion of Mer-
 chant Ships into Warships, 852 n.
 Convention on the Laws and Cus-
 toms of War on Land, 337,
 354 n., 363 n., 899, 953
 Convention on Rights and Duties of
 Neutral Powers in Maritime War
 (1907), 488 n.
 Drago doctrine at, 309 n.
 Haiti:
 guarantee of, 965 n.
 legal status of, 290 n.
 quasi-protectorate of United States
 over, 194 n.
 United States' intervention in
 (1929, 1930), 307 n.
 Halibut Fisheries Conventions (1923),
 200, 920 n.; (1937), 621-622
 Hanover, personal union with Great
 Britain, 171
 Hanseatic League, 80-81
 Harbour Dues, Convention for Ex-
 emption of Hospital Ships from
 (1905), 982 n.
 Harbours, 502-504

Hasemann, case of, 363 n.
 Havana Charter (1947), 323-324
 General Agreement on Tariffs and
 Trade, 999-1000
 proposed International Trade Or-
 ganisation and, 998-999
 Havana, Treaty of (1903), 289 n., 307,
 985
 Hay-Pauncefote Treaty (1901), 483,
 485, 912, 926
 Hay-Varilla Treaty (1903), 289 n.,
 485, 927
 Heads of States, 757-763. *See also*
 Governments; Kings; Monarchs;
 Presidents
 abdicated, 761, 775
 changes in:
 effect on consuls, 844
 effect on diplomatic envoys,
 817-819
 effect on treaties, 925
 competence of, 757-758
 honours and privileges of, 758
 internationally injurious acts of, 358
 libel and slander of, 282, 283 n.,
 named in treaties, 901
 necessity for, 757
 negotiations by, 868
 new, recognition of, 129-130
 objects of the Law of Nations, 758
 offences against, 366
 presidents of republics, 762-763
 ratification of treaties by, 910
 right of legation of, 774
 rights of, 637
 titles of, 281 n.
 treaty-making power of, 884-885,
 887, 906
 Health. *See* World Health Organisa-
 tion
 Hed, va. *See* Saudi Arabia
 Heinrichs, Herr von, case of, 807
 Heligoland, demilitarisation of, 539 n.
 Herring Fishery (Scotland) Act (1889),
 509 n.
 Herzegovina. *See also* Bosnia
 Austro-Hungarian administration
 of, 455
 High seas. *See* Open sea
 Hinterland, doctrine of, 560 n., 561
 History, impartial teaching of, 283 n.
 Hobbes, 7, 96, 121
 Holland. *See* Netherlands
 Holy Alliance (1815), 314, 315, 884,
 959
 Holy See, 250-255, 451
 envoys of, 252, 777
 international position of, 251-255,
 732 n.
 Lateran Treaty (1929), 244 n., 252-
 255, 540 n., 793 n., 807 n.

Holy See (continued)

- recognition of Kingdom of Italy, 142 n.
- subject of international rights and duties, 21
- Vatican City :
 - international status of, 254-255
 - neutralisation of, 244 n., 253
- Hostages, for securing performance of treaties, 930
- Hostile expeditions, duty to prevent, 291, 292
- 'Hot pursuit,' doctrine of, 605 n.
- Hovering Acts, 496 n.
- Huascar*, case of the, 611, 612
- Human Rights :
 - Bill of, 743-744
 - Commission on, 441 n., 743
 - Declaration of, 744-746
 - European Convention on, (1950), 746-749
- Human rights and fundamental freedoms :
 - Charter of United Nations, under, 296-297, 320, 642, 738-743
 - international protection of, 736-753
- Humanitarianism, intervention in interest of, 312-313
- Humanity, crimes against, 752-753
- Hungary :
 - Russian intervention in, 305
 - terrorism in, 292 n.
 - Treaty of Peace with (1947), 469, 470 n., 741 n.
- Hünigen, prohibition of fortification of, 542
- Hutcheson, 96
- Hydraulic power, Convention concerning the development of (1923), 476
- Hydrographic Bureau, Convention on (1919), 990 n.

I

Iceland :

- Convention of London (1901), 622
- Danish claim to fisheries in coastal waters of, 618 n.
- self-neutralisation, 244 n.
- union with Denmark, 171 n., 172 n.
- Immigration, restrictions on, 323
- Immunity from jurisdiction, 264-267.
 - See also* Extraterritoriality
 - government departments, 265
 - government officials, 264 n.
 - government operations, 265

Immunity from jurisdiction (contd.)

- Governments-in-exile in Great Britain during World War II, 326-327
- International Law and, 272-275
- limitations of, 271-275
- statutes of limitation and, 272 n.
- submission as waiver of, 266
- waiver of, 800-801
- Imperial Conference, Resolutions as to treaty-making power (1923, 1926, 1930), 201, 586, 911 n.
- Imperial Conference (1923), procedure as to full powers, 200 n.
- Imperial Conference (1926), definition of self-governing Dominions, 201, 911 n.
- Imperial Conference (1930), procedure in negotiation of treaties, 201
- Imperial Conference (1937) :
 - position of Dominions as regards treaties, 202
- In dubio mitius*, 953
- Inchoate title of discovery, 558-559, 578 n.
- Inconsistency of treaties. *See* Treaties, inconsistency
- Independence of States, 285-297
 - consequence of, 286-288
 - restrictions on, 289-292
 - violations of, 288-289
- India :
 - ancient, International Law in, 72 n.
 - Indian vassal States of Great Britain, 190
 - legal position of, 209
 - Indian States, 196 n.
 - maritime flag, 593 n.
 - representation at Peace Conference (1919), 199
- Individuals in International Law, 19-22, 636-753
 - access to international tribunals, 638 n.
 - grant of direct rights by States, 21
 - international criminal liability of, 357
 - international delinquencies by, 341-342
 - rights of mankind, 640-642
 - rights under treaties, 637
 - State responsibility for acts of, 364-369
 - whether subjects of International Law, 636-639
- Industrial Property, Convention on, 992 n.
- Inland seas. *See* Land-locked seas
- Institute of International Law :
 - Declaration on the Rights of Man (1929), 737

- Institute of International Law (*continued*)—
 on breadth of maritime belt, 488-492
 consular immunities, 841 n.
 Criminal Laws, 331 n.
 expulsion of aliens, 693 n.
 jurisdiction over foreigners, 331 n.
 men-of-war in foreign waters, 855 n.
 privileges of diplomatic envoys, 782 n., 792 n.
 radio-telegraphic communication, 462 n.
 recognition of new governments, 151 n.
 responsibility for acts of insurgents, 369 n.
 responsibility of Federal State for member-States, 340 n.
 rivers, international, 475 n.
 ships and crews in foreign ports, 460 n.
 telegraph cables, 625
 utilisation of flow of rivers, 475 n.
- Insurgency, recognition of, 140
- Insurgents:
 diplomatic agents of, 774, 860
 responsibility of States for acts of, 366-369
- Inter-Allied Reparation Agency, 824 n.
- Inter-departmental and inter governmental agreements, 901-902
- Inter-Governmental Maritime Consultative Organisation (I.M.C.O.), 1014-1018
 functions of, 1014-1016
 membership of, 1016
 structure of, 1016-1018
- Intercourse, 321-325
 a presupposition of international personality, 262, 321
 consequences of, 324-325
 rights of, 321-324
- Interest, award of, 353 n.
- International administration, 12, 375-378, 977-1029
- International Agricultural Institute, Convention on, 995, 996
- International Bank for Reconstruction and Development, 376, 824 n., 1007-1010
 interpretation of Agreement, 1009
 lending and borrowing powers of, 1009
 membership of, 1008
 purposes of, 1008
 structure of, 1009
- International Bill of the Rights of Man, 736 n., 740
- International Civil Aviation Conference (1944), 525-529
- International Civil Aviation Organisation (I.C.A.O.), 376, 445, 526, 528 n., 777, 1011-1014
 aims of, 1011
 functions of, 1012
 Navigation Code of the Air, 1013
 structure of, 1013
- International Code of Signals, 599
- International Comity, 33-35
- International Commission for Air Navigation, 521
- International Commission of American Jurists, 53 n.
- International community, 11-14. *See also* Family of Nations
 rules of conduct, 13
 enforcement of, 13
- International Conference of American States (1933), 320 n.; (1936), 320 n.; (1938), 915 n.; (1940), 318 n., 320 n.; (1945), 318. *See also* Inter-American Conference; Pan-American Conference
 Convention on Asylum (1928), 795 n.
 Convention on Radiocommunications (1937), 530 n.
- International co-operation and administration, 977-1029
- International Court of Justice, 12, 21, 440, 441, 719. *See also* Permanent Court of International Justice
 application of International Law by, 29, 33
 compulsory jurisdiction of, 168 n.
 development of International Law by, 27
 diplomatic privileges of members, 823
 judicial precedent and, 54
 oppressive treaty obligations, 944
 Statute of, 29-30
- 'International crimes,' 338-342. *See also* Responsibility of States
- International Criminal Court, proposal for, 293 n.
- International Labour Conventions. *See under* International Labour Organisation
- International Labour Organisation, 12, 376, 445, 716-732
 character of, 731-732
 Constitution of, 717-719, 729, 909 n.
 diplomatic immunities of officials, 821 n.
 functions of, 722-723
 General Conference, 720-721, 723

International Labour Organisation (continued)—

- Governing Body, 720, 721-722
- International Court of Justice and, 729
- Labour Conventions, 725-726, 727 n.-729 n.
 - ratification of, 724, 726-727, 730 n., 880 n., 913 n.
 - sanctions of, 729-731
- legal status of, 443
- membership of, 277, 719-720
- objects of, 718-719
- origin of, 717-718
- tripartite character of, 720-722
- United Nations, relationship with, 731

International Law :

- American, 52-54
- Anglo-American and Continental Schools, 43, 51-52, 54
- antiquity, in, 72
- basis of, 15-23
- bibliographies, list of, 112-113
- binding nature of, 5, 15
- Charter of United Nations and, 447 n., 448 n.
- Christianity and, 48, 78
- codification of. *See* Codification of International Law
- comity and, 33-35
- common consent, 15-19
- creation of, 17
- definition of, 4-7
- development of, 71-88
 - before Grotius, 71-83
 - bibliography, 71-72, 83-84, 88-89, 112-114
 - since Grotius, 83-88
 - World Wars I and II, during and since, 106
- dominion of, 47-56
- enforcement of rules of, 13-14
- equality of States as inference from, 22-23
- express municipal adoption of, 41
- Family of Nations and, 11, 10-22, 28
- federal structure and, 179-182
- foundation of, 3-70
- founders of, 89-99
- general, 5, 29-31
- history of, 86-88
- individuals: *see* Individuals in International Law
- international organisation and, 370-371, 378-380
- law, as, 3-15
- legal force of, 7-8, 14-15
- Municipal Law and, 7, 10, 19, 35-47, 270 n.
- national conceptions of, 55-56

International Law (continued)—

- nature of, 4-7, 9, 11, 14-15
- objects of, 451-581
 - particular, 5, 28
 - periodicals, list of, 113-114
- revision of, by international legislation, 69-70
- science of, 7, 88-114
- sources of, 23-35
- sovereignty, compatibility with, 126
- subjects of, 19-22, 117-118; *see also* Individuals in International Law
- totalitarian dictatorships and, 108
- treaties and, 27-28
- treatises, 90-105
- universal and regional, 5, 28, 51-52
- violations of, 15
 - intervention for, 308
 - weakness of, 14-15
- International Law Commission, 68, 69, 112 n., 491 n., 752 n., 915 n.
- International legislation, 27-28, 69-70
- equality of States and, 263-264
- International Monetary Fund, 323 n., 376, 823 n., 918 n., 1000-1007
- immunities of, 1004
- interpretation of Agreement, 1006-1007
- membership of, 1002-1003
- origin of, 1002
- status of, 1004
- structure of, 1003
- International morality, 35
- International organisation, principles of, 370-375
- International organisations, 375-380, 977-1029
 - diplomatic privileges of officials, 823-826
 - equality of States and, 277-279
 - impact of, upon International Law, 378-380
 - legal personality of, 21
 - majority rule in, 278 n.
 - objects of, 371-375
 - principles of, 370-380
 - rational principles of, 373
 - State sovereignty and, 371-372
 - universality of, 372-373
 - voting strength of members, 277 n.
- International personality:
 - conception of, 259-261
 - intercourse as a presupposition of, 262, 321
- international organisations, 21
- qualities of, 261-262
- International persons, 117-258. *See also* States
- changes in condition of, 152-156
- composite, 169-188

International persons (continued)—
 extinction of, 155-156
 member-States of a Federal State, 175-178
 real and apparent, 117-118, 170-171
 States, list of, 255-258
 States, qualities of, *as*, 286
 succession of, 156-169
 International Postal Union, 376, 378, 1018-1020
**International Radiographic Conventions:*
 London (1912), 462
 Washington (1927), 462, 529, 599, 627
 International rivers, 465, 467-471, 879 n.
 International Telecommunication Union, 376-377, 462, 1023-1027
 functions of, 1023-1025
 structure of, 1025-1027
 International Trade Organisation, 22, 323, 324 n., 884, 933, 998-1000
 International unions. *See* Unions, international
 Internment, 200 n.
 Interparliamentary Union, 260 n.
 Interpretation of treaties, 950-958
 authentic interpretation, 950-951
 compromise clause, 950-951
 preparatory work, consideration of, 957-958
 rules of, 951-957
 Intervention, 304-320
 balance of power, in interest of, 311-312
 by right, 306-310
 Chapultepec, Act of (1945), 280 n., 318, 320 n., 963
 Charter of United Nations and, 320, 414-420
 citizens abroad*, 309
 conception and character of, 305
 contract debts, for recovery of, 309 n.
 Covenant of League of Nations and, 309-310
 dictatorial nature of, 305
 distinguished from good offices, 305
 Drago doctrine, 309 n.
 financial, 312 n.
 Holy Alliance and, 314
 humanity, in interest of, 312-313
 limits of prohibition of, 319-320
 Monroe Doctrine, 313-316
 Non-intervention Agreement (1936), 305 n.
 on change of government or dynasty, 309
 participation in treaties by way of, 934

Intervention (continued)—
 self-preservation, in, 310
 Spanish Civil War, in, 306 n.
 Ionian Islands, legal position of, 193 n.
 Iran. *See* Persia
 Iraq:
 Capitulations in, 683
 mandate over, 216
 nationality in, 221-222
 United Kingdom, Treaty of Alliance with (1930), 216
 United States, Treaty with (1930), 222 n.
 Irish Free State:
 legal position of, 200, 203 n.
 nationality, 204 n., 206 n., 208 n., 653 n.
 neutrality of, in World War II, 206 n.
 succession to funds of the 'Irish Republic', 163 n.
 Islands, accretion by birth of, 563, 565
 Israel:
 blockade of, by Egypt, 482 n.
 responsibility for murder of Count Bernadotte, 366 n.
 Italy:
 Holy See, Lateran Treaty with (1929), 244 n., 252-255, 540 n., 793 n., 807 n.
 Law of Guarantee (1871), 251-252
 Papal States, annexation of, 251
 recognition of Kingdom of, by Vatican City, 142 n.
 recognition of rule over Abyssinia, 152
 by Great Britain, 136
 sanctions against, attitude of Switzerland, 245 n.
 Treaty of Peace with (1947), 476 n., 537 n., 554, 592 n., 741 n., 965
 public debt, 166
 Tripoli, annexation of, 571

J

Jacob-Salomon, case of, 295 n.
 Jacquin, case of, 709
 Jamaica, lease of air bases in, 458
 Jan Mayen Island:
 occupation of, 555 n.
 recognition of Norwegian sovereignty over, 142 n.
 Janina-Corfu affair, Committee of Jurists, 365 n., 862 n.
 Japan:
 a member of Family of Nations, 49
 aliens in, privileges of, 683 n.
 Capitulations in, 683
 extraterritorial jurisdiction in, 683
 Inland Sea of, international status of, 588 n.

Japan (continued)—

- Korea, merger of, 156, 158, 549
- protectorate over, 192 n.
- Manchuria, claim to, 319 n.
- invasion of, 143, 302-303
- non-recognition of conquest of, 143
- mandate over Pacific Islands, 220
- Jenkins, Sir Leoline, 94 n.

Jews:

- contribution to International Law, 73-74
- position of:
 - in Palestine, 217-219
 - in Roumania, 669 n.

Judgments of municipal tribunals, as a source of International Law, 32

Judicial functionaries, internationally injurious acts of, 359-361

Jurisdiction, 325-334

- consular immunities, 840
- criminal jurisdiction over an act causing collision in open sea, 333-334
- criminal jurisdiction over foreigners in foreign States, 331-333
- immunity from: *see* Extraterritoriality; Immunity from Jurisdiction

in gulfs and bays, 509-510

maritime belt, 47, 495

straits, 511

limitations upon, 143-144

open sea, 330-331, 594-608. *See also* Open sea

over aircraft, 520

- aliens, 330, 679
- armed forces abroad, 847, 849
- citizens abroad, 330
- foreign men-of-war, 853
- pirates, 330, 616
- public vessels, 856-859

quidquid est in territorio est etiam de territorio, 287, 452

submission to, 267

territorial, restrictions upon, 325-326

Jus albinagii, 690 n.

Jus fœdiale, 75

Jus gentium, 76, 93, 94

Jus postlimum, 76

Jus quarteriorum, 794

Jus sacrum, 75

Jus transitus innocui, 806

Jus voluntarium, 93

K

Kârnardji, Treaty of (1774), 774.

Kalkstein, case of, 796 n.

Kara Sea, international status of, 588

Kelley, Mr., case of, 782

Kellogg Pact (1928). *See* Renunciation of War, General Treaty for

Kelmis (Moresnet), 463 n.

Kelsen, influence on International Law, 15 n.

Kennan, Mr., case of, 816

Kiaochow, lease by China to Germany, 456, 549

Kidnapping on foreign territory, 205 n.

Kiel Canal, 482-483

King of England, title of, 200 n., 281 n.

Kings. *See also* Heads of States; Monarchs; United Kingdom

assumption of title, 281 n.

King's Chambers, 508

Kismayu, lease of land by Great Britain to Italy, 456 n.

Korea:

Japanese protectorate over, 192 n.

merger into Japan, 156, 158, 549

Kosztá, Martin, case of, 347 n.

Krohn, Captain, case of, 808 n.

Kuang chow Wan, lease by China to France, 456, 549

L

L'Aubespine, M., case of, 791

La Follette Seamen's Act, 503 n.

Labour Conventions. *See under* International Labour Organisation

Labour Organisation, International. *See* International Labour Organisation

Laches, 349 n.

Lado Enclave, lease by Great Britain to Congo Free State, 457

Lakes, 476-479

as boundaries, 533

international, 477-478

Land locked seas, 476-479

international, 477-478

Language of diplomacy, 771

Languages of treaties, 772, 956

Laos, 174

Lateran Treaty (1929), 244 n., 252-255, 540 n., 793 n., 807 n.

Latvia:

non-recognition by United States of Russian annexation of, 145 n.

recognition of, 135

Lauenburg, condominium over, 453

Lausanne:

Treaty of (1912), 166 n.

Treaty of (1917) (Straita Convention), 479

Treaty of (1923), 162 n., 166 n., 213 n., 455 n., 482, 504 n., 514, 567 n.

protection of minorities, 683 n., 713 n.

Law :

- basis of, 15-23
- conditions of, 8-10
- International Law as, 3-15
- Municipal Law, 7, 10
- Law of Nations. *See* International Law
- Law of Nature, 92-93, 593
- Law-making treaties, 28, 492, 878-880
- League of Nations, 12, 380-400
 - admission as test of recognition, 147
 - applications for admission, 383 n.
 - Assembly, 386-388
 - competence of, 387
 - functions of, 387
 - membership of, 386
 - relation to Council, 390 n.
 - resolutions, binding force of, 144 n.
 - voting, 387-388
 - assets of, transfer to United Nations, 401 n.
 - codification of International Law and, 61-62, 64-68
 - collective guarantee, 394
 - constitution of, 385-392
 - Council, 388
 - competence of, 389
 - composition of, 277
 - functions of, 389
 - membership of, 388
 - relation to the Assembly 390 n.
 - voting, 389
 - Covenant, 14, 27 n., 879 n.
 - abrogation of treaties inconsistent with, 397-399
 - adoption of, 382
 - alliances inconsistent with, 961
 - amendments to, 386
 - effect of, on coercion of vanquished State, 891
 - hegemony of Great Powers, 275-277
 - intervention under, 310
 - mandates, 212
 - Monroe Doctrine and, 316-317
 - non-members, effect of, on, 928
 - non-recognition, obligation of, 142-145
 - registration and publication of treaties under, 898 n., 919-923
 - respect for treaty obligations, 943 n.
 - sanctions, 356, 394, 932 n.
 - title by conquest and, 70, 573, 574
 - diplomatic immunities of officials, 821 n.
 - dissolution of, 401 n.
 - expulsion from, 383 n.

League of Nations (*continued*)—

- Financial Committee, 312 n.
- functions of, 392-400
- general character of, 380-385
- guarantee against aggression, 393-395
- international unions and organisations under, 391-392
- intervention by, 385
- legal nature of, 384-385
- Liberia and, 383 n.
- Luxemburg, admission of, 249 n.
- mandated territories. *See* Mandates
- membership of, 382-383
 - termination of, 383-384
- open door, 214, 227, 971 n.
- origin of, 381-382
- peaceful settlement of international disputes, 392-393
- permanent advisory committees, 385
- purposes of, 392
- reduction of armaments, 393
- sanctions, 356, 394, 932 n.
- Secretariat, 390-391
- self-governing Dominions, position of, 200
- Swiss Municipal Law, status of the League under, 384 n.
- technical organisations of, 385
- third States and, 222, 573
- treaties :
 - reconsideration of, 395-397
 - registration of, 898 n., 918-923
 - resolution as to ratifications, 909 n.
- treaty-making power, 882 n.
- unanimity, 387, 389
- United States and, 393
- var.*, 388
- withdrawal from, 384
- League of Nations Codification Committee, 60-61
 - on breadth of maritime belt, 186 n., 491 n.
 - classification of diplomatic envoys, 777 n.
 - conferences, 869 n.
 - distinction between national and territorial waters, 460
 - exploitation of the products of the sea, 619 n.
 - extradition, 697 n.
 - jurisdiction over foreigners abroad, 331 n.
 - recognition of legal personality of foreign corporations, 643 n.
 - surface and subsoil of the sea, 502 n.

- League of Nations Treaty Series, 921
 League to enforce peace, 381, 382
 Lease of bases by Great Britain to United States (1941), 457-458
 Leases of State territory, 457-459, 540
 Lebanon. *See* Syria and Lebanon.
Lebanon, case of the, 627 n.
 Legal remedies, exhaustion of, 361, 640 n.
Legati a latere, 777
 Legation. *See also* Diplomatic envoys
 history of, 769-770
 right of, 325, 772-775
 Legations. *See also* Diplomatic envoys
 permanent, origin of, 81
 privileges of, 810-811
Leges Visbuenenses, 80
 Legislation, foreign, recognition of, 267
 Legislation, international. *See* International Legislation
 Legitimacy Act (1926), 656 n.
 Legnano, 90
Lèse-majesté, 706, 707
 Letters of credence, 780, 817, 818
 expiration of, 814, 815
 Letters of marque, 610, 613 n.
Lettre de provision, 835
Lettre de récréance, 815
 Libel of Head of State, 282, 283 n.
 Liberia, 49, 383 n.
 Lieber, draft code of laws of war, 58 n.
 Liechtenstein, 451
 customs union with Switzerland, 179 n.
 international status of, 256 n.
 Lighthouses, 501, 556
 Lightships, Convention concerning (1930), 599
 Ligurian Sea, sovereignty over, 583
 Lima, Conference of (1938), 317
 Resolution concerning minorities, 715 n.
 Resolution on non-recognition, 145
 Limitation. *See* Statutes of limitation
 Liquor Traffic, Convention concerning the Abolition of (1887), 620
 Liquor Traffic, Convention for Suppression of Contraband (1925), 620 n.
 Liquor Treaty between Great Britain and United States (1924), 498
 Lithuania, non-recognition by United States of Russian annexation of, 145 n.
 Little Entente, 960 n., 962 n.
 Load Line Convention (1930), 601
 Loans, government, law governing, 271-272
 Local remedies, exhaustion of, 361, 640 n.
 Locarno Pact (1925), 199
 collective guarantee of *status quo*, 967 n.
 denunciation by Germany, 247
 neutralisation of Belgium, 246
 Locusts, Convention concerning fight against, 906 n.
 Lombardy, cession of, to France and Sardinia, 550 n.
 London:
 Convention of (1871), 894
 Convention of (1884), position of former South African Republic, 289 n.
 Convention of (1901); regarding Farø Islands, etc., fisheries, 622
 Conventions of (1914 and 1929), for Safety of Life at Sea, 599;
 (1948), 600
 Declaration of (1871), 943
 Declaration of (1911), 913 n.
 Fisheries Conference (1943), 623 n.
 Radiotelegraphic Convention (1912), 627
 Treaty of (1831), 246, 879 n.;
 (1839), 879 n.; (1840), 906 n.;
 (1841), 514, 733; (1863), 308;
 (1867), 248, 311; (1871), 514,
 591, 943, 944
 Loss of State territory, 578-581
 dereliction, 579-581
 modes of, 578
 operation of nature, 579
 revolt, 579
Lotus, The, case of, 39, 290 n., 331 n.,
 332, 461 n., 507 n., 603, 617,
 683 n., 700, 875
 summary of Judgment, 333-334
 Louisiana boundary question, 500 n.
Lurbe, van der, case of, 350 n.
 Lucerne, European Broadcasting Convention (1933), 530
 Luxembourg:
 admission to the League of Nations, 249 n.
 customs union with Belgium, 179 n.
 economic union with Belgium, 249
 invasion of, by Germany (1914), 301-302
 neutralisation of, 248-249, 966
 violation of, 249
 personal union with Netherlands, 171

M

McLeod, Alexander, case of, 850-851
 Magdalena Bay Company, case of, 212a

- Magellan, Straits of, 927
- Magna Charta (1215), 736 n.
- Maine, River, international position of, 467
- Malay Federation, British protectorate over, 196 n.
- Maltese Order, international position of, 252 n.
- Manchukuo, non-recognition of, 147 n.
- Manchuria :
 - Japanese claims to, 319 n.
 - conquest of, non-recognition of, 143
 - invasion of, 143, 302-303
- Mancini, code of International Law, 58 n.
- Mandated 'areas, 459-460. *See also* Mandates
 - British, maritime flag of, 593 n.
 - collective naturalisation, 551 n.
 - nationality of inhabitants, 651 n.
 - protection of inhabitants by mandatory, 647
 - treaties with mandatory, 920 n.
- Mandates, 212-222
 - classes of, 215-220
 - distinguished from annexation, 213
 - element of trusteeship, 214
 - general features of, 212-215
 - nationality of inhabitants, 220-222
 - 'open door,' 214
 - Permanent Mandates Commission, 216
 - replacement by trusteeship, 223
 - self-governing Dominions, allotment to, 199
 - sovereignty in respect of, 222 n.
 - third States and, 222
 - transfer of, 213
- Marginal belt, 461
- Maritime belt, 47 n., 461, 486-504*
 - accretions to, 563, 564
 - boundary of, 534
 - breadth of, 488-492
 - cabotage, 492-493, 504
 - ceremonials in, regulation of, 285, 492-493
 - cession of, 548
 - contiguous zone of protective jurisdiction, 497-499
 - fisheries, 492-493
 - protective jurisdiction over, 499-501
 - freedom of inoffensive passage through, 290, 325, 493-4; 543
 - jurisdiction within, 47, 495
 - lighthouses, 501
 - navigation within, 493-495
 - new-born islands within, 565
 - police control, 493
 - Maritime belt (*continued*)—
 - ports, harbours and roadsteads, 502-504
 - right of anchorage, 503 n.
 - subsoil, 501-502, 630
 - telegraph cables in, 625
 - whether State property, 497-488
 - zone for revenue and sanitary laws, 495-497
- Maritime ceremonials, 285, 492-493, 584, 591
- Maritime Consultative Organisation, 1014-1018
- Maritime Conventions Act (1911), 602, 607
- Maritime flag. *See* Flag
- Maritime law, early collections of, 80
- Maritime Ports, Convention respecting International Régime of (1923), 504
- Maritime Safety Committee, 1017
- Mafmora, Sea of, 587
- Marriage :
 - naturalisation by, 654
- Married women, nationality of, 655 n., 656 n., 670
- Martens, G. F. de, 96, 97, 586
- Mediation, in conclusion of treaties, 934
- Memel, status of, 454 n.
- Mémoire or memorandum*, 878
- Men-of-war :
 - character of, proof of, 852
 - crimes committed on, 854
 - extritoriality of, 282
 - position of, in foreign waters, 852-855
 - position of crew, on land abroad, 855
 - power over merchantmen, 603-605
 - right of pursuit, 604
 - right of search and visit, 598
 - territorial quality of, 461, 855
 - when State organs, 851-852
- Mendoza, case of, 584, 791
- Merchant Seamen, Agreement for Treatment of Venereal Disease (1924), 982 n.
- Merchant Shipping Acts (1873), 598; (1894), 595 n., 598, 605 n.; (1906), 595 n.; (1931), 919 n. (Amendment) Act (1862), 598 (Convention) Act (1914), 599 (Safety and Load Line Conventions) Act (1932), 599 n.
- Merger of States, 156
 - succession of States on, 158
- Merger of territory, 548
- Metric System, Convention for the Unification of (1875), 991 n.
- Meuse, River, navigation on, 467

Mexico :

American expedition into, 301
 occupation by France, 315

Middle Ages, development of International Law, 77-79 .

Military and naval forces. *See also*
 Armed forces

internationally injurious acts of,
 362-364

Military service, non-liability of aliens,
 681

Mines, under open sea, 629, 630

Ministers :

plenipotentiary, 776, 777-778

Resident, 776, 778

Minorities :

exchanges of, 553, 648 n.

protection of, 296, 641, 711-716

treaty provisions for, 641

Minorities treaties, 713 n., 715-716,
 932

Mistake, effect of, on validity of
 treaties, 892-893

Mixed arbitral tribunals, 638 n.

Modus et conventio vincunt legem, 897

Monoaco :

legal position of, 193 n., 451

Optional Clause, acceptance of,
 256 n.

Monaldeschi, case of, 760

Monarchs, 758-762. *See also* Heads of
 States

abdicated, 761, 775

predicates of, 281 n.

regents, 761

retinue of, 760

sovereignty of, 758

Monetary agreements, 322 n.

Mongolia, international status of,
 258 n.

Monistic doctrine of International
 Law, 38-39

Monroe Doctrine, 53 n., 313-316

'British,' 319

declaration of, 314

development of, 317-319

extension of, 315

'Japanese,' 319

League of Nations and, 316-317, 399
 merits of, 316-317

Montenegro :

merger with Serb-Croat-Slovene
 State, 156

neutralisation of, 593

recognition of, 149

withdrawal of recognition, 151 n.

Montevideo :

Convention on Extradition (1933),
 701 n.

Treaty on Political Asylum (1939),
 678 n.

Monti, Marquis de, case of, 808

Montreux :

Convention of (1936), on the Straits
 Zone, 515

Convention of (1937), on Capitula-
 tions, 685, 686 n.

Morality :

dependence of progress of Inter-
 national Law on, 88

law and, 8-9

rules of, in international intercourse,
 35

Morava, River, 470

Morvanet, 453 n.

Morocco :

Capitulations in, 686 n.

legal position of, 195

Moscow, Declaration of (1943), 401

Mosello, River, internationalisation
 of, 467, 471

Moser, 96, 97

Most-favoured-nation clause, 926, 954,
 971-974

Motor Traffic, Convention on (1936),
 322 n.

Motor Vehicles, Conventions relating
 to, 1023 n.

Mountains, boundary, 534

Mulhouse, merger into France, 549

Municipal Law, 10-11

dualist view, 37-38

English law, 39-41

International Law :

as part of, 35-47

in international courts, 31,
 39-40

necessity for express adoption
 of, 44

relation to, 35-47

monistic doctrine, 38-39

treaty stipulations and, 924

United States law, 41-42

when conflicting with International
 Law, 43-44, 45-46, 509 n.

Münster, Peace Treaty of (1648), 466,
 879 n.

Muscat, Capitulations in, 686 n.

N

Nansen Office for Refugees, 391, 671 n.

passports, 671

Narcotic Drugs Conventions, 929, 933,
 984

Narrow Seas, British claim to, 510-
 511, 583

National waters, distinguished from
 territorial waters, 460

Nationality, 642-649

absent, 664-665

Nationality (*continued*)—

- acquisition of, 649-660
 - by birth, 661-662
 - by cession, 666-667
 - by naturalisation, 654-666
 - by option, 652-654
 - by redintegration, 656
 - by subjugation, 666-667,
- aircraft, of, 519
- British, 645. *See also* British
- Nationality and Status of Aliens Act
- children, of, 670
- 'citizen,' meaning of, 644-645
- conception of, 642-645
- corporations, 642 n.
- de facto* subjects, 646-647
- denationalisation, 674 n.
- double nationality, 649 n., 664-668
- emigration, 647-648
- function of, 645-646
- German Law (1935), 644
- Hague Convention (1930), 643, 649, 654 n., 666-668
- imposition of, on aliens, 644 n.
- inhabitants of mandated areas, 651 n.
- loss of, 657-660
 - by deprivation, 657
 - by expatriation permit, 660
 - by expiration, 658
 - by release, 657
 - by renunciation, 658
 - by revocation of naturalisation certificate, 663 n.
 - by substitution, 669
- married women, 654-655 n., 656 n.
- naturalisation. *See* Naturalisation
- option on cession of territory, 552
- 554
- plebiscite as to, 551
- protégés, 646-647
- reimposition of, 644 n.
- ressortissant, meaning of, 643 n.
- statelessness, 668-675
- 'subject,' meaning of, 645
- subjects of subjugated State, 571
- sujets mixtes*, 666
- surrender of, 649 n.
- trust territories, inhabitants of, 236
- withdrawal, from naturalised persons, 675 n.
- Natural Law. *See* Law of Nature
- Naturalisation, 654-666, 660-663
- acquisition of nationality by, 654-666
 - collective, 551 n., 553
 - conditions of, 661-662
 - definition of, 660
 - nization distinguished, 663 n.
 - of, 662

Naturalisation (*continued*)—

- fraudulent, 644 n.
- need for consent, 289
- object of, 661
- revocation of, note on, 663 n.
- United Kingdom, law in, 663
- Naturalists, 31 n., 95-96, 106
- Nauru, mandate over, 220, 229
- Naval forces. *See also* Armed forces
- injurious acts done by, 362
- Navigation :
 - consular supervision of, 838
 - freedom of :
 - on open sea, 586-587
 - on rivers, 325, 465-474
 - within the maritime belt, 493-495
 - in territorial gulfs and bays, 509-510
 - safety of, 598-601
- Navigation Code of the Air, 1013
- Necessity, in self-defence, 298-299. *See also* Self-preservation
- Neckar, River, international position of, 467
- Negotiations, international, 785, 867-876
 - by whom conducted, 868
 - conception of, 867
 - form of, 868
 - parties to, 867
 - purpose of, 868
- Nejd, 257 n.
- Nemo iudex in re sua*, 396
- Nemo patriam exuere potest*, 648 n.-649 n., 662 n.
- Nemo plus juris transferre potest quam ipse habet*, 550
- Nepal, international status of, 258
- Netherlands :
 - Confederation of, 173
 - personal union with Luxemburg, 171
 - revolt from Spain, 579 n.
- Neuilly, Treaty of (1920), protection of minorities, 362 n., 713 n.
- Neutralisation of open sea, 591
- Neutralised States, 242-250
 - Albania, 255 n.
 - Belgium, 246-248
 - cession of territory by, 548 n.
 - conception of, 243
 - international position of, 244
 - Luxemburg, 248-249
 - power to conclude alliance, 961
 - self-neutralisation, 244 n.
 - Switzerland, 244-246
 - Trieste, Free Territory of, 249-250
 - Vatican City, 244 n., 254
 - veto of other States, 550-551
- Neutrality, treaties of, 969
- New Hebrides, condominium over, 453
- New States and International Law, 18

New Zealand :

- mandates held by, 199
- over Samoa and Nauru, 220
- maritime flag, 593
- trusteeship system, adoption of, 229

Newfoundland :

- lease of air bases in, 458
- legal position of, 210 n.
- Newfoundland Fishery dispute, 539 n.

Nicaragua :

- quasi-protectorate of United States, 194 n.

- Treaty with United States (1914), 307 n.

- United States requested to intervene in, 305 n., 307 n.
- withdrawal of recognition by United States, 151 n.

Niemen, River, international position of, 470

Niger, River, international position of, 467 n.

Nikitschenkow, case of, 796 n.

Nillins, case of, 700 n.

Non-Christian States, 49-50, 250

- consular service in, 845

Non-diplomatic persons, immunities of, 821-828

Non-discrimination. *See also* Human Rights

- on account of sex, 753
- plea of, 350-352

Non-intervention Agreement (1936), 305 n.

Non-nationals, extradition of, 700 n.

Non-recognition. *See also* Recognition of treaties and new international situations, principles of, 142-148, 895

- of treaties inconsistent with previous treaties, 895

North Atlantic Ocean Weather Stations, 1012

North Atlantic, regulation of fisheries in, 539 n.

North Atlantic Treaty (1949), 900 n., 934 n., 963

North Pacific Ocean, regulation of fisheries in, 621, 622 n.

North Pole, 556 n.

North Sea, control of fishing vessels, 605 n., 607 n.

North Sea Fisheries Convention (1882), 461 n., 509 n., 619, 622-623

- Hague Convention concerning Police and Fishery (1882), 509 n.

North Sea Liquor Traffic Convention (1887), 620

North-West Atlantic Fisheries Convention (1949), 622

Norway :

- dispute with Denmark concerning Eastern Greenland, 561, 764
- guarantee of, 965 n.
- sovereignty over Spitsbergen, 142 n., 555 n.

- Jan Mayen Island, 142 n., 555 n.

- part of Antarctic, 557 n.

- union with Sweden, 165, 172

Notarial functions of consuls, 839

Note verbal, 878

Notification, in general, 874-875

- of blockade, 874

- of occupation, 874 n.

- of outbreak of war, 874

Nuncio, 777, 778-779, 817 n.

Nuromberg, International Military Tribunal at, 342

Nyon Agreement (1937), 613

O

Oaths, for securing performance of treaties, 930

Objects of the Law of Nations, 452, 738-740

Observers at international conferences, 870 n.

Occupatio non procedit nisi in re terminata, 628

Occupation :

- of conquered territory by armed forces, 846-847

- of subsoil of bed of open sea, 630

- of territory for securing performance of a treaty, 931

- spheres of influence, 561-562

- subjugation, distinguished from, 567

Occupation as title of acquisition of territory, 544, 554-563

- conception of, 555, 580

- consequences of, 562-563

- extent of, 559-561

- how effected, 557-558

- inchoate title, 558-559

- notification of, 559

- object of, 555-556

Oceans, 588. *See also* Open sea

Oder, River, international position of, 470-471, 908 n.

Olden, Laws of, 80

Open diplomacy, 395

- 'Open door,' 971 n.

- in mandated areas, 214

- under League of Nations Covenant, 214, 227, 971 n.

- under trusteeship system of United Nations, 231

Open sea, 582-635
 arrest of foreign merchantmen on, 330
 bed of sea, 556, 618 n.
 conception of, 587-588
 criminal jurisdiction over, 333
 distinguished from territorial waters, 587
 distress on, 504
 fisheries, 617-625
 freedom of, 45, 325, 582-594. *See also* Freedom of the open sea
 jurisdiction on, 330-331, 498 n., 594-603
 collisions at sea, 601-603
 flag, connection with, 594-595, 603
 claims to sail under, 595-596
 men-of-war, powers of, 591, 603-605
 safety of traffic, 598-601
 ship's papers, 596
 shipwreck, 607-608
 territorial quality of vessels, 597-598
 legal provisions for, 590
 mines under, 629, 630
 neutralisation of, 591
 new-born islands in, 565
 occupation, not subject of, 556
 piracy, 330, 604, 608-617, 639 n.
 subsoil of bed of, 589 n., 629-635
 surface of the bed of, 628-629
 telegraph cables, 625-626
 wireless communication in, 626-627
 Opium Conventions, 929 n., 933, 984, 984 n.
 Option, naturalisation by, 552-554, 656
 Optional Clause, 208, 256 n., 900
 Oran, sinking of French fleet at, 303
 Orange Free State, 289 n.
 annexation of, by Great Britain, 571, 572 n.
 Oregon Boundary dispute, 560 n.
 Organisation for Communications and Transit, 321 n., 386, 474
 Original responsibility, 337-338
 Osnabrick, Treaty of (1648), 712, 879 n.
 Outer Mongolia, international status of, 257 n.
 Oyster fisheries, regulation of, 629 n.

P

Pacific Islands :
 Japanese mandate over, 320
 trusteeship system and, 220, 231 n., 232
 Pacific Ocean. *See* North Pacific Ocean

Pacta sunt servanda, principle of, 881 n.
Pacta tertiis nec nocent nec prosunt, 894, 925, 933
Pactum de contrahendo, 890, 891
 Pakistan, legal position of, 168, 190, 209-212
 Palestine :
 Capitulations in, 683
 mandate over, 216-219
 nationality in, 222
 partition of, 219 n.
 position of Jews in, 217-219
 Pan-American Conference (1906), 64
 at Lima (1938), 317
 Pan-American Conventions on :
 Duties and Rights of States in the Event of Civil Strife (1928), 64, 292 n., 610 n., 816 n.
 Extradition (1902 and 1933), 697 n.
 Nationality (1933), 655 n.
 'Organ of Consultation' (1947), 963 n.
 Political Asylum (1933), 677 n.
 Rights and Duties of Diplomatic Officers (1928), 63 n., 816 n.
 Rights and Duties of States (1933), 260 n., 320 n.
 Status of Aliens (1928), 692 n.
 Teaching of History (1933), 283 n.
 Treaties (1928), 898 n., 903 n., 907 n.
 Pan-American Postal Union, 1021
 Pan-American Union, 52, 63 n., 921 n., 963
 Panama :
 grant of territory to United States, 458-459
 guarantee of, 965 n.
 intervention by United States in (1904), 307
 legal status of, 289 n.
 quasi-protectorate of United States, 194 n.
 revolt from Colombia, 129 n., 579 n.
 secession of Colombia, 129 n.
 Trans-Isthmian Highway, joint use of, 454 n.
 Panama Canal, 483-485, 890 n.
 security of, 308 n.
 status of, 927
 Panama Canal Zone, 458-459, 485
 United States corridor through, 538 n.
 air navigation in, 484 n.
 Panama Claims Commission, 362 n.
 Panama Congress (1826), 63 n.
 Panay, case of the, 354 n.
 Pantaleon Sa. case of, 812
 Panther, case of the, 363 n.
 Papal States, 250-251

Papen, Captain von, case of, 816
Par est parem non habet imperium, 204,
 759, 793

Paris:

Convention of, for Regulation of
 Aerial Navigation (1919), 518-
 522, 523-525

Declaration of (1856), 5, 13, 49, 872,
 879 n., 899 n., 946

Final Act (1945), 929 n.

Pact of (1928). *See* Renunciation
 of War, General Treaty for
 Submarine Telegraph Cable Confer-
 ence (1884), 626

Treaty of (1763), 580

Treaty of (1814), on Abolition of
 Slavery, 733

Treaty of (1856), 49, 311, 514,
 894

neutralisation of the Black Sea,
 478, 591, 943

Parliaments, internationally injurious
 acts of, 359

Part sovereign States, 175-177

Particular international law, 5, 28

Passage, right of, 461

Passport Regulations, Conference on
 (1926), 676 n.

Passports:

agreements concerning, 322 n.

Nansen, 671

of diplomatic envoys, 813, 817

Peace movements, 82-83

Peaceful settlement, duties of mem-
 bers of the United Nations, 405-
 406

Penal damages, 354-355

Periodicals, list of, 113-114

Permanent Court of Arbitration, 12,
 922 n.

Permanent Court of International
 Justice, 21, 34 n. *See also* Inter-
 national Court of Justice

compulsory jurisdiction of, 168 n.

diplomatic privilege of members,
 823

interpretation of treaties, 922 n.,
 924, 950-957 nn.

Kiel Canal, 483

law applied by, 26, 29, 33, 107

Optional Clause, acceptance by self-
 governing Dominions, 208

Panama Canal, 484 n.

parties before, 21

precedent, judicial, and, 57

preparatory work in treaties, con-
 sideration of, 957

previous decisions of, binding force
 of, 31

resus sic stantibus, application of
 principle, 940

Permanent Court of International
 Justice (*continued*)—

reparation for breach of obligation,
 352 n.

restriction of sovereignty by treaties,
 291 n.

Statute, 60, 879 n.

third States, intervention in pro-
 ceedings, 951 n.

Perpetual leases, 456 n.

Persia:

Capitulations up, 684

position of, 49

Russian and British spheres of
 influence in, 362 n.

Persian Gulf, pearl fisheries regula-
 tion, 618 n.

Personal union, 171

Pessoa, 58 u.

Peterburg and Smolensk, case of the,
 514 n.

Petition of Right (1628), 736 n.

Pharmacopoeial Formulae for Potent
 Drugs, Convention on (1906),
 982 n., 984-985

Philadelphia, Declaration of (1944),
 718

Philippine Islands:

legal position of, 194 n.

United States right of intervention
 in, 307 n.

Piepenbrink, August, case of, 347 n -
 348 n.

Pillau, oral Treaty of (1697), 896

Piracy, 20, 330-339, 604, 608-617

by States, 608 n., 612 n.

conception of, 608-609

how effected, 611

International Law and, 20

jurisdiction over pirates, 616-639 n.

locality of, 615

Municipal law and, 616, 617

mutinous crews and passengers, 614

Nyon Agreement (1937), 613

objects of, 614

pirata non mutat dominium, 616

private vessels, 609-612

public ships, 612-614

punishment of, 330, 616, 639 n.

slave trade, 617, 732-735

Platts, Convention for the Protection
 of (1929), 996 n., 998 n.

Platen Hallermund, Count, case of,
 572 n.

Plebiscite on cession of State territory,
 551-552

Pledge for securing performance of
 treaties, 931

Pledge of State territory, 455-456,
 549, 578

Plural nationality, 665 n.

Podiebrad, King of Bohemia, project for European federation, 82

Poland :
 absorption by neighbour States (1795), 156
 membership of U.N.E.S.C.O., 988 n.
 minorities in, 713 n., 714 n.
 Treaty with Danzig (1920), 194 n.
 Polar regions, sovereignty over, 550 n.-557 n.

Political agents, 859-860

Political Asylum, Treaty on (1939), 678 n.

Political crime, responsibility of State for, 366 n.

Political criminals, non-extradition of, 703, 704-710

Political organisation of mankind, objects of, 371

Political Rights of Women, Convention on (1952), 753

Pollution of the sea, 601 n.

Pope. *See also* Holy See
 international position of, 251-255
 title of, 281 n.

Populations, compulsory exchange of, 553 n.

Port Arthur :
 joint use by China and Russia, 456 n.
 lease by China to Russia, 456, 549

Ports :
 free zones in, 502 n.
 status of, 460 n., 502-504

Portsmouth, Treaty of (1905), 456 n.

Portugal :
 British intervention in, 305
 claim to sovereignty over open sea, 583, 584

Positivists, 31 n., 96-97, 106-107

Possession, as element of occupation of territory, 557-558. *See also* Prescription

Potsdam, Conference at (1945), 873

Powers. *See* Full powers

Preamble of treaty, 901

Precedence of States, 281

Predicates of title, 281 n.

Preparatory work, consideration of, in interpretation of treaties, 957-958

Prescription, 575-578
 conception of, 575
 extinction of international claims, 340-350, 575 n.
 how effected, 576

Presidents of Republics, 762-763. *See also* Heads of State. United States of America

'Principal Allied and Associated Powers,' 276

Private International Law, 7

Private persons, responsibility of States for acts of, 365

Private property, respect for :
 in regard to aliens, 351-352
 in regard to State succession, 550 n., 571

Privateers, 610

Prize courts :
 impartiality of, 32 n.
 rules of International Law binding on, 41 n.

Procès-verbal, 878, 914, 916, 917 n.

Proconsuls, 833

Prohibition Amendment, United States, 498

Propaganda, revolutionary, against foreign States, 292, 294 n.

Proposals in negotiation of treaties, 878, 890

Protection, treaties of, 968

Protection of citizens abroad, 290, 325, 686-689
 by consuls, 838-839
 by diplomatic agents, 786
 minorities, 711-716

Protectorates, 188-191
 colonial, 194-196
 distinguished from spheres of influence, 562 n.
 intervention in affairs of, right of, 306-310
 legal status of, 290
 precursor of occupation, 561

Protégés, 646-647

Protest, 874-875

Protocol, 878, 898-899, 907. *See also* Treaties

Prussia, absorption of Poland (1795), 156

Pseudo-guarantees, 968

Public debt :
 Russian repudiation of, 154 n.
 State succession and, 159, 160, 165, 166

Public international organisations, 375-380, 883-884

Public ships. *See also* Ships, State-owned
 relations with consuls, 838
 territorial quality of, 461

Publication of treaties, 918-923

Pufendorf, 7, 95

Punctationes, 890, 891

Pursuit, right of, of men-of-war, 604. *See also* 'Hot pursuit'

Pruth, River, international position of, 470

Q

Quadruple Pacific Treaty (1921), 960 n., 968 n.

Quality of States, modification of, 277-279

Questions de préséance, 280

Qui in territorio meo est, etiam meus subditus est, 452

Quidquid est in territorio, est etiam de territorio, 287, 452

'Quishings' and traitors, principle of asylum with regard to, 677 n

R

Rachel, 96

Radiographic Conventions

London (1912), 462

Washington (1927), 462, 529

Railway Transports and Freights, Conventions concerning, 1022 n

Railways, Conventions concerning the Standardisation of, 1023 n

Rakovsky, M., case of, 787 n

Rank of States, 281

Ratification of treaties, 903 918

British practice, 40, 905 n

by whom effected, 910 911

conception and function of, 903 905

conditional, 911 913

effect of, 917 918

exchange and deposit of, 916 917

form of, 910

League of Nations Committee of

Report on, 909 n

non ratification, effect of, 904 n

partial, 911 913

period for, 908

refusal of, 908 910

renunciation of, 907

reservations, 913 916

retroactive effect of, 903 n

submission to constitutional authorities, 909

whether absolutely necessary, 906 908

Real unions, 155, 171 173

Rebus sic stantibus, doctrine of, 309 n, 397 n, 543, 939 944

absence from (charter of United Nations, 448 n

Recall of diplomatic envoys, 815 816

Reception of diplomatic envoys, 781 785

Recognition. *See also* Non recognition

by treaty, 148

closing of embassy and, 819 n

consequences of, 137 139

conditional, 148 149

de facto, 134-137

de facto and *de jure*, difference between, 151 n.

during invalidity, by act of a State, 142

Recognition (*continued*)—

duty of, 126

implied, 146-147

League of Nations, admission as test of, 147 n.

legal nature of, 131 133

need for, 125 126

of belligerency, 140

foreign legislation, 267 270

governments, 129-139

insurgency, 140-141

new Heads and Governments of old States, 129 131, 137 139

new States, 125-129

new territorial and international situations, 141-142

revolutionary change of Head or Government of State, 130 131

precipitate, 128 129

refusal of 132

retroactive effect of, 149 150

right to, 127

withdrawal of, 150 152

Reconduction of aliens, 694 695

Reconfirmation of treaties, 919

Reconsideration of treaties and international conditions, 401 403

Red Indians, relations with United States, 50 51

Redintegration

acquisition of nationality through, 656

of treaties, 950

Reduction of armaments, 393

Reformation, influence on International Law, 81

Refrigeration, International Institute of, (convention on (1920), 990 n

Refugees

Convention on Status of (1951), 672 673

Intergovernmental Committee on (1938), 672 n

international arrangements concerning, 671 n, 672 n

International Refugee Organisation, 672 n

International Status of, Convention on (1933), 671

Regents, 761

Regional arrangements, in (charter of United Nations, 318

Regional International Law, 51

Regional organisation, World Health Organisation and, 980

Registration and publication of treaties, 918 923

Release from nationality, 657

Renaissance, influence on International Law, 81

Renewal of treaties, 949

Renunciation :

- of nationality, 571, 658-659
- of ratification, 907
- of rights, 875
- of treaties, 938

Renunciation of war :

- effect of, on coercion of vanquished State, 891

- General Treaty for (1928), 14, 18-19, 60, 143, 299 n., 317, 319 n., 879 n., 892, 920 n., 932 n., 935 n.
- title by conquest, and, 570, 573, 574

Reparation as consequence of international delinquency, 352-354**Reputation, right of, 282****Requisitioning of a vessel, 296 n.*****Res extra commercium*, 589*****Res inter alios acta*, 921 n.*****Res transit cum suo onere*, 159, 550****Reservations to treaties, 913-916****Residents, 776, 778. See also Diplomatic envoys****Resolutions of League of Nations.****See League of Nations, Assembly****Responsibility of States, 335-369**

- aliens, concerning, 350
- delinquencies, international, 338-357

abuse of rights, 345-347**apology, need for, 354****conception of, 338-339****criminal responsibility, 355-357, 366 n.****damages, 353 n.****fault as condition of, 343****individuals as subjects of, 341-342****individuals, by, 341****interest, 353 n.****nationality of claims, 347-349****non-payment of contract debts and damages, 344-345****objects of, 343-344****penal damages, 354-355****plea of non-discrimination, 350-352****prescription, extinctive, 349-350****reparation for, 352-354****state organs as subjects of, 340-341****subjects of, 339-340****federal States, 340****in general, 335-338****nature of, 336-337****original responsibility, 337-338****private persons, acts of, 364-369****aliens, offences against, 366****insurgents and rioters, 366-369****political crimes, 366 p.****Responsibility of States (continued)—****State organs, acts of, 357-364 *****administrative officials, 362-364****denial of justice, 359-361****diplomatic envoys, 359****exhaustion of legal remedies, 361-362****Heads of States, 358****judicial functionaries, 359****members of Government, 358****military and naval forces, 362****parliaments, 359-364****vicarious responsibility, 337-338, 365*****Ressortissant*, meaning of, 643 n.****Retinue of diplomatic envoys, 808-813****Retroactive effect of :****recognition, 149-150****treaties, 903 n.****Revenue laws, foreign, enforcement of, 328****Revision of treaties, 69, 941-943****League of Nations and, 401****United Nations and, 448****Revolt, loss of territory by, 578, 579****Revolutionary Government, succession to property of, 163-164****Revolutionary party, diplomatic agents of, 774, 859-860****Revolutionary propaganda against foreign States, 292****Revolutions, effect on diplomatic envoys, 818*****Rheinbund*, 174****Rhine, River :****banks, demilitarisation of, 539 n.****bridges, acquisition of, by France, 533 n.****international position of, 467, 468, 471****occupation of bridgeheads (1919), 847, 932****Rhineland, demilitarisation of, 943, 948 n.****Rhodian law, 80****Right of chapel, 804****Right of passage, 461****Rights and Duties of States, Convention on (1933), 260 n., 330 n.****Rights and Duties of States in the Event of Civil Strife, Convention on (1928), 64, 292 n., 610 n.****Rights of man, international protection of, 736-753****Bill of, 736 n., 740, 743, 744 *****Charter of United Nations and, 738-743****Rights of mankind, 640-642****Rio de Janeiro, Treaty of (1947), 318, 902**

Rioters, responsibility of States for acts of, 366-369

Ripperda, Duke of, case of, 794 n.

Rivers, 463-476

abandoned bed of, 566

alluvion, 564-565

alteration of flow of, 290-291

artificial formations, 564

Barcelona Convention (1921), 471-474

boundary, 532

cession of, 548

channel, 465

'course,' definition of, 465 n.

European rivers after World War I, 470-471, 473-474

freedom of navigation on, 325, 465-470

international, 466-470

navigational rights on:

international rivers, 466-470

national, boundary and not

national rivers, 465-466

new born islands in, 565-566, 579

property of riparian States, 464-465

Thalweg, 532, 566

utilisation of flow of, 474-476

Road Signals, Convention for limitation of (1931), 322 n.

Road Signs, Conventions relating to, 1023 n.

Roadsteads, 502-504

Road Traffic, Conventions on, 322 n., 1023, 1023 n.

Romans, contributions to International Law, 75-77

Rome, Convention of (1933), 518 n.

Roosevelt, President, on 'Four Freedoms,' 738 n.

Ross sector, 556 n.

Roumania:

recognition of, 149

recognition of sovereignty over Bessarabia, 142 n.

restriction of personal supremacy, 296

Treaty of Peace with (1947), 469, 741 n.

Ruanda, transfer of mandate to Belgium from United Kingdom, 214 n.

Ruanda Urundi, mandates over, 219, 229

Ruh, Gottfried, case of, 811 n.

Rupture of diplomatic relations, 775

Russian Empire. *See also* Soviet Russia

absorption of Poland (1796), 156

Baltic Fleet (Dogger Bank) incident, 364 n.

Russian Empire (*continued*)—

Fisheries Law (1911), 618 n.

intervention in Greece (1827), 313; (1916, 1917), 308

in Hungary, 305

relations with Turkey (1827), 313; (1878), 306

withdrawal of recognition of, on recognition of Soviet Russia, 151 n.

Russo-Japanese War (1904), 514 n.

Rutherford, 96

S

Saar Basin, 385

Saar Territory, 459 n.

plebiscite in, 552 n.

Sackville, Lord, case of, 787 n.

Safety of traffic on the open sea, 598-601

St. Germain, Treaty of (1919), 478 n.

abrogation of General Act of Berlin

Congo Conference (1895), 559

abrogation of General Act of Brussels concerning Slave Trading (1890), 734

independence of Austria, 287 n.

neutralisation of Belgium, 247

neutralisation of Luxembourg, 249

protection of minorities, 713 n.

St. Lucia, lease of air bases in, 456

Island, dereliction of, 580

St. Petersburg, Declaration of (1866), 872

Sale of territory, 549

Salmon Fisheries Treaty (1930), 621

Salutes, maritime, 285

Salvage at Sea—Brussels Convention concerning (1910), 601, 607

Samoa, mandate over, 200 n., 220, 229

Samos, Island of, neutrality of, 191 n.

San Domingo, legal status of, 240 n.

San Francisco, Conference of (1945) 50, 402, 411, 412, 870

languages of, 772

procedure at, 871

San Marino, 451

legal position of, 194 n.

title of, 281 n.

San Stefano, Preliminary Treaty of Peace of (1878), 306, 894, 934

Sanctions, under Covenant of League of Nations, 356, 932 n.

against Italy, 245 n., 398 n.

attitude of Switzerland, 245 n.

Sarawak, sovereignty over, 545 n.

Sarpi, Paolo, 585

Saudi Arabia, international status of, 257 n.

- Savoy. *See also* Free Zones of Upper Savoy and Gex
 abrogation of neutralisation of, 542 n., 543 n.
 Scheldt, River, international position of, 466-467
 Schersted, Mogen, case of, 810 n.
 Schleswig :
 cession of part to Denmark, 547 n.
 plebiscite in, 552 n.
 Schleswig - Holstein, condominium over, 453
 Sea. *See* Open sea
 Sea bed, 501-502
 Seadromes, international status of, 597 n.
 Seal Fisheries :
 Convention (1911), 621
 (North Pacific) Act (1912), 570
 Search (of merchantmen), how effected, 606
 right of, 330-331, 598
 Secession. *See* Revolt
 Secretary-General of the United Nations, 440-443
 Sector principle, 556 n.
 Security Council of United Nations, 427-430
 composition of, 279, 427-428
 powers and functions of, 428-430
 relation to General Assembly, 435
 self-defence and, 299
 subsidiary organs, 430 n.
 treaty-making power, 882 n.
 trusteeship agreements, approval of, 228, 231
 veto rule, 434
 voting in, 430-434
 Security for costs, against foreign States, 266 n.
 Seismologic Association, 991 n.
 Selden, John, 94 n., 585
 Self-defence. *See* Self-preservation
 Self-governing Dominions. *See* Dominions, self-governing
 Self-help, 15
 Self-jurisdiction of diplomatic envoys, 805
 Self-neutralisation, 244 n.
 Self-preservation, 297-304
 Charter of United Nations, in, 299
 damages in case of resort to, 343 n.
 historical instances of, 299-303
 intervention in, 310-311
 necessity in self-defence, 298-299
 when excused, 289-290
 whether a right, 297
 Seneca, 452
 Separation of States, effect on succession, 165
 Sera, standardisation of, 983 n.
 Serb-Croat-Slovene State. *See* Yugoslavia
 Serbia, recognition of, 149
 Servitudes. *See* State servitudes
 Set-off, in suits involving foreign States, 266 n.
 Shanghai, International Settlement at, Chinese courts in, 457 n.
 Shenandoah, case of the, 812
 Shimonoseki, Peace Treaty of, 934
 Ships. *See also* Men-of-war; Vessels
 State-owned, position in foreign waters, 851-859
 territorial quality of, 461
 Ship's papers, 596
 Shipwreck, 607-608
 Siam, Capitulations in, 684
Sic utere tuo ut alienum non laedas, 346
 Signals :
 British Commercial Code (1837-1900), 598
 International Code, 599
 Road Signs and, 1023
 Simla Rules (1931), 600 n.
 Skaggerak, Fisheries Conventions concerning (1937), 620 n.
 Slander of Heads of States, 282, 283 n.
 Slave trading :
 Berlin, Congo Conference (1885), 733
 Brussels, General Act of (1890), 734, 912
 Geneva, Convention of (1926), 734, 735
 London, Treaty of (1841), 733
 St. Germain, Convention of (1919), 734
 Slavery and slave traffic, 617, 732-735
 abolition of, 641, 735, 879 n.
 Treaty for (1814), 733
 Somaland, Trusteeship Agreement with Italy, 229, 231 n.
 Soulé, case of, 807 n.
 Sound dues, 513
 Sources of International Law, 23-35
 comity, 33-35
 consent, 25
 custom, 25-27
 decisions of tribunals, 31-32
 general principles of law, 29-31
 judgments of municipal tribunals, 32
 treaties, 27-28
 writings of authors, 33
 South Africa, protectorates in, 196 n.
 South Africa, Union of :
 Great Seal of, 887
 mandate over South-West Africa, 220, 222 n.
 mandates held by, 199
 maritime flag, 593

South African Republic :

annexation of, by Great Britain, 571

legal status of, 289 n.

right of legation, 774

South American States, revolt from Spain, 579 n.**South Pacific Commission, 241 n.****South Pole, 556 n.****South-West Africa :**

mandate over, 220, 221, 222 n.

status of, 226, 880, 927 n., 937 n.

Union of South Africa and, 225 n.

Sovereignty, 119

acquisition of territory, 545-546

by occupation, 555

cession of territory, 547

divisibility of, 120, 122, 452-460

exercise of, by foreign Power, 455

leases, position in case of, 549 n.

loss of, on dereliction of territory, 579-581

mandates, 222 n.

monarchs, of, 758-759

over the air, 519

in connection with wireless, 529-530

over the open sea, 584

over trust territories, 235-239

State independence and, 286

territorial and personal supremacy, 286-288

servitudes, 538

Soviet Russia :

Chinese Chungchun Railway, joint user of, 454 n.

Constitution of, 178

declaration concerning arctic territory, 557 n.

diplomatic envoys, classes of, 777 n., 780 n.

evacuation of German minorities, 552 n.

fisheries regulation, 618 n.

International Law, conception of, 55

non-recognition by United States of annexation of Baltic Republics, 145 n.

recognition of :

by Great Britain, 135

by United States, 133 n., 294 n., 328 n.

repudiation of public debts by, 154 n.

responsibility for communist activities, 294 n.

Spain :

claim of sovereignty over open sea, 583-584

Cuban debt, case of, 166 n.

protectorate over Morocco, 195

Tangier, invasion of, 195 n.

Spanish Civil War :

exchange of agents by Great Britain with insurgents, 146 n.

intervention by European States in, 306 n.

Non-intervention Agreement (1936), 305 n.

Nyon Agreement (1937), 613

recognition of revolutionary Government by Great Britain, 152

Spanish Colonies, recognition of independence of, 129 n.

Spheres of influence, 561-562

Spies, 862

Spitsbergen, Norwegian sovereignty over, 142 n., 555 n.

Sponsio, 884 n.

Springer, case of, 794 n.

Staatenbund, 173-174

State Departments, immunity in foreign courts, 265 n.

State officials, immunity in foreign courts, 265 n.

State responsibility. *See* Responsibility of States

State servitudes, 535-543

extinction of, 542-543

fishery rights, 539 n.

kinds of, 540-541

objects of, 538-540

subjects of, 538

validity of, 541-542

State succession. *See* Succession of States

State supremacy, over its subjects, 639

State territory, 451-581. *See also*

Exterritoriality

accretion, 563-566

acquisition of, 543-546

adjudication, 546 n.

administration, 558

alluvion, 564-565

atmosphere, 462-463

bays, 461, 505-508

boundaries, 530-535

boundary waters, 463, 532-534

cession of, 546-554

conception of, 451-452

condominium, 453-455

conquest, 566-575

deltas, 565

diplomatic envoys' houses, 461

divisibility of, 452-460

exercise of sovereignty vested elsewhere, 455

federal State, 459

fictional parts of, 461

gift, 548-549

grants in perpetuity, 458-459

gulfs, 461.

State territory (*continued*)—

- importance of, 452
- inalienability of, 463
- islands, new-born, 565-566
- joint use of, 453 n.
- lease of, 457-459, 549
- loss of, 578-581
- mandated areas, 459
- men-of-war, 461
- merger, 548
- national waters, 460-461
- occupation, 554-563
- parts of, 460-463
- pledge of, 455-458, 549, 578
- possession, 557-558
- prescription, 575-578
- rivers, 463-476
- sale of, 549
- ships, 461, 856-859
- straits, 461
- subjugation, 566-575
- subsoil, 461-462
- tradition of territory, 550
- trusteeship areas, 232-233
- wireless telegraphy, 462
- Statelessness, 67 n., 668-675
 - abolition of, 673-675
 - Draft Convention on (1953), 572 n., 674-675, 746 n.
 - Hague Codification Conference (1930), 669-670
 - international regulation of stateless persons, 640 n., 641
 - regulation by treaty, 669-673
- States. *See also* International persons as international persons, 117-152
 - breaking-up of States, 155
 - changes in, 153
 - conception of, 118-119
 - confederated, 173-174, 175
 - consuls, competence to appoint, 835
 - dignity of, 282-285
 - dismemberment of, 164-165
 - equality of, 22-23, 123, 262-282
 - external independence of, 286
 - extinction of, 153
 - effect on diplomatic envoys, 819
 - federal, 175-178
 - Federations and Associations of, 182-188
 - fundamental rights of, 259-261
 - immunity from suit, 264-267, 773
 - independence of, 286-297
 - list of, 255-258
 - loss of independence, 155
 - merger of, 156
 - neutralised, 242-250
 - non-Christian, 49-50, 250
 - not-full sovereign, 118, 119
 - personal union, 171

States (*continued*)—

- power over subjects, 288
 - restrictions on, 296
- precedence of, 281
- rank of, 280, 281
- real union of, 155, 171-173
- recognition of, 124-152
- representation in United Nations, 133-134
- responsibility of, 335-369. *See also* Responsibility of States
- right of legation, 774
- right to sue or be sued, 264
- subjects of Law of Nations, 19-22
- succession of. *See* Succession of States
- titles of, 153, 281
- under protectorate, 191-196
- vassal States, 188-191
- Statistics, Commercial, Convention for the Establishment of (1913), 1000 n.
- Status quo :
 - collective guarantee of, 967 n.
 - declaration concerning the maintenance of, 968
- Statutes of limitation, jurisdictional immunity of foreign States and, 272 n.
- Stimson doctrine of non-recognition, 143
- Stockholm. Treaty of (1905), dissolution of Sweden-Norway, 172 n.
- Straits, 510-516
 - Bosphorus and Dardanelles, 512-516
 - boundary, 534
 - navigation, fisheries and jurisdiction in, 511-513
 - non territorial, 510
- Strait. Convention (1923), 479, 941 n.
- Strait's Zone Convention (1936), 515
- Strakosch, case of, 699 n.
- Stratosphere, 518 n.
- Suarez, 90
- 'Subject,' meaning of, 646-647
- Subjects of International Law, 19-22
- Subjugation, 566-575
 - acquisition of nationality by, 656, 660
 - Charter of United Nations and, 570, 573, 574
 - conception of, 566-567
 - conquest of enemy territory, 567-570
 - consequences of, 571-573
 - distinguished from cession, 567
 - occupation, 567
 - during war, 568-570
 - renunciation of war and title by conquest, 574

Subjugation (*continued*)—

- State succession and, 158-163
- veto of third States, 573-574
- Submarine cables. *See also* Telegraph cables
 - destruction of, 613 n.
- Submission to jurisdiction, acts amounting to, 266 n.
- Subsoil :
 - beneath bed of open sea, 501-502, 589 n., 629-635
 - beneath maritime belt, 630
 - territorial, 461-462
- Substitution of nationality by naturalisation abroad, 659
- Subversive activities against foreign States, 292-294
- Succession of States, 156-169
 - acquired rights of individuals, 160-161
 - contracts and concessions, 161-162
 - fiscal property and debts, 159-161
 - in consequence of absorption, 158-163
 - in international organisation, 168-169
 - local rights and duties, 159
 - on cession of States, 165-169
 - dismemberment of States, 164-165
 - separation of States, 165-168
 - subjugation, 571-573
 - suppression of revolt, 163-164
 - political rights and duties, 158-159
 - suppressed revolting Government, property of, 163
 - treaties and, 159, 944-945
 - unliquidated damages, 162-163
- Sudan, condominium over, 190 n. 453
- Suez Canal, 480-482
 - defence of, 541 n.
- Sujets mixtes*, 666
- Sully, Duc de, case of, 805 n
- Sully, plan of European federation, 82
- Sun Yat Sen, case of, 796 n.
- Supremacy :
 - personal, restrictions on, 294-297
 - territorial and personal, 285-297
 - consequences of, 286-288
 - violations of, 288-289
 - territorial :
 - enforcement of foreign public law and, 327-330
 - relaxation of, 326-327
 - restrictions on, 290-292
- Surface of bed of open sea, 628-629
- Spritz, M., case of, 817 n.
- Suzerainty, definition of, 188-189. *See also* Vassal States
- responsibility for vassal States, 339 n.

Sverdrup Islands :

- British sovereignty over, 142 n
- Canadian sovereignty over, 556 n.
- Swaziland, position of, 196 n.
- Sweden :
 - claim to sovereignty over Baltic, 583
 - union with Norway, 165, 172
- Switzerland :
 - claim to maritime flag, 592 n.
 - Customs Union with Liechtenstein, 179 n.
 - extradition of political offenders, 709
- International Law, part of the law of, 43
- neutralisation of, 244-246, 879 n.
- Swiss Confederation, 244-246
- Syria :
 - Capitulations in, 683
- Syria and Lebanon :
 - French mandate over, 216, 217
 - nationality in, 222
 - recognition of independence of, 217
 - Treaties with France (1933 and 1936), 217

T

Tagna-Arica :

- controversy over, 536 n
- plebiscite in, 552 n.
- Tanganyika :
 - mandate over, 219
 - trusteeship system, under, 229
- Tangier, status of, 195 n., 453 n., 454 n.
- Tariffs and Trade, General Agreement on (G A T T.) (1947), 324, 934 n., 974 n., 998-1000
- Tarnowski, Count, case of, 808
- Tax Agency, status of, 265 n.
- Taxation :
 - exemption from, 802-803
 - of aliens, 288, 680 n.
- Telecommunication Agreement (1936), 902 n.
- Telecommunication Union, 1023-1027
- Telecommunications, International Conventions, 462
- Telecommunications, International Convention of Madrid (1932), 629-630
- Telegraph cables in the open sea, 625-626
- Termination of treaties, 936-944
- Terræ potestas finitur ubi finitur armorum vis*, 490
- Terrist Award, 543 n.
- Territorial supremacy, 285-297, 679-682

- Territorial waters. *See also* Hague Codification Conference; Maritime belt
 distinguished from national waters, 460-461
 distinguished from open sea, 587
 jurisdiction over, 47
 limits of, 69
 Territorial. Waters Jurisdiction Act (1878), 47, 495, 511
 Territory. *See* State territory
 Terrorism, Convention concerning (1937), 710
 Terrorist activity, Resolution of Council of League of Nations concerning (1934), 292 n.
 Text-books, impartiality of, 284 n.
 Textor, 96
 Thailand. *See* Siam
 Thalweg, 532
 abandoned river beds, 566
 Theiss, River, 470
 Thomasius, 95
 Three-miles rule, 490-492
 Tibet, international status of, 258 n.
 Tilsit, Peace Treaty of (1807), 299
Titani, case of the, 599
 Titles of States, 281 n.
 Tolbar doctrine, 132 n.
 Togoland:
 Agreement, 230 n.
 mandates over, 214 n., 219, 229
 trusteeship system, under, 139 n.
 Totalitarian dictatorships and International Law, 108
 Tourville, case of, 699-700
 Trade marks, Convention on international registration of, 992 n.
 Trade Organisation, 998-1000
 Trading with the Enemy Act (1939), 766 n.
 Tradition of territory, 550
 Traffic, Conventions concerning, 322 n.
 Transit, Conventions concerning, 322 n.
 Transjordan:
 relations with Great Britain, 218 n.
 Treaty of Alliance with United Kingdom (1946), 218 n., 541 n.
 Transport Organisations, 1011-1029
Travaux préparatoires, consideration of, in interpretation of treaties, 957-958
 Trawling in Prohibited Areas Prevention Act (1909), 509 n.
 Treaties, 877-958
 abrogation of, if inconsistent with Covenant of League of Nations, 397-399
 acceptance of, 918
 Treaties (continued)—
 accession to, 18, 934
 adhesion to, 935
 alliances, 959-964
 binding force of, 880
 loss of, 945-949
 cancellation of, 945-949
 change of Government, effect of, 925
 clausula rebus sic stantibus. *See* *Rebus sic stantibus*
 coercion, effect of, 891-892
 collections of, list of, 108-111
 commercial, 969-976
 commodity agreements, international, 974-976
 compromise clause, 950-951
 conception of, 877-878
 constitutional restrictions on treaty-making power, 287, 887-890
 denunciation of, 920 n.
 desuetude in, 924 n.
 duress, effect of, 891-892
 effect of, 923-929
 enforcement of, 930-933
 error, effect of, on validity of, 892, 893
 expiration and dissolution of, 936-944
 extradition, treaties of, 696-697
 form of, 897-901
 fulfilment of, 945
 guarantee of, 932
 guarantee, treaties of, 964-968
 illegal obligations, 897
 immoral obligations, 896
 impossibility of execution, 944-945
 inconsistency with:
 Charter of United Nations, 895-896
 Covenant of the League of Nations, 398
 former treaty obligations, 894
 Municipal Law, 924 n.-925 n.
 subsequent International Law, 946-947
 individuals and, 21
 inter-departmental and inter-governmental agreements, 901-902
 international organisations and, 21
 interpretation of, 950-958
 kinds of, 878-880
 alliances, 959-964
 commercial, 969-976
 guarantee, 964-968
 international commodity agreements, 974-976
 law-making, 27-28, 492, 878-880
 neutrality treaties, 969
 languages used in, 771, 898 n., 956
 law-making, 27-28, 492, 878-880

Treaties (continued)—

- legislation, necessity for, 40-41, 906 n
 - minorities, 715-716, 932
 - mistake, effect of, 892-893
 - most-favoured-nation clause, 926, 954, 971-974
 - Municipal Law and, 40-44, 924
 - mutual consent, necessity for, 890-891, 937
 - necessity for Act of Parliament, 40
 - neutrality, treaties of, 969
 - objects of, 893 897
 - oral, 898
 - parties to, 881-893, 923 924
 - parts of, 900-901
 - publication of, 918 923
 - ratification of, 903-918 *See also* Ratification of Treaties
 - reconfirmation of, 949
 - reconsideration of, by League of Nations, 395 397
 - redintegration of, 950
 - registration of, 395, 898 n., 918 923
 - renewal of, 949
 - restrictions on State supremacy by, 290-292
 - right of entering into, 291
 - self executing treaties, 924 n.
 - signing, order of, 281
 - source of International Law, as, 27 28
 - sponsorships, 884 n.
 - State succession and, 158 159, 925, 945
 - termination of, 936-944
 - third States, effect on, 921 n., 925-928
 - participation of, 933 935
 - treaty-making power, 882 883
 - violation of, 947
 - voidance of, 944 945
 - war, outbreak of, effect of, 949
 - withdrawal from, 18, 938
- Treaties on International Law, enumeration of, 99-105
- Trent*, case of the, 146 n.
- Trianon, Treaty of (1919)
- facilities to Czechoslovakia in Hamburg and Stettin, 592 n
- Fiume, 454 n.
- flag of State with no sea coast, 592 n.
- protection of minorities, 713 n.
- Trieste:
- Free Territory of, 249-250, 455, 592 n., 965 n.
 - lease of land at, 457 n.
- Trinidad, lease of air bases in, 458
- Tripartite character of the International Labour Organisation, 720-722

Tripoli, annexation of, by Italy, 571

- Trusteeship, 223-242
 - agreements, 228-229, 230-232
 - areas, 232-233
 - dependent peoples outside the system, 230 242
 - international peace and security, furtherance of, 231
 - nationality of inhabitants of trust area, 236 n.
 - objects of, 226 227
 - 'open door' principle and, 231
 - respect for human rights, 739
 - sovereignty over trust territories, 235 239
 - strategic areas, 232, 233
 - substitution for mandates, 228 229
 - territories under, 223 242
 - Trusteeship Council, 230, 232, 233 235
 - United Nations, functions of, 233
- Tunis, legal position of, 195
- Tunnels, under open sea, 629, 630
- Turkey *See also* Black Sea, Bosphorus, Ottoman Public Debt
- Capitulations in, 49, 683
- cession of Alexandretta by France, 216
- debts of, 166 n
- Egypt as a vassal State of, 169, 190 n
- Greece, war with (1827), 313, (1897), 311
- identity with former Ottoman Empire, 155 n
- maintenance of concessions by succeeding States, 162

U

- Ulpian, 582
- Ultava, River, 470
- Unanimity in International Law, 278
 - under Charter of United Nations, 279 280
 - under Covenant of League of Nations, 389, 390
- Union of Soviet Socialist Republics. *See* Soviet Russia
- Unions, international, 375 380, 977 1020
- United Kingdom:
 - 'Act of State' in English law, 336 n.
 - aliens legislation, 675 n., 690, 691 n
 - See also* Nationality and Status of Aliens Act
 - Allied forces in, 327

United Kingdom (*continued*)—

- claims to sovereignty over the sea, 584, 586
- extradition legislation, 698, 700 n.
- 'Governments-in-exile' in, during World War II, 326, 329 n.
- Greece, intervention in (1827), 313 ; (1916, 1917), 308
- leases of naval bases to United States, 457-458
- nationality legislation, 204 n., 651 n.-652 n., 652
- naturalisation, 663
- Palestine, mandate over, 216-219
- personal union with Hanover, 171
- so-called 'British Monroe Doctrine,' 319
- spheres of influence, 561-562
- title of the King, 200 n., 281 n.
- trusteeship system, adoption of, 229
- United Nations, 12, 400-448
 - budget, 425, 427 n.
 - Charter. *See* Charter of United Nations
 - consultative organisations, 439
 - diplomatic privileges of officials, 421 n., 821-823, 826
 - domestic matters, exclusion of, 408, 414-420
 - duties of peaceful settlement, 405-406
 - Economic and Social Council, 437-440
 - establishment of, 400-403
 - flag of, 422
 - General Assembly, 421-427
 - Interim Committee, 434 n.
 - Resolution on trusteeship system (1946), 225 n.
 - trusteeship agreements :
 - approval of, 228-229
 - powers in respect of, 240
 - voting in, 279-280, 430-434
 - humanitarian intervention, 312-313
 - international administration, centralisation and co-ordination of, 444-447
 - International Labour Organisation and, 718
 - intervention, duty of, 310
 - languages, official, 772
 - legal nature of, 420-423
 - legation, right of, 773
 - membership of, 408-411
 - termination of, 411-412
 - mutuality of benefits and obligations, 406-407
 - non-member States :
 - control of, 407
 - right to register treaties, 923
 - objects of, 400-423

United Nations (*continued*)—

- organs and Constitution of, 423-448
 - General Assembly, 424-427
 - general character of, 423
 - relation of General Assembly and Security Council, 435
 - Security Council, 427. *See also* Security Council of United Nations
 - voting in, 430-435
- permanent organs and institutions of, 12
- Preparatory Commission, 403
- principles of, 405
- privileges and immunities, Convention on, 421 n.
- purposes of, 403-405
- seat of, 421, 430
- Secretariat, 440-443
- Security Council. *See* Security Council of United Nations
- sovereign equality of members, 405, 412-414
- specialised agencies, 445-447, 977-1029
- treaties :
 - ratification of, 918 n.
 - registration of, 919-921
- treaty-making power of, 882 n.
- trust territories, functions with regard to, 233
- Trusteeship Council. *See* Trusteeship
- veto, 434
- withdrawal from, 411-412, 423, 958 n.
- World Health Organisation and, 979
- United Nations Educational, Scientific and Cultural Organisation (U.N.E.S.C.O.), 376, 445, 986-993
 - functions of, 990-993
 - membership of, 987-988
 - purpose of, 986-987
 - structure and methods of work, 988-989
- United States of America :
 - Cuba, intervention in (1906), 307
 - expatriation, Congressional Resolution on (1868), 648 n.
 - expeditions into Mexico, 301
 - 'Federal Clause,' 181
 - fishery conservation zones, 600
 - Haiti, intervention in (1929, 1930), 307 n.
 - Immigration and Nationality Act (1952), 657-658, 659, 661 n.
 - International Law part of law of, 41-43

United States of America (*contd.*)—

- Japanese schoolchildren in, question of, 340
- League of Nations afd, 393
- legal position of, 173, 175
- Monroe Doctrine, 313-316
- membership of International Labour Organisation, 918 n.
- Nationality Act (1940), 655 n.; (1952), 657-658, 659, 661 n.
- neutrality obligations, modification during World War II, 303-304
- Nicaragua, request for intervention from, 305 n.
- non-recognition of Japanese conquest of Manchuria, 143
- Panama, Treaty with (1936), concerning corridor through Canal Zone, 538 n.
- Panama Canal, rights over, 483-485
- Philippines, right of intervention in, 307 n.
- protectorates of, 194 n.
- recognition of American States, 129 n.
- recognition of U.S.S.R., 151 n., 294 n., 328 n.
- recognition of, by France (1778), 148 n.
- Red Indians, relations with, 50
- 51
- revolt from Great Britain, 579 n.
- subsoil of continental shelf, Proclamation concerning jurisdiction over (1945), 631
- treaty-making power, 41 42, 882 n., 898-899, 899 n., 902
- ratifying power, 912 n.
- Venezuela, intervention in boundary dispute with, 315
- visiting forces in United Kingdom during World War II, 327
- Universal Copyright Convention, 992
- Universal Declaration of Human Rights (1948), 674 n., 677, 744-746, 900
- Universal International Law, 5, 51
- Universal Postal Union, 22, 884, 1018-1023
- purpose of, 1019
- structure of, 1020
- Upper Silesia :
 - Arbitral Tribunal, 638 n., 715 n.
 - plebiscite in, 552 n.
- Usage, distinguished from custom, 25-27
- Uti possidetis* doctrine, 534 n., 576 n.
- Utrecht, Treaty of (1713), 311, 952 n.
- State servitudes under, 539 n., 540 n.

V

- Vaderland*, case of the, 627 n.
- Vassal States, 188-191
- responsibility for, 339 n.
- Vatican City. *See* Holy See
- Vattel, 98-99, 586, 690
- Venezuela :
 - blockade of (1902), 315
 - boundary arbitration with Great Britain, 316, 467, 577 n.
- Venice :
 - cession to France and Italy, 549
 - Republic of, title of, 281 n.
 - sovereignty over Adriatic Sea, 583
- Verification du pavillon*, 604 n.
- Versailles, Treaty of (1871), 931
- Versailles, Treaty of (1919) :
 - Alsace-Lorraine, status of inhabitants, 551 n.
 - boundary rivers, 532, 533 n.
 - extradition of war criminals, 698 n.
 - Germany, position of, under, 55-56
 - International Labour Organisation, under, 718-719
 - international rivers, 465, 470-471
 - languages of, 772
 - leases of German concessions in China, abrogation of, 457 n.
 - Memel, 454 n.
 - minorities, 641
 - nationality of inhabitants of ceded territory, 553-554
 - neutralisation of Belgium, 247
 - neutralisation of Luxemburg, 249
 - neutralised zone of Savoy, 543 n.
 - North Sea fisheries control, 619-620
 - North Sea Liquor Traffic Convention (1887), 620
 - plebiscite, provisions regarding, 552 n.
 - ratification of, 917 n.
 - recognition of flag of State with no sea coast, 592 n.
 - repudiation of certain clauses by Germany, 943, 947 n.-948 n.
- Rhine, River :
 - bridges, 533 n.
 - demilitarisation of banks of, 539 n.
- Saar Territory, provisions regarding, 459 n.
- Vessels. *See also* Public ships ; Ships
 - collisions at sea, 601-603
 - flag, maritime. *See* Maritime flag
 - in distress, 504
 - names of, 597
 - on open sea, under jurisdiction of flag State, 330-331
 - piracy, 609-614

Vessels (continued)—

- right of requisitioning, in foreign waters, 296 n.
- safety provisions and convention, . 598-601
- search, visit and arrest, 330-331, 606-607
- ship's papers, 596
- territorial quality of, 597
- Veterinary questions, Conventions on, 996 n.
- Veto, 190 n., 434, 550-551
- Vicarious responsibility, 337-338, 358
- Vienna, Congress of (1815), 245, 276, 311, 733, 776
 - Final Act, 879 n., 899
 - navigation on international rivers, 467
 - neutralisation of Savoy, 512
 - of Switzerland, 245
 - order of precedence of States, 240-281
 - Treaty of, 771
- Vienna School of jurisprudence, 16 n.
- Viet-minh, 174
- Vietnam, 174
- Villafranca, Preliminaries of Peace of (1859), 884
- Virginia, case of the, 301 n.
- Visit :
 - of men-of-war, 598
 - of merchantmen, how effected, 606
- Visiting Forces (British Commonwealth) Act (1933), 848 n.
- Vistula, River, international position of, 470
- Vitoria, 90
- Van, of League of Nations Assembly, 388, 396
- Voidance of treaties, 944-945
- Vollme, M., case of, 787 n.
- Volstead Act, 498
- Vorovski, Russian delegate, assassination of, 360 n.
- Voting power of States :
 - in General Assembly of United Nations, 279 n.
 - Governing Body of International Labour Organisation, 278
 - international organisation generally, 279-280
 - League of Nations, 277-278
 - Security Council of United Nations, 279-280. *See also* Appendix, pp. 997-1029, with respect to Specialised Agencies
- Wabush, case of the, 514 n.
- Waddington, Carlos, case of, 812

- War, outbreak of, effect on treaties, 949
- War, Renunciation of, General Treaty for (1928). *See* Renunciation of war
- War criminals :
 - Agreement for Punishment of (1945), 341, 356 n., 902 n., 906 n.
 - extradition of, 698 n., 707 n.
- Warsaw, Convention and Rules regarding International Air Transport (1929), 522, 904 n.
- Warships. *See* Men-of-war
- Washington, Treaty of (1922), 613, 937 n., 939 n., 949 n.
- Watershed doctrine, 534, 560
- Wei-Hai-Wei, lease by China to Great Britain, 456, 457, 514 n., 549
- Welwood, William, 585
- Westminster, Statute of (1931), 202-203
- Westminster, Treaty of (1674), 586
- Westphalia, Peace of (1648), 245, 311, 763, 879 n.
- Whaling, regulation of, 623-624
- Wielingen, Passage of, 488 n., 511 n.
- Wilson, President, signatory of Treaty of Versailles (1919), 868 n.
- Wilson, Thomas Alfred, refusal of extradition of, 699 n.
- Wines, Convention on Methods of Analysis of, 998 n.
- Wireless, 529-530. *See also* International Telecommunication Union
- International Convention concerning Use of Broadcasting in the Cause of Peace (1936), 294 n.
- on the open sea, 626-627
- Wireless telegraphy, territorial rights concerning, 462
- Wires, telegraphic, 462
- Wisby, maritime laws of, 80
- Wismar, pledge by Sweden to Mecklenburg-Schwerin, 456, 549
- Withdrawal from treaties, 938
- Wolff, 98
- Women :
 - appointment as consuls, 834
 - appointment to diplomatic service, 777-780
 - married, nationality of, 655 n., 656 n., 870
 - Political Rights of, Convention on (1952), 753
- World Health Organisation (W.H.O.).
 - 22, 376, 378, 884, 977-986
 - activities of, 985
 - membership of, 978-979
 - origin and objects of, 977-978
 - regulations of, 981-983

World Health Organisation (*contd.*)—

scientific and professional standard,
984-985

structure of, 979-980^a

World Meteorological Organisation

(W.M.O), 1027-1029

functions of, 1027-1028

procedures of, 1028-1029

structure of, 1028

World Monetary and Economic Con-

ference (1933), 322 n.

Wrech, Baron de, case of, 799 n.

Writings of authors, as a source of

International Law, 33

Y

Yalta, Conference at (1945). *See*
Crimea Conference

Yenien, international status of, 258 n.

Yugoslav terrorists in Hungary, 292 n.

Yugoslavia, merger of Montenegro,
156

Z

Zone for revenue and sanitary laws.
495-497

Zone of protective jurisdiction, 497-
501

Zouche, 94, 96

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